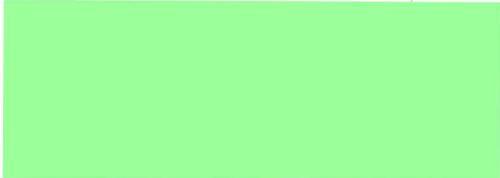


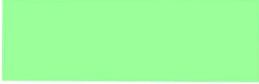
(b)(6)

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



U.S. Citizenship  
and Immigration  
Services



DATE: **JUN 03 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:

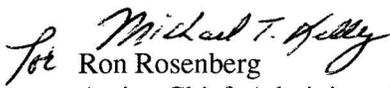


INSTRUCTIONS:

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

Page 2

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

On the Form I-129 visa petition, the petitioner describes itself as a three-employee company that provides goods and services to the funeral home industry, household goods, and software technology<sup>1</sup> established in 2009. In order to employ the beneficiary in what it designates as a commercial artist position,<sup>2</sup> 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 the basis of her determination that the petitioner had failed to demonstrate that the proffered position qualifies for classification as a specialty occupation.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's letter denying the petition; and (5) the Form I-290B and supporting documentation.

Upon review of the entire record of proceeding, the AAO finds that the petitioner has failed to overcome the director's ground for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

At the outset of this decision, and beyond the decision of the director, the AAO finds that the petitioner provided as the supporting Labor Condition Application (LCA) for this petition an LCA which does not correspond to the petition, in that: (1) the LCA was certified for a wage level below that which is compatible with the level of responsibility the petitioner claimed for the proffered position through its descriptions of its constituent duties; and (2) the occupational category for which the LCA was certified (Commercial and Industrial Designers) does not correspond to the proffered position and its constituent duties as described in the record of proceeding.<sup>3</sup> This aspect of the petition undermines the credibility of the petition as a whole and any claim as to the proffered position or the duties comprising it as being particularly complex, unique, and/or specialized.

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<sup>1</sup> The petitioner provided a North American Industry Classification System (NAICS) Code of 327212, "Other Pressed and Blown Glass and Glassware Manufacturing." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "327212 Other Pressed and Blown Glass and Glassware Manufacturing," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (accessed Mar. 15, 2013).

<sup>2</sup> The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for the SOC (O\*NET/OES) Code 27-1021, the associated Occupational Classification of "Commercial and Industrial Designers," and a Level I (entry-level) prevailing wage rate.

<sup>3</sup> The AAO conducts appellate review on a *de novo* basis (*See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)), and it was in the course of this review that the AAO identified this aspect of the petition.

In its Business Plan dated September 2011 the petitioner described itself as follows:

The lines of business under [REDACTED] are designed for rapid growth and economic success. The goal is for each line of business to bring new and innovative products to market culminating in ultimately bringing the line of business itself to market.

[REDACTED] is one of [REDACTED] lines of business. The purpose of [REDACTED] is to create beautiful, one of a kind works of Glass Art incorporating cremains into an artistic expression of remembrance for the grieving family upon a death occasion.

These artistic memorials, marketed as [REDACTED] are each hand produced at the [REDACTED] in Columbus, Ohio. Artists under the direction of [REDACTED] Chief Executive Officer of [REDACTED] create a solid, resilient, museum quality work of art in the shape of a large egg, an enduring symbol of the start of new life.

[REDACTED] envisions the provision of its artistically created works to become available to funeral homes throughout the United States and offered as part of each funeral home's cremation services. . . .

In its October 4, 2011 letter of support, the petitioner described the duties of the proffered position as follows:

[The beneficiary] will create and implement new product designs after determining the requirements of the clients, the purpose of the product, and the tastes of the customers considering the context in which the product will be used. She will ascertain the desired product characteristics, such as size, shape, weight, color, materials used, and cost. In addition, she will meet with clients and visit potential users.

[The beneficiary] will prepare conceptual sketches or diagrams by hand and with the aid of a computer to illustrate her vision of the product, and consult with other members of the product development team. She will create detailed sketches or renderings using computer-aided design (CAD) tools, and present the designs and prototypes to clients and managers and incorporate any changes and suggestions. She will work with managers and marketing staff to ensure that designs fit into the company's business plan and strategic vision so products accurately reflect the company's image.

Counsel makes several claims as to complexity and uniqueness in the proffered position. For example, in his October 11, 2011 letter, counsel referenced “the complex duties” of the position, and argued that “[t]he skills are technical and the responsibilities are great.”

In his April 24, 2012 letter, counsel claimed that this is “a complex and highly-advanced artistic position,” and argued that “the duties are undeniably critical, complex, and responsible.”

In similar fashion, counsel argues on appeal that the proffered position is a “complex and, by the very nature of this new product, unique, and highly-advanced artistic position.” Counsel reiterated his earlier claim that “the duties are undeniably critical, complex, and responsible,” and that “the job is complex and unique.”

However, as will now be discussed, these assertions materially conflict with the wage level designated in the LCA that the petitioner submitted with the petition. As noted above, the LCA submitted by the petitioner in support of the instant position specifies the occupational classification for the position as “Commercial and Industrial Designers,” SOC (O\*NET/OES) Code 27-1021, at a Level I (entry level) wage. The *Prevailing Wage Determination Policy Guidance*<sup>4</sup> issued by the U.S. Department of Labor (DOL) states the following with regard to Level I wage rates:

**Level I** (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer’s methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered [emphasis in original].

Counsel’s assertions regarding the proposed duties’ level of complexity and the occupational understanding required to perform them are materially inconsistent with the petitioner’s submission of an LCA certified for a Level I, entry-level position. The LCA’s wage level (Level I, the lowest of the four that can be designated) is only appropriate for a low-level, entry position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels quoted above, this wage rate is appropriate for positions in which the beneficiary is only required to have a basic understanding of the occupation; will be expected to perform routine tasks requiring limited, if any, exercise of judgment; will be closely supervised and his work closely monitored and reviewed for accuracy; and 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 proffered position’s educational demands and level of responsibilities. Doubt cast on any aspect of the petitioner’s proof may, of course, lead to a

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<sup>4</sup> Available at [http://www.foreignlaborcert.doleta.gov/pdf/Policy\\_Nonag\\_Progs.pdf](http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf) (last accessed Mar. 15, 2013).

reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

It should be noted that, for efficiency's sake, the AAO's discussion and findings regarding the material conflict between assertions in the petition and the LCA wage-level are hereby incorporated as part of this decision's later analyses of each criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Aside from the adverse impact of the LCA wage-level against the overall credibility of the petition, the AAO will now discuss that additional issue raised by the LCA which was noted at the outset of this decision, namely, the fact that the LCA does not appear to correspond to the instant petition. This factor precludes approval of the petition.

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

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

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

Further, the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(2) also makes clear that certification of an LCA does not constitute a determination that a position qualifies for classification as a specialty occupation:

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

While the 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 the content of 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.

As previously noted, the conflict between the LCA and the petition adversely affects the merits of the petition, because it materially undermines the credibility of the petition's statements with regard to the nature and level of work that the beneficiary would perform.

Moreover, the petitioner's certification of the LCA under the O\*NET occupational code classification of "Commercial and Industrial Designers" constitutes a second reason why the submitted LCA does not correspond to the petition, as the proposed duties as described in the record of proceeding do not comprise the type of position (Commercial and Industrial Designers) designated in the LCA.

The appropriate wage level is determined only after selecting the most relevant O\*NET occupational code classification. The aforementioned *Prevailing Wage Determination Policy Guidance* issued by the DOL states that "[t]he O\*NET description that corresponds to the employer's job offer shall be used to identify the appropriate occupational classification" for determining the prevailing wage for the LCA.

The O\*NET Summary Report for the occupational category "Commercial and Industrial Designers" summarizes that occupation as follows:

Develop and design manufactured products, such as cars, home appliances, and children's toys. Combine artistic talent with research on product use, marketing, and materials to create the most functional and appealing product design.

Employment & Training Administration, U.S. Dep't of Labor, O\*Net OnLine, Summary Report for Commercial and Industrial Designers, available at <http://www.onetonline.org/link/details/27-1027> (accessed Mar. 15, 2013).

The O\*NET Details Report for this occupation lists the following "core tasks" that are performed by commercial and industrial designers:

- Prepare sketches of ideas, detailed drawings, illustrations, artwork, or blueprints, using drafting instruments, paints and brushes, or computer-aided design equipment.
- Confer with engineering, marketing, production, or sales departments, or with customers, to establish and evaluate design concepts for manufactured products.
- Modify and refine designs, using working models, to conform with customer specifications, production limitations, or changes in design trends.

- Direct and coordinate the fabrication of models or samples and the drafting of working drawings and specification sheets from sketches.
- Evaluate feasibility of design ideas, based on factors such as appearance, safety, function, serviceability, budget, production costs/methods, and market characteristics.
- Present designs and reports to customers or design committees for approval, and discuss need for modification.
- Investigate product characteristics such as the product's safety and handling qualities, its market appeal, how efficiently it can be produced, and ways of distributing, using and maintaining it.
- Develop manufacturing procedures and monitor the manufacture of their designs in a factory to improve operations and product quality.
- Research production specifications, costs, production materials and manufacturing methods, and provide cost estimates and itemized production requirements.
- Participate in new product planning or market research, including studying the potential need for new products.
- Fabricate models or samples in paper, wood, glass, fabric, plastic, metal, or other materials, using hand or power tools.
- Coordinate the look and function of product lines.
- Design graphic material for use as ornamentation, illustration, or advertising on manufactured materials and packaging or containers.

*Id.* at <http://www.onetonline.org/link/details/27-1027.00>.

The U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, which the AAO recognizes as an authoritative source on the duties and educational requirements of the wide variety of occupations it addresses,<sup>5</sup> states the following with regard to the duties of industrial designers, an occupational category which counsel claims corresponds to the proffered position:

Industrial designers develop the concepts for manufactured products, such as cars, home appliances, and toys. They combine art, business, and engineering to make

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<sup>5</sup> The *Handbook*, which is available in printed form, may also be accessed online at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are from the 2012-13 edition available online.

products that people use every day. Industrial designers focus on the user experience in creating style and function for a particular gadget or appliance. . . .

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Industrial Designers," <http://www.bls.gov/ooh/arts-and-design/industrial-designers.htm#tab-2> (accessed Mar. 15, 2013).

On the surface, these duties appear similar to those of the proffered position. However, a closer, more careful comparison of these duties to those of the proffered position reveals that the duties proposed for the beneficiary are not actually those of an industrial designer as claimed by counsel. As stated above, industrial designers develop and design manufactured products. The products that the beneficiary would design would not be manufactured – instead, the beneficiary would craft them herself.<sup>6</sup>

Furthermore, it is noted that, according to the *Handbook*, most entry-level industrial design positions require a bachelor's degree in either industrial design, architecture, or engineering. *Id.* at <http://www.bls.gov/ooh/arts-and-design/industrial-designers.htm#tab-4>. Although neither a decisive nor material factor in the AAO's decision, the beneficiary's lack of qualifications listed by the DOL as among those normally possessed by industrial designers strengthens further the AAO's determination that the proffered position is not actually that of an industrial designer.

Instead, the AAO finds that the duties of the proffered position align with those performed by craft artists,<sup>7</sup> as those duties are described in O\*Net OnLine. The O\*NET Summary Report for the occupational category "Craft Artists" summarizes that occupation as follows:

Create or reproduce hand-made objects for sale and exhibition using a variety of techniques. . . .

Employment & Training Administration, U.S. Dep't of Labor, O\*Net OnLine, Summary Report for Craft Artists, available at <http://www.onetonline.org/link/details/27-1012> (accessed Mar. 15, 2013).

The AAO notes that among the "sample reported job titles" for this occupational category are "Glass Artist," "Designer," and "Glass Blower."

The O\*NET Details Report for this occupation lists the following "core tasks" that are performed by craft artists:

- Create functional or decorative objects by hand, using a variety of methods and materials.

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<sup>6</sup> The petitioner's letter of support, as well as the promotional materials submitted below and on appeal, emphasize the "handmade" nature of its products.

<sup>7</sup> It is worth noting that the petitioner referenced its "artists" in that portion of its website excerpted by counsel on appeal. The petitioner also specifically referred to the beneficiary as an "artist" on her business card.

- Cut, shape, fit, join, mold, or otherwise process materials, using hand tools, power tools, and/or machinery.
- Attend craft shows to market products.
- Select materials for use based on strength, color, texture, balance, weight, size, malleability and other characteristics.
- Apply finishes to objects being crafted.
- Develop concepts or creative ideas for craft objects.
- Set specifications for materials, dimensions, and finishes.
- Confer with customers to assess customer needs or obtain feedback.
- Fabricate patterns or templates to guide craft production.
- Create prototypes or models of objects to be crafted.
- Sketch or draw objects to be crafted.
- Advertise products and work, using media such as internet advertising and brochures.
- Develop product packaging, display and pricing strategies.
- Research craft trends, venues, and customer buying patterns in order to inspire designs and marketing strategies.

*Id.* at <http://www.onetonline.org/link/details/27-1012.00>.

The AAO finds these duties more similar to those proposed for the beneficiary.

DOL guidance specifies that when ascertaining the proper occupational classification, a determination should be made by “consider[ing] the particulars of the employer’s job offer and compar[ing] the full description to the tasks, knowledge, and work activities generally associated with an O\*NET-SOC occupation to insure the most relevant occupational code has been selected.” *See Prevailing Wage Determination Policy Guidance*. In this case, the petitioner has provided no explanation of its apparently erroneous claim that the position’s primary and essential tasks, knowledge, and work activities are those generally associated with the occupational category of “Commercial and Industrial Designers” as depicted by O\*Net OnLine, rather than “Craft Artists.” As such, it has not established that this LCA actually corresponds to this petition for this additional reason.

As reflected in this decision's earlier discussion regarding the fact that the LCA does not correspond to the petition, that conflict between the petition and the LCA adversely affects the merits of the petition, because it materially undermines the credibility of the petition's statements therein with regard to the nature and level of work that the beneficiary would perform. That being said, the AAO will now continue to address the evidence in the record of proceeding.

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

To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one 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 term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

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

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

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;

- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

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

To determine whether a particular job qualifies as a specialty occupation, USCIS does not rely simply upon a proffered position’s title. The specific duties of the 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 beneficiary, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d at 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 will now discuss the application of each supplemental, alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) to the evidence in this record of proceeding.

The AAO will first discuss the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which is satisfied by establishing that a baccalaureate or higher degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of the petition.

As discussed above, the AAO does not agree with the petitioner that the duties of the proffered position align with those of industrial designers as outlined in the *Handbook*. Instead, the AAO finds that the duties of the proffered position align with those normally performed by craft and fine artists as that range of occupations is described in the *Handbook*. The *Handbook* states the following with regard to the duties of craft and fine artists:

Craft and fine artists use a variety of materials and techniques to create art for sale and exhibition. Craft artists create handmade objects, such as pottery, glassware, textiles or other objects that are designed to be functional. Fine artists, including painters, sculptors, and illustrators, create original works of art for their aesthetic value, rather than a functional one. . . .

\* \* \*

Craft and fine artists typically do the following:

- Use techniques such as knitting, weaving, glass blowing, painting, drawing, or sculpting
- Develop creative ideas or new methods for making art
- Create sketches, templates, or models to guide their work
- Select which materials to use on the basis of color, texture, strength, and other qualities
- Process materials, often by shaping, joining, or cutting
- Use visual elements, such as composition, color, space, and perspective, to produce desired artistic effects
- Develop portfolios highlighting their artistic styles and abilities to show to gallery owners and others interested in their work

Artists create objects that are beautiful or thought-provoking. They often strive to communicate ideas or feelings through their art.

Craft artists make a wide variety of objects, mostly by hand, to sell in their own studios, online, in stores, or at arts-and-crafts shows. Some craft artists display their works in galleries and museums.

Craft artists work with many different materials, including ceramics, glass, textiles, wood, metal, and paper, to create unique pieces of art, such as pottery, quilts, stained glass, furniture, jewelry, and clothing. Many craft artists also use fine-art techniques—for example, painting, sketching, and printing—to add finishing touches to their products.

\* \* \*

*Glass artists* process glass in a variety of ways—such as by blowing, shaping, or joining it—to create artistic pieces. Specific processes used include glassblowing, lampworking, and stained glass. These workers also decorate glass objects, such as by etching or painting.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Craft and Fine Artists," <http://www.bls.gov/ooh/arts-and-design/craft-and-fine-artists.htm#tab-2> (accessed Mar. 15, 2013).

The *Handbook* states the following with regard to the educational requirements necessary for entrance into this field:

Formal schooling is not required for craft and fine artists. However, many artists take classes or earn a bachelor's or master's degree in fine arts, which can improve their skills and job prospects. . . .

\* \* \*

Formal schooling is rarely required for craft and fine artists. However, it is difficult to gain adequate artistic skills without some formal education in the fine arts.

Most craft and fine artists have at least a high school diploma. High school classes, such as those in art, shop, or home economics, can teach prospective artists some of the basic skills they will need, such as drawing, woodworking, or sewing.

Many artists pursue postsecondary education and take classes or earn degrees that can improve their skills and job prospects. Many colleges and universities offer bachelor's and master's degrees in fine arts. In addition to studio art and art history, courses may also include core subjects, such as English, social science, and natural science.

*Id.* at <http://www.bls.gov/ooh/arts-and-design/craft-and-fine-artists.htm#tab-4>.

These statements from the *Handbook* do not support a finding that a bachelor's degree or the equivalent, in a specific specialty, is the normal minimum entry requirement for this occupation.

Nor does the record of proceeding contain any persuasive documentary evidence from any other relevant authoritative source establishing that the proffered position's inclusion in this occupational category is sufficient in and of itself to establish the proffered position as, in the words of this criterion, a "particular position" for which "[a] baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry."

Moreover, as noted above, the petitioner submitted an LCA certified for a wage-level that is only appropriate for a comparatively low, entry-level position relative to others within its occupation, which signifies that the beneficiary is only expected to possess a basic understanding of the occupation.

As the evidence in the record of proceeding does not establish that a baccalaureate degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of this petition, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).<sup>8</sup>

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<sup>8</sup> Furthermore, it is noted that, even if the proffered position were established as being that of an industrial designer, a review of the *Handbook* does not indicate that, as a category, such a position qualifies as a specialty occupation in that the *Handbook* does not state a normal minimum requirement of a U.S. bachelor's or higher degree in a specific specialty or its equivalent for entry into the occupation of industrial designer. In relevant part, the *Handbook* states the following:

A bachelor's degree is usually required for most entry-level industrial design jobs.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Industrial Designers," <http://www.bls.gov/ooh/arts-and-design/industrial-designers.htm#tab-4> (accessed Mar. 15, 2013).

"Most" does not indicate that an industrial designer position normally requires at least a bachelor's degree, or its equivalent, in a specific specialty. The first definition of "most" in *Webster's New Collegiate College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of industrial designer positions require at least a bachelor's degree in a specific specialty, it could be said that "most" industrial designer positions require such a degree. It cannot be found, therefore, that a particular degree requirement for "most" positions in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner. Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. To interpret this provision otherwise would run directly contrary to the plain language of the Act, which requires in part "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." Section 214(i)(1) of the Act.

Next, the AAO finds that the petitioner has not satisfied 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 at 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent. Also, there are no submissions from professional associations, individuals, or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions. Nor did the petitioner submit any other evidence 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.

Therefore, the petitioner has not satisfied the first of the two alternative prongs described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), as the evidence of record does not establish a requirement for at

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This finding is supported by the O\*NET Details Report for the occupational category "Commercial and Industrial Designers," which states that only 52% of the commercial and industrial designers that responded to a voluntary survey reported possessing a bachelor's degree. Another 25% percent of the respondents reported possessing only an associate's degree, and 19% reported having completed some college, but not earning a degree.

See Employment & Training Administration, U.S. Dep't of Labor, O\*Net OnLine, Details Report for Commercial and Industrial Designers, available at <http://www.onetonline.org/link/details/27-1027> (accessed Mar. 15, 2013).

As such, absent evidence that the position of programmer analyst satisfies one of the alternative criteria available under 8 C.F.R. § 214.2(h)(4)(iii)(A), the instant petition could not be approved for this additional reason.

Moreover, even if the proffered position were established as being that of an industrial designer, and the AAO had found it to be a specialty occupation (which it does not), the petition could still not be approved, as the *Handbook* indicates that for those industrial design positions which *do* require a bachelor's degree, the degree should be in the fields of industrial design, architecture, or engineering. The beneficiary does not possess a bachelor's degree, or the equivalent, in any of those areas.

least a bachelor's degree in a specific specialty as 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.

Next, the AAO finds that the petitioner did not satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "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."

In this particular case, the petitioner has failed to credibly demonstrate that the duties the beneficiary will perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

The record of proceeding does not contain sufficient evidence establishing relative complexity or uniqueness as aspects of the proffered position, let alone that the position is so complex or unique as to require the theoretical and practical application of a body of highly specialized knowledge such that a person with a bachelor's or higher degree in a specific specialty or its equivalent is required to perform them. Rather, the AAO finds, the petitioner has not distinguished either the proposed duties, or the position that they comprise, from generic craft-artist work, which, the *Handbook* indicates, does not necessarily require a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

The petitioner therefore failed to establish how the beneficiary's responsibilities and day-to-day duties comprise a position so complex or unique that the position can be performed only by an individual with a bachelor's degree, or the equivalent, in a specific specialty.

Additionally, the AAO incorporates here by reference and reiterates its earlier discussion regarding the LCA and its indication that the petitioner would be paying a wage-rate that is only appropriate for a low-level, entry position relative to others within the occupation, as this factor is inconsistent with the relative complexity and uniqueness required to satisfy this criterion. Based upon the wage rate, the beneficiary is only required to have a basic understanding of the occupation. Moreover, that wage rate indicates that the beneficiary will perform routine tasks that require limited, if any, exercise of independent judgment; that the beneficiary's work will be closely supervised and monitored; that he will receive specific instructions on required tasks and expected results; and that his work will be reviewed for accuracy.

Consequently, as it did not show that the particular position for which it filed this petition is so complex or unique that it can only be performed by a person with at least a bachelor's degree, or the equivalent, in a specific specialty, the petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO turns next to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which entails an employer demonstrating that it normally requires a bachelor's degree, or the equivalent, in a specific specialty for the position.

The AAO's review of the record of proceeding under this criterion necessarily includes whatever evidence the petitioner has submitted with regard to its past recruiting and hiring practices and employees who previously held the position in question.

To satisfy this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency, in a specific specialty, in its prior recruiting and hiring for the position. 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 the performance requirements of the proffered position.<sup>9</sup> In the instant case, the record does not establish a prior history of recruiting and hiring for the proposed position of only persons with at least a bachelor's degree, or the equivalent, in a specific specialty.

It should be noted that a petitioner may believe or otherwise assert that a proffered position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's assertion of a particular degree requirement is not necessitated by the actual performance requirements of the proffered position, the position would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d at 387. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proposed position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so

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<sup>9</sup> Any such assertion would be undermined in this particular case by the fact that the petitioner indicated in the LCA that its proffered position is a comparatively low, entry-level position relative to others within its occupation.

long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

Although the petitioner submits promotional materials referencing its “degreed artisans,” the record lacks copies of those individuals’ degrees, as well as evidence establishing that they are, or were, employed by the petitioner. Simply 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The evidence submitted by the petitioner is not sufficient to establish that it normally requires a bachelor’s degree, or the equivalent, in a specific specialty for the position.

As the petitioner has failed to demonstrate a history of recruiting and hiring only individuals with a bachelor’s degree, or the equivalent, in a specific specialty for the proffered position, it has failed to satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Next, the AAO finds that the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which requires the petitioner to establish that the nature of the proffered 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.

Both on its own terms and also in comparison with the three higher wage-levels that can be designated in an LCA, the petitioner’s designation of an LCA wage-level I is indicative of duties of relatively low complexity.

As earlier noted, the *Prevailing Wage Determination Policy Guidance* issued by the U.S. Department of Labor (DOL) states the following with regard to Level I wage rates:

**Level I** (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer’s methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered [emphasis in original].

The pertinent guidance from the Department of Labor, at page 7 of its *Prevailing Wage Determination Policy Guidance* describes the next higher wage-level as follows:

**Level II** (qualified) wage rates are assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation. They perform moderately complex tasks that require limited judgment. An indicator that the job request warrants a wage determination at Level

II would be a requirement for years of education and/or experience that are generally required as described in the O\*NET Job Zones.

The above descriptive summary indicates that even this higher-than-designated wage level is appropriate for only “moderately complex tasks that require limited judgment.” The fact that this higher-than-here-assigned, Level II wage-rate itself indicates performance of only “moderately complex tasks that require limited judgment,” is very telling with regard to the relatively low level of complexity imputed to the proffered position by virtue of its Level I wage-rate designation.

Further, the AAO notes the relatively low level of complexity that even this Level II wage-level reflects when compared with the two still-higher LCA wage levels, neither of which was designated on the LCA submitted to support this petition.

The aforementioned *Prevailing Wage Determination Policy Guidance* describes the Level III wage designation as follows:

**Level III** (experienced) wage rates are assigned to job offers for experienced employees who have a sound understanding of the occupation and have attained, either through education or experience, special skills or knowledge. They perform tasks that require exercising judgment and may coordinate the activities of other staff. They may have supervisory authority over those staff. A requirement for years of experience or educational degrees that are at the higher ranges indicated in the O\*NET Job Zones would be indicators that a Level III wage should be considered.

Frequently, key words in the job title can be used as indicators that an employer’s job offer is for an experienced worker. . . .

The *Prevailing Wage Determination Policy Guidance* describes the Level IV wage designation as follows:

**Level IV** (fully competent) wage rates are assigned to job offers for competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. These employees receive only technical guidance and their work is reviewed only for application of sound judgment and effectiveness in meeting the establishment’s procedures and expectations. They generally have management and/or supervisory responsibilities.

Here the AAO again incorporates its earlier discussion and analysis regarding the implications of the petitioner’s submission of an LCA certified for the lowest assignable wage-level. By virtue of this submission the petitioner effectively attested that the proffered position is a low-level, entry position relative to others within the occupation, and that, as clear by comparison with DOL’s instructive comments about the next higher level (Level II), the proffered position did not even

involve “moderately complex tasks that require limited judgment” (the level of complexity noted for the next higher wage-level, Level II).

The AAO also finds that, separate and apart from the petitioner’s submission of an LCA with a wage-level I designation, the petitioner has also failed to provide sufficiently detailed documentary evidence to establish that the nature of the specific duties that would be performed if this petition were approved 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.

For all of these reasons, the evidence in the record of proceeding fails to establish that the proposed duties meet the specialization and complexity threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Finally, the AAO notes that counsel cites to *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*, 839 F. Supp. 2d 985 (S.D. Ohio 2012), for the proposition that “[t]he knowledge and not the title of the degree is what is important. Diplomas rarely come bearing occupation-specific majors. What is required is an occupation that requires highly specialized knowledge and a prospective employee who has attained the credentialing indicating possession of that knowledge.”

The AAO agrees with the aforementioned proposition that “[t]he knowledge and not the title of the degree is what is important.” In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor’s or higher degree in more than one specialty is recognized as satisfying the “degree in the specific specialty” requirement of section 214(i)(1)(B) of the Act. In such a case, the required “body of highly specialized knowledge” would essentially be the same. Since there must be a close correlation between the required “body of highly specialized knowledge” and the position, however, a minimum entry requirement of a degree in two disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be “in *the* specific specialty,” unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required body of highly specialized knowledge is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added). For the aforementioned reasons, however, the petitioner has failed to meet its burden and establish that the particular position offered in this matter requires a bachelor’s or higher degree in a specific specialty, or its equivalent, directly related to its duties in order to perform those duties.

In any event, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*.<sup>10</sup> The

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<sup>10</sup> It is noted that the district judge’s decision in that case appears to have been based largely on the many factual errors made by the service center in its decision denying the petition. The AAO further notes that the service center director’s decision was not appealed to the AAO. Based on the district court’s findings and description of the record, if that matter had first been appealed through the available administrative process, the AAO may very well have remanded the matter to the service center for a new decision for many of the same reasons articulated by the district court if these errors could not have been remedied by the AAO in its *de novo* review of the matter.

AAO also notes that, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising even within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

As the petitioner has not satisfied at least one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position is a specialty occupation. Accordingly, the appeal will be dismissed and the petition will be denied on this basis.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (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 and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.