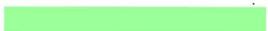




U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: **JAN 25 2013** OFFICE: CALIFORNIA SERVICE CENTER FILE: 

IN RE: Petitioner:   
Beneficiary: 

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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

Thank you,

  
  
Ron Rosenberg  
Acting Chief, Administrative Appeals Office

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

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the California Service Center on September 2, 2011. In the Form I-129 visa petition, the petitioner describes itself as an apparel manufacturer established in 1989. In order to employ the beneficiary in what it designates as a fashion designer position, the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on March 14, 2012, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that it satisfied all evidentiary requirements.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) the Form I-290B and supporting materials. 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 that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed. The petition will be denied.

Later in this decision, the AAO will also address an additional, independent ground, not identified by the director's decision, that the AAO finds also precludes approval of this petition. Specifically, beyond the decision of the director, the AAO finds that the petitioner failed to submit a Labor Condition Application (LCA) that complies with the applicable statutory and regulatory provisions. For this additional reason, the petition may not be approved. It is considered an independent and alternative ground for denial.<sup>1</sup>

In this matter, the petitioner stated in the Form I-129 that it seeks the beneficiary's services as a fashion designer to work on a full-time basis. With the Form I-129 petition, the petitioner submitted a letter dated August 30, 2011, which included a description of the duties of the proffered position. Specifically, the petitioner stated that the beneficiary would perform the following duties:

- a. Study and analyze artistic elements in the industry trend [sic] as well as high-tech materials development in the trade[;]
- b. Study [the petitioner's] customers' specific requirements and account performance history to understand and forecast [the petitioner's] dynamic needs for making designing strategies[;]

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<sup>1</sup> The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

- c. Conduct fashion design activities, taking into consideration of [sic] sellable and exclusive styles for [the petitioner's] sophisticated, fashion conscious customers[;]
- d. Sketch manually and by computer programs, such as Illustrator and Photoshop[;]
- e. Keep up with current market trends and bring in new ideas through competitive research[;]
- f. Meet with Creative Director to review designs, production, fabric, and other issues[;]
- g. Execute public relationship and marketing projects to build and promote [the petitioner's] brands[;]
- h. Conduct web-marketing campaign for the [petitioner] through online tools such as Facebook, [the petitioner's] blog, Twitter, etc.[;]
- i. [Be] [i]n charge of import styles, which include leading, training, and controlling [and] assembling technical packages with sketch, flats, fabric and trim information, and sewing construction information[;] conduct fittings[;] follow up on changes[;] and keep efficient and constant communication with factories for updates[;]
- j. Assist with various interdepartmental projects, including marketing, public relations, store operations, production, vendors and factories issues, and international department activities[;]
- k. Assist in developing value creation strategies in concert with inside sales and outside agents[;]
- l. Provide comprehensive backup in presentations to the management of customers[;]
- m. Interface with customers when necessary to solve problems[;]
- n. Support and enhance efficiency of customer services by analyzing after-sale market feedback and related studies[.]

In the letter of support, the petitioner did not state the academic requirements for the proffered position. However, the petitioner claimed that the beneficiary "has achieved her Business Administration degree and another [sic] associate degree in Fashion Design." The petitioner further asserted that the beneficiary "was the most meritorious candidate" and that she possesses the "educational merits [the petitioner is] looking for."

With the initial petition, the petitioner submitted a copy of the beneficiary's diplomas and transcripts, as well as a credential evaluation from [REDACTED]. The evaluation states that the beneficiary's "qualification is equivalent to [a] Bachelor Degree in Business Administration in Marketing and Management of Organizations awarded by a regionally accredited college or university in the United States." The petitioner also provided additional evidence including (1) job postings from other companies; (2) a print out from the Office of Foreign Labor Certification (OFLC) Online Data Center – Online Wage Library (OWL) for the occupation "Fashion Designers"; and (3) evidence regarding the petitioner's business operations.

In addition, the petitioner provided copies of job postings for the proffered position, which state that a "BFA or BS degree [is] required" for the position. It appears that the job announcements were

placed in July 2011 (less than two months prior to the submission of the H-1B petition).

The petitioner also submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification of "Fashion Designers" – SOC (ONET/OES Code) 27-1022, at a Level I wage.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on November 17, 2011. The petitioner was asked to submit probative evidence to establish that a specialty occupation position exists for the beneficiary. The director outlined the specific evidence to be submitted.

On January 12, 2012, counsel for the petitioner responded to the RFE by submitting a brief and additional evidence. Specifically, counsel submitted, in part, (1) several opinion letters; (2) marketing/promotional materials featuring the petitioner's products; and (3) additional job postings.

Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish how the beneficiary's immediate duties would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. The director denied the petition on March 14, 2012. The petitioner submitted an appeal of the denial of the H-1B petition. In support of its Form I-290B, the petitioner submitted a brief and additional evidence.<sup>2</sup>

Based upon a complete review of the record of proceeding, the AAO will make some preliminary findings that are material to the determination of the merits of this appeal.

To ascertain the intent of a petitioner, USCIS must look to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position

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<sup>2</sup> With regard to the documentation submitted on appeal that was encompassed by the director's RFE, the AAO notes that this evidence is outside the scope of the appeal. The regulations indicate that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary in the adjudication of the petition. See 8 C.F.R. §§ 103.2(b)(8); 214.2(h)(9)(i). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. § 103.2(b)(1), (8), and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted it with the initial petition or in response to the director's request for evidence. *Id.* The petitioner has not provided a valid reason for not previously submitting the evidence. Under the circumstances, the AAO need not and does not consider the sufficiency of such evidence submitted for the first time on appeal.

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offered, the location of employment, the proffered wage, et cetera. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

In the instant case, the petitioner claims in its August 30, 2011 letter that the beneficiary possesses a "Business Administration degree and another [sic] associate degree in Fashion Design" and that she possesses the "educational merits [the petitioner is] looking for." In addition, the petitioner submitted copies of its job postings, which indicate that a "BFA or BS degree [is] required" for the fashion designer position. In the appeal brief, the petitioner states that it requires a "minimum of a 4-year degree majoring in fashion design and/or business" for the proffered position.

The petitioner has provided inconsistent information as to the requirements of the proffered position. The job announcements submitted in support of the initial H-1B petition indicate that a **bachelor of fine arts (BFA) or a bachelor of science (BS) degree** are sufficient for the fashion designer position. However, on appeal, the petitioner claims that a degree in **fashion design and/or business** is required to perform the duties of the proffered position. The petitioner did not acknowledge or provide any explanation for the variance. Notably, USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. 103.2(b)(1). On appeal, a petitioner cannot materially change the requirements for the proffered position. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification for the benefit sought. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

Furthermore, even assuming *arguendo* that the description of the proffered position as stated in the appeal brief accurately reflects the petitioner's academic requirements, the AAO finds that this claimed educational requirement for entry into the proffered position, nonetheless, is inadequate to establish that the proposed position qualifies as a specialty occupation.<sup>3</sup> A petitioner must

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<sup>3</sup> Prior to the appeal, the petitioner submitted documentation indicating that a general-purpose bachelor's degree (BFA or BS) was sufficient for the proffered position. The petitioner did not state that it required a degree in a specific specialty directly related to the duties and responsibilities of the proffered position, or its equivalent.

In the appeal, the petitioner states that the following:

[T]he reason of [sic] requiring Fashion Design 'an/or Business' instead of requiring only Fashion Design is because Fashion Institutions, such as FIDM (the Fashion Institute of Design and Merchandising) offer a 4 year degree which include a two-year study of Fashion Design followed by another 2 years of Business studying.

demonstrate that the proffered position requires a precise and specific course of study that relates directly to the duties and responsibilities of the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as "business," without further specification, does not establish the position as a specialty occupation. Cf. *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

To demonstrate that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. Although a general-purpose bachelor's degree, such as a degree in business, 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).<sup>4</sup>

Again, the petitioner in this matter claims that the duties of the proffered position can be performed by an individual with only a general-purpose bachelor's degree, i.e., a bachelor's degree in business. This assertion is tantamount to an admission that the proffered position is not in fact a specialty occupation. The director's decision must therefore be affirmed and the petition denied on this basis alone.

Furthermore, the AAO finds that there is a significant discrepancy in the record of proceeding with regard to the proffered position. 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

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The AAO reviewed the [REDACTED] printouts and notes that the institute does not offer a degree simply in "business." Rather, [REDACTED] offers a degree in "business management," which is "open only to graduates of [REDACTED] Associate of Arts Degree Program." Notably, the petitioner has not stated that the proffered position is limited to individuals who possess a degree in business management from [REDACTED] or a similar program. Instead the petitioner claims that a degree in fashion design and/or **business (without further specification)** is acceptable for the proffered position.

<sup>4</sup> Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

[t]he courts and the agency consistently have stated that, although a general-purpose bachelor's degree, such as a business administration degree, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify the granting of a petition for an H-1B specialty occupation visa. See, e.g., *Tapis Int'l v. INS*, 94 F.Supp.2d 172, 175-76 (D.Mass.2000); *Shanti*, 36 F. Supp.2d at 1164-66; cf. *Matter of Michael Hertz Assocs.*, 19 I & N Dec. 558, 560 ([Comm'r] 1988) (providing frequently cited analysis in connection with a conceptually similar provision). This is as it should be: otherwise, an employer could ensure the granting of a specialty occupation visa petition by the simple expedient of creating a generic (and essentially artificial) degree requirement.

proffered position. This particular aspect is the discrepancy between what the petitioner and counsel claim about the occupational classification on the LCA submitted in support of the petition.

As previously mentioned, the petitioner submitted an LCA in support of the instant petition that designated the proffered position under the occupational category "Fashion Designers" - SOC (ONET/OES) code 27-1022. The petitioner stated in the LCA that the wage level for the proffered position was a Level I (entry) position, with a prevailing wage of \$17.84 per hour.<sup>5</sup> The LCA was certified on August 16, 2011 and signed by the petitioner on August 29, 2011.

Wage levels should be determined only after selecting the most relevant Occupational Information Network (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.<sup>6</sup> Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties.<sup>7</sup> The U.S. Department of Labor (DOL) emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

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

**Level I** (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and

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<sup>5</sup> The AAO notes that if the proffered position were determined to be a higher level position, the prevailing wage at that time would have been \$26.92 per hour for a Level II position, \$36.00 per hour for a Level III position, and \$45.08 per hour for a Level IV position.

<sup>6</sup> For additional information on wage levels, see DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs* (Rev. Nov. 2009), available on the Internet at [http://www.foreignlaborcert.doleta.gov/pdf/Policy\\_Nonag\\_Progs.pdf](http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf).

<sup>7</sup> A point system is used to assess the complexity of the job and assign the wage level. Step 1 requires a "1" to represent the job's requirements. Step 2 addresses experience and must contain a "0" (for at or below the level of experience and SVP range), a "1" (low end of experience and SVP), a "2" (high end), or "3" (greater than range). Step 3 considers education required to perform the job duties, a "1" (more than the usual education by one category) or "2" (more than the usual education by more than one category). Step 4 accounts for Special Skills requirements that indicate a higher level of complexity or decision-making with a "1" or a "2" entered as appropriate. Finally, Step 5 addresses Supervisory Duties, with a "1" entered unless supervision is generally required by the occupation.

programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

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

DOL guidance indicates that information contained in the O\*NET Job Zones provides guidance in determining whether the job offer is for an entry level, qualified, experienced, or fully competent employee when making the determination of wage level. A requirement in a job offer that is at the upper range of the requirements and preparation generally required for performance in an occupation is an indicator that a prevailing wage determination at a higher level should be considered. A requirement for years of education and/or experience that are generally required as described in the O\*NET Job Zones would be an indication that a wage determination at Level II would be proper classification for a position. The occupational category "Fashion Designers," has been assigned an O\*NET Job Zone 3, which groups it among occupations for which medium preparation is needed.<sup>8</sup> More specifically, most occupations in this zone "require training in vocational schools, related on-the-job experience, or an associate's degree." See O\*NET OnLine Help Center, at <http://www.onetonline.org/help/online/zones>, for a discussion of Job Zone 3.

In the instant case, the petitioner designated the proffered position as a Level I position. This suggests that the petitioner's academic and/or professional experience requirements for the proffered position would be *less than* "training in vocational schools, related on-the-job experience, or an associate's degree" as stated for occupations designated as O\*NET Job Zone 3.

In the instant case, the petitioner claims that the duties of the proffered position are complex, unique and/or specialized. For example, in its support letter dated August 30, 2011, the petitioner asserts that it has been "looking for a fashion designer who is qualified and trained in marketing, brand management, fashion design, and various tools and systems such as illustrator, photoshop, tech-packs, among others." According to the petitioner the beneficiary will "[be] [i]n charge of import styles, which include leading, training, and controlling [and] assembling technical packages." The petitioner further states that the position requires the beneficiary to be "capable of handling multiple tasks involving fashion [sic] design, fabric design, market analysis and designing plans to expand recognition of [the petitioner's] brands." The petitioner submitted a list of its employees and designated the beneficiary as serving in the position "Head Designer." Notably, the list of employees also includes an individual serving as "Associate Designer," suggesting that the beneficiary is serving in a more senior designer position.

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<sup>8</sup> For additional information regarding Fashion Designers, see O\*NET OnLine, Summary Report for: 27-1022.00 - Fashion Designers, on the Internet at <http://www.onetonline.org/link/summary/27-1022.00>.

In its appeal brief, the petitioner reports that as the "company has been growing and expanding rapidly, there has been more workload and new job duties to be performed." The petitioner further claims that the "company plans to step into the field of importing apparel merchandise from Asian countries, as well as adopting new technologies, such as web marketing, online sales inventory management, and Computer Aided Design" into its business. The petitioner concludes that a minimum educational requirement of a bachelor's degree in "Fashion Design and/or Business" is essential for the beneficiary "to successfully perform all the duties for the proffered position in this complex and fast moving working environment."

Furthermore, in its appeal brief, the petitioner indicates that in order for its products to be selected for inclusion in fashion magazine articles, the beneficiary will be required to "not only design, but also study the trend closely each week to know what customers and editors are looking for, and combine the trend into a cohesive story." Further, the petitioner asserts that "the job duties of the proffered position include a wide range of tasks from design activities such as sketching and trend forecasting, to management fields such as coordinate [sic] interdepartmental projects and be [sic] in charge of all import activities, to branding activities, such as [an] online marketing campaign, public relations, and customer and market researches [sic]." According to the petitioner, the duties of the proffered position involve "complex task[s]." Finally, the petitioner states that the beneficiary "needs to keep in contact with the bloggers, editors, and social medias frequently to keep pushing and promoting the products and brand image, which would require outstanding marketing, negotiation, and communication skills."

However, as the LCA is certified for a Level I, entry-level position, the AAO must question the level of complexity, independent judgment and understanding required for the proffered position. That is, this characterization of the position and the claimed duties and responsibilities as described in the record of proceeding conflict with the wage-rate element of the LCA selected by the petitioner, which, as reflected in the discussion above, is indicative of a comparatively low, entry-level position relative to others within the occupation. 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, level of responsibilities and requirements of the proffered position. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Under the H-1B program, a petitioner must offer a beneficiary wages that are at least the actual wage level paid by the petitioner to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information

available as of the time of filing the application. See section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A).

The petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the correct wage level in order for it to be found to correspond to the petition. To permit otherwise would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, by allowing that petitioner to simply submit an LCA for a different wage level at a lower prevailing wage than the one that it claims it is offering to the beneficiary.

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

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

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 petitioner has failed to submit a valid LCA that corresponds to the claimed duties and requirements of the proffered position, that is, specifically, that corresponds to the level of work, responsibilities and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work, responsibilities and requirements in accordance with the pertinent LCA regulations.

In the instant case, the statements regarding the claimed level of complexity, independent judgment and understanding required for the proffered position are materially inconsistent with the certification of the LCA for a Level I entry-level position. This conflict undermines the overall credibility of the petition. The AAO finds that, fully considered in the context of the entire record

of proceedings, the petitioner failed to establish the nature of the proffered position and in what capacity the beneficiary will actually be employed.

A review of the enclosed LCA indicates that the information provided does not correspond to the level of work and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work and requirements in accordance with the pertinent LCA regulations. As a result, even if it were determined that the petitioner overcame the basis for the director's denial (which it has not), the petition could not be approved for this reason.

The AAO will now address the director's basis for denial of the petition, namely that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, the AAO agrees with the director and finds that the evidence fails to establish that the position as described constitutes a specialty occupation. It should be noted that, for efficiency's sake, the AAO hereby incorporates the above discussion and analysis regarding the duties and requirements of the proffered position into each basis discussed below for dismissing the appeal.

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

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

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

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

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

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

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum

requirement for entry into the particular position;

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

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

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

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

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

The petitioner stated that the beneficiary would be employed in a fashion designer position. 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 DOL's *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>9</sup> As discussed, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Fashion Designers."

The AAO reviewed the chapter of the *Handbook* entitled "Fashion Designers," including the sections regarding the typical duties and requirements for this occupational category.<sup>10</sup> However, the *Handbook* does not indicate that "Fashion Designers" comprise an occupational group for which normally the minimum requirement for entry is at least a bachelor's degree in a specific specialty, or its equivalent.

The subchapter of the *Handbook* entitled "What Fashion Designers Do" states, in pertinent part, the following about this occupation:

Fashion designers create original clothing, accessories, and footwear. They sketch designs, select fabrics and patterns, and give instructions on how to make the products they designed.

#### **Duties**

Fashion designers typically do the following:

- Study fashion trends and anticipate designs that will appeal to consumers
- Decide on a theme for a collection

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<sup>9</sup> All of the AAO's references are to the 2012-2013 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

<sup>10</sup> For additional information on the occupational category "Fashion Designers," see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Fashion Designers, on the Internet at <http://www.bls.gov/ooh/arts-and-design/fashion-designers.htm#tab-1> (last visited January 16, 2013).

- Sketch designs of clothing, footwear, and accessories
- Use computer-aided design programs (CAD) to create designs
- Visit manufacturers or trade shows to get fabric samples
- Select fabrics, embellishments, colors, or style for each garment or accessory
- Work with other designers or team members to create a prototype design
- Present design ideas to the creative director or showcase them in fashion or trade shows
- Market designs to clothing retailers or directly to consumers
- Oversee the final production of their designs

Larger apparel companies typically employ a team of designers headed by a creative designer. Some fashion designers specialize in clothing, footwear, or accessory design, but others create designs in all three fashion categories.

For some fashion designers, the first step in creating a new design is researching current fashion and making predictions of future trends, using trend reports published by fashion industry trade groups. Other fashion designers create collections from inspirations they get from their regular surroundings, from the cultures they have experienced and places they have visited, or from various art media that inspire them.

After they have an initial idea, fashion designers try out various fabrics and produce a prototype, often with less expensive material than will be used in the final product. They work with models to see how the design will look and adjust the designs as needed.

Although most designers first sketch their designs by hand, many now put their sketches online with computer-aided design (CAD) programs. CAD allows designers to see their work on virtual models. They can try out different colors, design, and shapes while making adjustments more easily than they can when working with real fabric on real people.

The designers produce samples with the actual materials that will be used in manufacturing. Samples that get good responses from editors or trade and fashion shows are then manufactured and sold to consumers.

Although the design process may vary by specialty, in general, it takes 6 months from initial design concept to final production, when either the spring or fall collection is released. Some companies may release new designs as frequently as every month, in addition to releases during the spring and fall.

The Internet and e-commerce allow fashion designers to offer their products outside of the traditional brick-and-mortar stores. Instead, they can ship directly to the consumer, without having to invest in a physical place to showcase their products

lines.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Fashion Designers, on the Internet, at <http://www.bls.gov/ooh/arts-and-design/fashion-designers.htm#tab-2> (last visited January 16, 2013).

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

Postsecondary education is not required. Most fashion designers entering the industry have some formal education where they learn design skills, including how to use computer-aided design (CAD) technology. Employers usually seek applicants with creativity, as well as a good technical understanding of the production process for clothing, accessories, or footwear.

#### **Education**

Although postsecondary education is not required for fashion designers, many take classes or earn a 2-year or 4-year degree in a related field, such as fashion merchandising, that can improve their knowledge of textiles and fabrics.

For many artists, including fashion designers, developing a portfolio—a collection of design ideas that demonstrates their styles and abilities—is essential because employers rely heavily on a designer's portfolio in deciding whether to hire the individual. For employers, it is an opportunity to gauge talent and creativity. Students studying fashion design often have opportunities to enter their designs in student or amateur contests, helping them to develop their portfolios.

*Handbook, 2012-13 ed.*, Fashion Designers, on the Internet at <http://www.bls.gov/ooh/arts-and-design/fashion-designers.htm#tab-4> (last visited January 16, 2013).

When reviewing the *Handbook*, the AAO must note again that the petitioner designated the proffered position as a Level I position on the LCA. As previously discussed, this designation is indicative of a comparatively low, entry-level position relative to others within the occupation and signifies that the beneficiary is only expected to possess a basic understanding of the occupation and will perform routine tasks that require limited, if any, exercise of judgment. In accordance with the relevant DOL explanatory information on wage levels, this wage rate further indicates that the beneficiary will be closely supervised; that her work would be closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results.

The *Handbook* does not indicate that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into this occupation. Rather, the *Handbook* specifically states that post-secondary education for the position of fashion designer is *not required*. According to the *Handbook*, most fashion designers entering the industry have some formal education. The *Handbook* states that many fashion designers take classes or obtain a two-year or four-year degree in a related field. The *Handbook* also reports that developing a portfolio is

essential for fashion designers because employers rely heavily on a designer's portfolio in deciding whether to hire the individual. The *Handbook* does not conclude that normally the minimum requirement for entry into fashion designer positions is a baccalaureate (or higher degree) in a specific specialty, or its equivalent.

In response to the RFE, counsel submitted a printout regarding "Fashion Designers" from the OFLC Data Center's – Online Wage Library (OWL). The AAO reviewed the printout in its entirety. However, upon review of the printout, the AAO finds that it is insufficient to establish that the position qualifies as a specialty occupation normally requiring at least a bachelor's degree in a *specific specialty*, or its equivalent, for entry into the occupation. The occupation "Fashion Designers" has a designation of Job Zone 3 – Education and Training Code: 5. As previously mentioned, the O\*NET OnLine Help Center provides a discussion of the Job Zone 3. See O\*NET OnLine Help Center at <http://www.onetonline.org/help/online/zones>. A Job Zone 3 indicates that "most occupations in this zone require training in vocational schools, on-the-job experience, or an associate's degree." Furthermore, although the designation of Job Zone 3 indicates that some positions may require a bachelor's degree, it does not, however, demonstrate that a bachelor's degree in any *specific specialty* is required, and does not, therefore, demonstrate that a position so designated is in a specialty occupation as defined in section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii).<sup>11</sup> Therefore, despite counsel's assertion to the contrary, the printout is not probative evidence to establish that the proffered position qualifies as a specialty occupation.

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<sup>11</sup> The Program Electronic Review Management ("PERM") process was developed by DOL to streamline the filing and processing of labor certifications for foreign workers. It went into effect on March 28, 2005. Professional occupations and the related education and training category codes are listed in Appendix A to the Preamble of the PERM regulations. For additional information, see the *Federal Register*, Vol. 69, No. 247 at 77345 and Appendix A to the Preamble-Professional Recruitment Occupations-Education and Training Categories at 77377 (December 27, 2004).

However, the AAO notes that the assertion that the occupational category "Fashion Designers" has been assigned an "Education and Training Code: 5" is insufficient to establish that the proffered position qualifies for eligibility as a specialty occupation. More specifically, the *Federal Register* indicates that the purpose of the list of occupations at Appendix A is not for determining whether a position is a specialty occupation. In fact, the *Federal Register* specifically states that "**the list is not intended to be used to qualify an alien for purposes of eligibility under the H-1B and H-1B1 program** (emphasis added)." Moreover, the *Federal Register* clearly states that "[t]he primary purpose of the list of occupations is to provide employers with the necessary information to determine whether to recruit under the standards provided in the regulations for professional occupations or for nonprofessional occupations." The *Federal Register* continues by stating that "the only presumption the list of occupations should create is that if the occupation involved in the application is on the list of occupations in Appendix A, employers must follow the recruitment regiment for professional occupations at § 656.17(e) of this final rule."

Although the petitioner and its counsel indicate that the proffered position qualifies as a specialty occupation based upon the education and training code assigned to the occupation "Fashion Designers," the AAO finds no merit in the assertion. The petitioner and its counsel cite no statutory or regulatory authority, case law, or precedent decision to support it. Moreover, neither the statutory nor regulatory provisions governing USCIS adjudication of Form I-129 petitions provide for the approval of an H-1B specialty occupation petition on the grounds argued by the petitioner's counsel, or even indicate that an employer's recruitment regiment for

It is incumbent on the petitioner to provide sufficient evidence to establish that the particular position that it proffers 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. As previously mentioned, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation." Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

In the instant case, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding by the petitioner do not indicate that the position is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

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

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

As previously discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent. Thus, the AAO incorporates by reference the

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permanent labor certification is relevant to USCIS adjudications of Form I-129 H-1B specialty occupation petitions. The AAO notes that the current, primary, and fundamental difference between qualifying as a profession and qualifying as a specialty occupation is that specialty occupations require the U.S. bachelor's or higher degree to be in a specific specialty (or its equivalent). An occupation assigned an "Education and Training Code: 5" does not demonstrate that a bachelor's degree in any *specific specialty* is required, and does not demonstrate that a position so designated is in a specialty occupation as defined in section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). For the reasons discussed, the printout is not probative evidence that the proffered position falls under an occupational category that qualifies as a specialty occupation.

previous discussion on the matter. The record of proceeding also does not contain any evidence from an industry professional association to indicate that a degree is a minimum entry requirement.

In support of the petitioner's assertion that the proffered position is a specialty occupation position, the record of proceeding contains several job announcements and opinion letters from individuals in the industry. However, upon review of the evidence, the AAO finds that the petitioner's reliance on the job announcements and letters is misplaced.

In the Form I-129, the petitioner stated that it is an apparel manufacturer with 17 employees. The petitioner also reported its gross annual income as approximately \$4.5 million and its net annual income as approximately \$45,000. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 315.<sup>12</sup> The AAO notes that this NAICS code is designated for "Apparel Manufacturing." The U.S. Department of Commerce, Census Bureau website describes this NAICS code by stating the following:

Industries in the Apparel Manufacturing subsector group establishments with two distinct manufacturing processes: (1) cut and sew (i.e., purchasing fabric and cutting and sewing to make a garment), and (2) the manufacture of garments in establishments that first knit fabric and then cut and sew the fabric into a garment. The Apparel Manufacturing subsector includes a diverse range of establishments manufacturing full lines of ready-to-wear apparel and custom apparel: apparel contractors, performing cutting or sewing operations on materials owned by others; jobbers performing entrepreneurial functions involved in apparel manufacture; and tailors, manufacturing custom garments for individual clients are all included. Knitting, when done alone, is classified in the Textile Mills subsector, but when knitting is combined with the production of complete garments, the activity is classified in Apparel Manufacturing.

*See* U.S. Dep't of Commerce, U.S. Census Bureau, 2007 NAICS Definition, 315-Apparel Manufacturing, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last viewed January 16, 2013).

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. Without such evidence, postings submitted by a petitioner are generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and the advertising organization share the same general characteristics, such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements

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<sup>12</sup> According to the U.S. Census Bureau, the North American Industry Classification System (NAICS) is used to classify business establishments according to type of economic activity, each establishment is classified to an industry according to the primary business activity taking place there. *See* <http://www.census.gov/eos/www/naics/> (last viewed January 16, 2013).

that may be considered). It is not sufficient for the petitioner to claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion.

The AAO reviewed the job advertisements submitted by the petitioner with the initial Form I-129 and in response to the RFE. Notably, the petitioner did not provide any independent evidence of how representative these job advertisements are of the particular advertising employers' recruiting history for the type of jobs advertised. Further, as they are only solicitations for hire, they are not evidence of the employers' actual hiring practices.

Upon review of the documents, the AAO finds that they do not establish that a requirement for a bachelor's degree in a specific specialty, or its equivalent, is common to the petitioner's industry in similar organizations for parallel positions to the proffered position. For instance, the petitioner submitted a job posting for [REDACTED] for a textile CAD artist. The AAO notes that [REDACTED] describes itself as "the world's largest designer and retailer of maternity apparel" operating "1,887 retail locations, including 695 stores." In addition, the advertising company states that it is expanding internationally and has entered into franchise and product supply relationships in India and the Middle East. The petitioner also submitted a job posting for [REDACTED] or an assistant designer. The advertising company reports that it serves as "one of the largest apparel brands in North America, operating more than 1000 stores across the US, Canada and Puerto Rico." The posting indicates that the advertising employer has over 350 million customers and over \$5 billion in sales. Another advertisement is for [REDACTED] for an apparel designer – sweaters. The job posting states that [REDACTED] is one of the largest multimedia retailers in the world. The posting continues by stating that [REDACTED] programming is distributed in approximately 200 million homes worldwide and its website is ranked among the top general merchant websites. The job posting continues by stating that [REDACTED] has operations in the United Kingdom, Germany, Japan, Italy and the United States and that it has shipped more than a billion packages. The petitioner also submitted a job posting for [REDACTED] for a design trainee. The advertising employer is described as "one of America's largest department store and e-commerce retailers, employing approximately 150,000 Associates and operating over 1,100 department stores throughout the United States and Puerto Rico."

Additionally, the petitioner provided an advertisement for [REDACTED] for an assistant technical designer. The posting states that [REDACTED] operates 838 stores in 47 states and is part of the [REDACTED], which is a leading national specialty retailer with nearly 2,500 stores and revenues of over \$2.8 billion. In addition, the petitioner submitted a posting for [REDACTED], which according to the advertisement is "the sixth largest specialty retailer of women's and men's apparel in the United States" and operates over 560 retail outlets. The petitioner also submitted a posting for [REDACTED], which is described as "America's premier accessible luxury accessories brand and a leader in international markets" as well as "a designer and marketer of high quality, modern accessories." Furthermore, the petitioner provided a posting for [REDACTED] "a leading international fashion and lifestyle company" with four brands. The petitioner also submitted a posting for [REDACTED], which the advertisement describes as a health and medical services company. Without further information, the advertisements appear to be for organizations that are not similar to the petitioner and the petitioner has not provided any probative evidence to

suggest otherwise. That is, the petitioner has not provided any information regarding which aspects or traits (if any) it shares with the advertising organizations.

Furthermore, the petitioner submitted job postings for [REDACTED] and an unnamed company. Notably, the job postings provide little or no information regarding the employers. The petitioner also provided a job posting for [REDACTED], which is described as a "world-class specialty realtor" who provides products for tweens (7 to 14 years of age), as well as a posting for [REDACTED], an "online fashion and décor boutique" and "social media mavens." No further information was provided regarding the advertising employers. Consequently, the record is devoid of sufficient information regarding the advertising organizations to conduct a legitimate comparison of the organizations to the petitioner. The petitioner failed to supplement the record of proceeding to establish that the advertising organizations are similar to it. That is, again, the petitioner has not provided any information regarding which aspects or traits (if any) it shares with the advertising organizations.

Moreover, some of the advertisements do not appear to be for parallel positions. For instance, the petitioner provided a job posting for [REDACTED] for a graphic designer and an advertisement for [REDACTED] for a textile CAD artist. The postings include brief descriptions of the duties of the advertised positions, which do not appear to be similar to the duties of the proffered position. Moreover, the positions appear to be more senior positions. Specifically, the graphic designer position requires a degree and at least five to seven years of experience designing textile, packaging or apparel graphics. The textile CAD artist position requires a degree and a minimum of eight years of textile CAD design experience. In addition, the petitioner submitted a job posting for [REDACTED] that indicates that a degree and three to five years of experience in design or product development is required. The petitioner also provided a job posting for [REDACTED] for a designer – footwear/girlcare. The position includes training and developing a direct report. In addition, the job posting indicates that the position requires a degree and five years of design experience. Additionally, the petitioner submitted job postings for [REDACTED], Inc., an unnamed company, [REDACTED] – all of whom require a degree and 5+ years of experience. The petitioner also provided a job posting for [REDACTED] for an assistant designer that requires a degree and eleven years of experience in fashion design. As previously discussed, the petitioner designated the proffered position on the LCA through the Level I wage rate as an entry-level position. Thus, the advertised positions appear to be more senior than the proffered position. More importantly, the petitioner has not sufficiently established that the primary duties and responsibilities of the advertised positions are parallel to the proffered position.

Additionally, contrary to the purpose for which the advertisements were submitted, some of the postings do not establish that at least a bachelor's degree in a specific specialty, or its equivalent, is required for the positions. For example, the job postings for [REDACTED] state that a bachelor's degree is preferred. An advertisement for [REDACTED] states that a college degree is preferred. Obviously, a *preference* for a degreed individual is not an indication of a requirement for the advertised positions.

The petitioner also submitted an advertisement for [REDACTED] for a fashion designer. The

posting reports that the position requires a college degree or extensive work experience. Additionally, the petitioner submitted job postings for [REDACTED] both of whom require a college degree. Notably, the job postings state a requirement for a college degree, but they do not specify that any particular type of degree (e.g., vocational degree, associate's degree, baccalaureate, master's degree) is required for the advertised positions.

Additionally, the petitioner provided an advertisement for [REDACTED] for an assistant designer. The advertisement provides inconsistent information as to the employer's academic requirements for the position, initially stating that a BFA in fashion design is required, but later reporting that an associate's degree is sufficient. The AAO is not in a position to "guess" the advertising employer's requirements and the petitioner failed to supplement the record with documentation regarding the advertising employer's actual requirements.

Moreover, the AAO observes that some of the postings state that a bachelor's degree is required, but they do not provide any further specification. For example, an advertisement for [REDACTED] for a textile CAD artist requires a bachelor's degree and experience. An advertisement for [REDACTED] states that a bachelor's degree is expected. The petitioner also submitted a job posting for [REDACTED] for which a bachelor of arts is required and an advertisement for [REDACTED] for which a four year college degree or equivalent experience is required. Additionally, the petitioner submitted a posting for [REDACTED] that requires a bachelor's degree or equivalent work experience. Thus, the job postings do not indicate that a bachelor's degree in a *specific specialty* that is directly related to the duties and responsibilities of the occupation is required. The AAO here reiterates that the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but such a degree in a *specific specialty* that is directly related to the specialty occupation claimed in the petition. Moreover, the AAO observes that the petitioner submitted advertisements stating that a degree in business is acceptable. As previously discussed, since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business, without further specification, does not support the assertion that a position is a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558.

The AAO reviewed all of the advertisements submitted by the petitioner with the initial petition and in response to the RFE.<sup>13</sup> However, 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

<sup>13</sup> In support of its appeal, the petitioner provided additional job postings. As previously mentioned, evidence requested in an RFE but not included in the petitioner's RFE response will not be considered if later submitted. See 8 C.F.R. §§ 103.2(b)(8)(iv) and (b)(11). See also *Matter of Soriano*, 19 I&N Dec. 764. Under the circumstances, the AAO need not consider the sufficiency of the requested evidence submitted by the petitioner on appeal. Nevertheless, the AAO reviewed the job postings submitted with the appeal, but finds that the advertisements submitted have similar deficiencies to the advertisements submitted with the initial petition and in response to the RFE. The job advertisements do not establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

addressed.

The job advertisements do not establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner. Further, it must be noted that even if all of the job postings indicated that a bachelor's degree in a specific specialty is common to the industry in parallel positions among similar organizations (which they do not), the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from the advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations.<sup>14</sup>

In support of the assertion that the proffered position qualifies as a specialty occupation, the petitioner and counsel submitted letters from [REDACTED]. The letters from [REDACTED] state, "We have had the position of fashion designer filled by people with the minimum of a Bachelor's degree in designing or business." The letter from [REDACTED] states, "We now have two fashion designers, and both of them are 4-year university graduates majoring in fashion design or business."

The AAO reviewed all of the letters and observes that there are substantial similarities in the wording of the letters (including grammatical and punctuation errors), calling into question their veracity. When affidavits are worded the same (and include identical errors), it indicates that the words are not necessarily those of the affiants and may cast some doubt on the validity of the affidavits.

Upon review of the letters, the AAO notes that [REDACTED] claims that [REDACTED] has been doing business for seven years, [REDACTED] states that [REDACTED] has been in business for four years,

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<sup>14</sup> According to the *Handbook's* detailed statistics on fashion designers, there were approximately 21,500 persons employed as fashion designers in 2010. *Handbook*, 2012-13 ed., available at <http://www.bls.gov/oooh/arts-and-design/fashion-designers.htm> (last accessed January 16, 2013). Based on the size of this relevant study population, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from the postings with regard to determining the common educational requirements for entry into parallel positions in similar organizations in the industry. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. See *id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

As such, even if the job announcements supported the finding that organizations similar to the petitioner in its industry commonly require, for positions parallel to the one here proffered, at least a bachelor's or higher degree in a specific specialty or its equivalent, 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.

and [REDACTED] reports that [REDACTED] was established 20 years ago (and has 150 employees). Notably, the employers did not provide the total number of people they have employed to serve in the position of fashion designer. While the AAO acknowledges that [REDACTED] reports that the company currently employs two fashion designers, it cannot be determined how representative [REDACTED] claim regarding *two individuals over a 20 year period* is of [REDACTED] normal recruiting and hiring practices.

The AAO observes that the employers did not provide any documentary evidence to corroborate that they currently or in the past employed individuals in parallel positions to the proffered position, nor did they provide any documentation to substantiate their claimed academic requirements (e.g., copies of diplomas/transcripts, employment records, job vacancy announcements).<sup>15</sup> Instead of submitting such evidence, the employers simply provided unsupported discussions of their claimed academic requirements.

Further, while the employers provide general statements that they have employed individuals to serve as fashion designers, they fail to provide the actual job duties and day-to-day responsibilities of the positions that they claim are the same or parallel to the proffered position. More specifically, [REDACTED] simply states that the "key position within [the] organization oversees all tasks which include but are not limited to; [sic] planning, design, production, post production service, analyzing performance and forecasting." [REDACTED] claims that "the job duties of a Fashion Designer include design, production, trend forecasting, marketing, etc." According to [REDACTED] the "position at [the] organization is the key person who sees and charges from the planning and designing all the way to production, post-production service and analyzes the elements of the performance of the project for future projection." Upon review of these brief job descriptions, the AAO observes that the employers fail to provide sufficient information regarding the complexity of the job duties, supervisory duties (if any), independent judgment required or the amount of supervision received. Accordingly, aside from the job title, it is unclear whether the duties and responsibilities of these positions are the same or related to the proffered position.

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<sup>15</sup> The petitioner stated in the appeal that "these companies not being able to provide the degree of their employee is [sic] due to the protection of their precious human assets, which should be an understandable concern." Notably, the employers did not submit similar or secondary evidence, or redacted documents. See 8 C.F.R. § 103.2(b)(2). While a petitioner should always disclose when a submission contains confidential commercial information, the AAO observes that such a claim does not provide a blanket excuse for the petitioner's failure to provide documentation if that evidence is material to the requested benefit. Although a petitioner may always refuse to submit confidential commercial information if it is deemed too sensitive, the petitioner must also satisfy the burden of proof and runs the risk of a denial. Cf. *Matter of Marques*, 16 I&N Dec. 314 (BIA 1977).

Moreover, both the Freedom of Information Act and the Trade Secrets Act provide for the protection of confidential business information when it is submitted to USCIS. See 5 U.S.C. § 552(b)(4), 18 U.S.C. § 1905. Additionally, the petitioner may request pre-disclosure notification pursuant to Executive Order No. 12,600, "Predisclosure Notification Procedures for Confidential Commercial Information." Exec. Order No. 12,600, 1987 WL 181359 (June 23, 1987).

The AAO may, in its discretion, use as advisory opinions or 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. 1988). As a reasonable exercise of its discretion the AAO discounts the advisory opinion letters as not probative of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). For efficiency's sake, the AAO hereby incorporates the above discussion and analysis regarding the opinion letters into its analyses of each criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

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

In support of its assertion that the proffered position qualifies as a specialty occupation, the petitioner submitted various documents, including evidence regarding its business operations. For example, the petitioner submitted several financial documents (unsigned federal tax return, quarterly reports, bank statements); lease agreement; insurance documents; one sales order dated July 28, 2011; three purchase orders; photographs of the petitioner's premises; printouts from the petitioner's website; as well as promotional/marketing materials. The AAO reviewed the record of proceeding in its entirety. However, upon review of the record, the AAO finds that the petitioner failed to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position of fashion designer.

To begin with and as discussed previously, the petitioner itself does not require at least a baccalaureate degree in a *specific specialty*, or its equivalent. Moreover, a review of the record indicates that the petitioner has failed to credibly demonstrate the duties the beneficiary will be responsible for or perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree in a specific specialty, or its equivalent.

Additionally, the AAO finds that the petitioner has not provided sufficient documentation to support a claim that its particular position is so complex or unique that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent. This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. The LCA indicates a wage level at a Level I (entry level) wage. As previously mentioned, the wage-level of the proffered position 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. Without further evidence, it is simply not credible that the petitioner's proffered position is complex or unique as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing wage. For example, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."<sup>16</sup>

The petitioner 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.

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 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 its equivalent. On appeal, the petitioner submitted a listing of courses for the [REDACTED] bachelor's degree in fashion design. However, in its brief, the petitioner suggested that such a course of study was *not* sufficient preparation for the duties of the proffered position, stating the following:

The job duties of the proffered position requires [sic] the employee who performs these duties to have knowledge and skills not only in design but also in business. There are two major Art institutions located in Los Angeles, which are [REDACTED] and [REDACTED]. In the [REDACTED] Fashion Design major Course Curriculum, the two year Associate degree only provides classes which are focused on design skills, and to learn the knowledge in the business field, the students would have to complete another 2 years of study in Business Management. The 4 years of study together in both Fashion Design and Business Management would give them the Bachelor of Science Degree. Whereas for [REDACTED] among the 27 courses provided during the 4-year degree study, only one class covers the study of Marketing and the rest are all focused on design only. The course curriculums of these two main Art Institutions located in Los Angeles have shown that, to perform the job duties that covers both design and marketing/public relations fields, the employee needs to have at least a Bachelor's Degree, or even a 4-year degree in art along with another degree in business. (Errors in original).

<sup>16</sup> For additional information regarding wage levels as defined by DOL, see Employment and Training Administration (ETA), *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), at [http://www.foreignlaborcert.doleta.gov/pdf/Policy\\_Nonag\\_Progs.pdf](http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf).

Here, the petitioner appears to contradict its own assertion that a bachelor's degree in fashion design is a minimum entry requirement into the occupation. That is, the petitioner states that a four-year degree in fashion design would not provide the necessary marketing training required for the position; however, a two-year associate's degree in fashion design, followed by two additional years of business training would be sufficient. Thus, the petitioner in essence states that a bachelor's degree in fashion design is not required to perform the duties of the proffered position.

Moreover, the petitioner fails to demonstrate how the duties of the fashion designer as described in the record 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. For instance, while the petitioner submitted a printout of courses for a degree in fashion design, the petitioner did not establish how such a curriculum is necessary to perform the duties of the proffered position. While related courses may be beneficial, or even required, in performing certain duties of the proffered position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the particular position here.

The AAO observes that the description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. 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. The petitioner has not credibly demonstrated that this position, which the petitioner characterized in the LCA as an entry-level position, is so complex or unique that it can be performed only by an individual with at least a baccalaureate degree in a specific specialty, or its equivalent.

The AAO observes that the petitioner has indicated that the beneficiary's educational background and experience in the industry will assist her in carrying out the duties of the proffered position. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. In the instant case, the petitioner does not establish which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. The petitioner failed to demonstrate that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent. Consequently, 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 satisfy this criterion, the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. In the instant case, 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.

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

It must be noted that the petitioner stated in the Form I-129 petition that it was established in 1989 (twenty-two years prior to the submission of the H-1B petition). However, the petitioner did not provide the total number of people it has employed to serve in the proffered position. The petitioner also did not submit any documentation regarding employees who currently or previously held the position. In its appeal brief, the petitioner states that since 1989 the company has hired several designers and "some" of them had a bachelor's degree in fashion design or business administration. However, it cannot be determined how representative the petitioner's claim regarding "some" individuals *over a 22 year period* is of the petitioner's normal recruiting and hiring practices.

The petitioner further states that it hired a second fashion designer on March 19, 2012 and that this person holds a degree in fashion design from [REDACTED]. However, the petitioner declined to provide any documentation in support of this assertion (e.g., copies of diplomas/transcripts, employment records), citing concern for the employee's privacy. Notably, the petitioner did not submit similar or secondary evidence, or redacted documents. *See* 8 C.F.R. § 103.2(b)(2). As previously mentioned, while a petitioner should always disclose when a submission contains confidential commercial information, the claim does not provide a blanket excuse for the petitioner's failure to provide such a document if that document is material to the requested benefit.<sup>17</sup> Although a petitioner may always refuse to submit confidential commercial information if it is deemed too sensitive, the petitioner must also satisfy the burden of proof and

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<sup>17</sup> As discussed, *supra*, both the Freedom of Information Act and the Trade Secrets Act provide for the protection of a petitioner's confidential business information when it is submitted to USCIS. *See* 5 U.S.C. § 552(b)(4), 18 U.S.C. § 1905. Additionally, the petitioner may request pre-disclosure notification pursuant to Executive Order No. 12,600, "Predisclosure Notification Procedures for Confidential Commercial Information." Exec. Order No. 12,600, 1987 WL 181359 (June 23, 1987).

runs the risk of a denial. *Cf. Matter of Marques*, 16 I&N Dec. 314. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

Further, while the petitioner provided a general statement that it had previously employed "several" individuals to serve as fashion designers and recently hired another designer, the petitioner failed to provide the job duties and day-to-day responsibilities of the positions that it claims are the same as the proffered position. The petitioner did not provide any information regarding the complexity of the job duties, supervisory duties (if any), independent judgment required or the amount of supervision received. Accordingly, aside from the job title, it is unclear whether the duties and responsibilities of these individuals were the same or related to the proffered position.

Further, the AAO again notes that the job advertisements for the proffered position state the educational requirement as "BFA or BS degree required." The AAO here reiterates that the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but such a degree in a *specific specialty* that is directly related to the specialty occupation claimed in the petition. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at 147 (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position").

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

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

The AAO acknowledges that the petitioner submitted opinion letters from other industry companies that refer to the common duties of a fashion designer as "complex." However, as previously stated, the AAO incorporates by reference and reiterates its earlier discussion and analysis that the opinion letters do not establish the proffered position as qualifying as a specialty occupation.

In its appeal brief, the petitioner's creative director claimed that the proffered position is needed to expand and develop the business. She provided the following statement:

I, as Creative Director of the company, have been performing most the design job duties same as the proffered position during the past few years. However, with our company growing and expanding rapidly, there has been more workload and new job duties to be performed. Furthermore, our company plans to step into the field of importing apparel merchandise from Asian countries, as well as adopting new technologies, such as web marketing, online sales inventory management, and

Computer Aided Design into our business. Hiring a Fashion Designer with a minimum of a Bachelor degree in Fashion Design and/or Business has been essential for the person to successfully perform all the duties for the proffered position in this complex and fast moving working environment.

In support of the petition, the petitioner submitted various documents, including evidence regarding its business operations such as several financial documents (unsigned federal tax return, quarterly reports, bank statements); lease agreement; insurance documents; one sales order; three purchase orders; photographs of the petitioner's premises; printouts from the petitioner's website; as well as promotional/marketing materials. However, while the creative director asserts that the petitioner's business operations are growing and expanding rapidly and that it has plans to import apparel and adopt new technologies, the AAO observes that the petitioner did not establish how these factors specifically impact the duties and responsibilities of the proffered position. Furthermore, the petitioner did not submit probative evidence substantiating its claims.<sup>18</sup>

As previously discussed, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190. Furthermore, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248. As such, eligibility for the benefit sought must be assessed and weighed based on the facts as they existed at the time the instant petition was filed and not based on what were merely speculative facts not then in existence.<sup>19</sup>

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<sup>18</sup> The record of proceeding does not contain evidence establishing the rapid expansion of the petitioner's business operations, or any credible documentation regarding concrete plans to import apparel merchandise or adopt new technologies. More importantly, the petitioner did not submit probative documentation to establish that these (or other) aspects of the petitioner's business demonstrate that the nature of the duties of the proffered position is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent.

<sup>19</sup> The agency made clear long ago that speculative employment is not permitted in the H-1B program. For example, a 1998 proposed rule documented this position as follows:

Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. See section 214(i) of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

While the petitioner is certainly permitted to petition for H-1B classification on the basis of facts not in existence at the time the instant petition was filed, it must nonetheless file a new petition to have these facts considered in any eligibility determination requested. Thus, without further information, the petitioner's claimed potential business expansions and adoption of new techniques does not 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 in a specific specialty.

Moreover, the AAO finds that the level of complexity, independent judgment and understanding claimed by the petitioner is materially inconsistent with the LCA certification for a Level I position (the lowest of four assignable wage levels). The AAO incorporates its earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a low, entry-level position relative to others within the occupation, and hence one not likely distinguishable by relatively specialized and complex duties. As previously discussed, DOL indicates that a Level I designation is appropriate for "beginning level employees who have only a basic understanding of the occupation." Without further evidence, it is simply not credible that the petitioner's proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing. As previously mentioned, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."

The petitioner has submitted inadequate probative evidence to satisfy this criterion of the regulations. Thus, the petitioner has not established that the duties of the position are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. The AAO, therefore, concludes that the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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

A 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 has failed to establish that the proffered position requires a baccalaureate or higher degree in a specific specialty, or its equivalent. Therefore, the AAO need not and will not address the beneficiary's qualifications.

As previously mentioned, an application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all

of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1043, *aff'd*, 345 F.3d 683; *see also Soltane v. DOJ*, 381 F.3d 145 (noting that the AAO conducts appellate review on a *de novo* basis).

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

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.<sup>20</sup> In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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

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<sup>20</sup> As previously discussed, the AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 145. However, as the appeal is dismissed for the reasons discussed above, the AAO will not further discuss the additional issues and deficiencies that it observes in the record of proceedings.