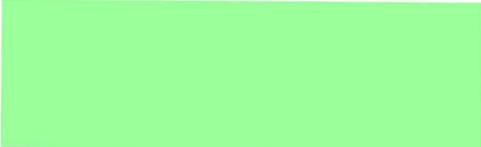
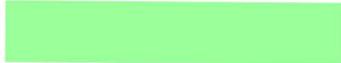


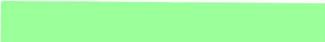
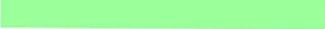


U.S. Citizenship
and Immigration
Services

(b)(6)



Date: **JUN 25 2013** Office: CALIFORNIA SERVICE CENTER 

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

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 stated that it is a "music and entertainment provider" with one employee. To employ the beneficiary in what it designates as a "Graphic Designer (Multimedia Production Artist)" position, the petitioner endeavors to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. On appeal, counsel asserted that the director's basis for denial was erroneous and contended that the petitioner satisfied all evidentiary requirements.

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

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

The issue on appeal before the AAO is whether the proffered position qualifies as 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 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 providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens

who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

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

With the visa petition, counsel provided evidence that the beneficiary has a bachelor's degree in electronics engineering awarded by [REDACTED] Turkey, and has taken classes in the fine arts program at the [REDACTED] California, majoring in animation. Counsel provided an evaluation of the petitioner's educational credentials that states that the Turkish degree is equivalent to a bachelor's degree in electronics engineering awarded by a U.S. institution, and that he also "has graduate-level credit toward a master of fine arts degree in animation from an accredited University in the United States."

Counsel also provided nine vacancy announcements and a letter from the petitioner's president, dated August 24, 2010. The August 24, 2010 letter from the petitioner's president contains the following description of the duties of the proffered position:

- Develop brand graphic elements (10%)
 - Create original graphics, icons, logos, symbols, characters, imager.
 - Develop original illustrations and presentations.
 - Develop rich multimedia elements.
 - Create the look and identity of [REDACTED] events.
 - Develop interactive contents.

- Design, develop, company website and online platforms (40%)
 - Process images and graphics for use on website.
 - Implement web design parameters, style guides and visual standards.
 - Develop layouts for online content.
 - Monitor online content materials.
 - Produce graphic materials for advertising and promotion on social media platforms.

- Implement policies, procedures, and guidelines for online media content.
- Integrate video and audio capability to the company website.
- Generate and manipulate graphic images, animations, sound, text and video into consolidated seamless multimedia programs.
- Create 2D/3D animation and motion graphics.
- Maintain company web portal (25%)
 - Perform backups.
 - Ensure user accessibility to site.
 - Monitor site traffic, prepare analysis and reporting.
 - Scale site capacity as necessary to meet traffic demands.
 - Establish and implement user interface design.
 - Design and implement common user interface standards, system usability guidelines, design guidelines, GUI prototypes, page design and management, and development methodologies.
- Design marketing e-communication tool graphics (25%)
 - Create interactive ads, banners.
 - Design E-newsletters and other marketing emails
 - Public Relations, Press Release Visuals
 - Photo Shoot Concepts
 - Design Event Graphics
 - Prepare event design.
 - Organize photos of events and post online.
 - Create blog/forum section.
 - Create live web-chat section.

The petitioner's president also cited the U.S. Department of Labor's (DOL's) Foreign Labor Certification Data Center Online Wage Library (OWL) as support for the proposition that the proffered position requires a minimum of a bachelor's degree. He did not allege that the proffered position requires a degree in any specific specialty in this letter.

On November 24, 2010, the service center issued an RFE in this matter. The service center requested, *inter alia*, evidence that the petitioner would employ the beneficiary in a specialty occupation.

In response, counsel provided (1) additional vacancy announcements; (2) a January 3, 2011 evaluation of the proffered position; and (3) a letter, dated December 29, 2010, from the petitioner's president. The evaluation of the proffered position was prepared by a professor of art at Seattle Pacific University who also owns his own design firm. The evaluator stated:

In my professional opinion, the position of Graphic Designer qualifies as a "Specialty Occupation" as per Immigration (USCIS) regulations, because the job requires

theoretical and practical application of a body of highly specialized knowledge (graphic design), and attainment of a bachelor's or higher degree in the specific specialty is a minimum for entry into the occupation in the United States."¹

In his December 29, 2010 letter, the petitioner's president asserted that the proffered position requires a bachelor's degree in graphic design, but did not assert that the beneficiary has such a degree. In support of the proposition that graphic designer positions require a minimum of a bachelor's degree in a specific specialty or its equivalent, the petitioner's president quoted from DOL's *Occupational Outlook Handbook (Handbook)* and stated, "If the bachelor's degree in graphic design is usually required, then it must be a normal requirement."

The director denied the petition on March 28, 2011, finding, as was noted above, that the petitioner had not demonstrated that the proffered position qualifies as a position in a specialty occupation by virtue of requiring a minimum of a bachelor's degree in a specific specialty or its equivalent. More specifically, the director found that the petitioner had satisfied none of the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel submitted (1) an addendum, dated April 20, 2011, to the January 3, 2011 evaluation of the proffered position; (2) a letter from the membership director of the [redacted] and (3) a brief.

The addendum to the January 3, 2011 evaluation states:

In my previous letter I wrote "due to the increased demand and competitive nature of the Graphic Design industry, it is now standard in the industry that the requirement of a bachelor's degree or equivalent is common in parallel position in similar organizations" (paragraph 8). By "industry" I meant the occupation of Graphic Design in the United States in general, and by "similar organizations" I referred to any organization employing a Graphic Designer.

My expertise and opinion focus on the occupation/industry of Graphic Designer rather than on the event provider industry. I do not claim to have specific expertise in [the petitioner's] specific field of endeavor and my opinion should not be construed in that way. In fact, the advertisements from other employers on which I based my opinion were for the same Graphic Designer occupation, but not in the same industry as [the petitioner].

The letter from the [redacted] membership director states:

A Bachelor's degree or its equivalent (in communication design, or closely related field, such as fine arts, visual communication or advertising design) is the educational

¹ The evaluator did not assert that the beneficiary has a minimum of a bachelor's degree in graphic design or its equivalent.

qualification normally required for an individual who enters the field of graphic design in the United States.² Often characterized by a legacy term of graphic designer, the communication designer must be adept at planning, designing, and managing production of visual communication for all media, including (in addition to print and exhibition systems) design strategies, video screens, internet and interactive navigational design.

In the appeal brief, counsel asserted that the evidence does, in fact, satisfy several of the alternative criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A). The AAO will now discuss the application of those additional, supplemental requirements of 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)(1), which is satisfied if a baccalaureate or higher degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position.

The AAO recognizes the *Handbook*, cited by counsel, as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.³ In the "Graphic Designers" chapter, the *Handbook* provides the following descriptions of the duties of those positions:

Graphic designers create visual concepts, by hand or using computer software, to communicate ideas that inspire, inform, or captivate consumers. They help to make an organization recognizable by selecting color, images, or logo designs that represent a particular idea or identity to be used in advertising and promotions

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, "Graphic Designers," <http://www.bls.gov/ooh/arts-and-design/graphic-designers.htm> (last visited June 21, 2013).

In addition, the *Handbook's* chapter on "Information Security Analysts, Web Developers, and Computer Network Architects" provides the following description of web developer positions:

Web developers design and create websites. They are responsible for the look of the site. They are also responsible for the site's technical aspects, such as performance

² The AIGA membership director appears to assert that any degree in fine arts would be closely-related to graphic design. The AAO observes that "fine arts" includes music, dance, and theatre, subjects which are not directly related to graphic design.

³ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2012 – 2013 edition available online.

and capacity, which are measures of a website's speed and how much traffic the site can handle. They also may create content for the site.

Web developers typically do the following:

- Meet with their clients or management to discuss the needs of the website and the expected needs of the website's audience and plan how it should look
- Create and debug applications for a website
- Write code for the site, using programming languages such as HTML or XML
- Work with other team members to determine what information the site will contain
- Work with graphics and other designers to determine the website's layout
- Integrate graphics, audio, and video into the website
- Monitor website traffic

When creating a website, developers have to make their client's vision a reality. They work with clients to determine what sites should be used for, including ecommerce, news, or gaming. The developer has to decide which applications and designs will fit the site best.

The following are some types of web developers:

Web architects or programmers are responsible for the overall technical construction of the website. They create the basic framework of the site and ensure that it works as expected. Web architects also establish procedures for allowing others to add new pages to the website and meet with management to discuss major changes to the site.

Web designers are responsible for how a website looks. They create the site's layout and integrate graphics; applications, such as a retail checkout tool; and other content into the site. They also write web-design programs in a variety of computer languages, such as HTML or JavaScript.

Webmasters maintain websites and keep them updated. They ensure that websites operate correctly and test for errors such as broken links. Many webmasters respond to user comments as well.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, "Information Security Analysts, Web Developers, and Computer Network Architects," <http://www.bls.gov/ooh/computer-and-information-technology/information-security-analysts-web-developers-and-computer-network-architects.htm#tab-2> (last visited June 21, 2013).

Upon review, in comparing the descriptions of these two occupations to the duties as described by the petitioner, while some of the duties the petitioner attributed to the proffered position are consistent with the duties of a graphic designer as described in the *Handbook*, the great majority are

consistent with the duties and responsibilities of a web developer and, more specifically, those of a web designer and webmaster. On the balance, the AAO finds that the proffered position is a web developer position as described in the *Handbook*. This finding is further supported when considering the context in which the duties will be performed, i.e., for a small event party company and not for a graphic design firm or a corporation with sufficient graphic design needs to employ a graphic designer for thirty to forty hours per week for a three-year period.

The *Handbook* states the following about the educational requirements of web developer positions:

Educational requirements for web developers vary with the setting they work in and the type of work they do. Requirements range from a high school diploma to a bachelor's degree. An associate's degree may be sufficient for webmasters who do not do a lot of programming.

However, for web architect or other, more technical, developer positions, some employers prefer workers who have at least a bachelor's degree in computer science, programming, or a related field.

Web developers need to have a thorough understanding of HTML. Many employers also want developers to understand other languages, such as JavaScript or SQL, as well as have some knowledge of multimedia publishing tools, such as Flash. Throughout their career, web developers must keep up to date on new tools and computer languages.

Some employers prefer web developers who have both a computer degree and have taken classes in graphic design, especially when hiring developers who will be heavily involved in the website's visual appearance.

Id. at <http://www.bls.gov/ooh/computer-and-information-technology/information-security-analysts-web-developers-and-computer-network-architects.htm#tab-4> (last visited June 21, 2013).

According to the *Handbook*, individuals with a high school diploma may enter web developer positions. In addition, while some employers may prefer individuals with a computer degree who have taken classes in graphic design, it must be noted that (1) a preference is not a requirement for such a degree and (2) the *Handbook* does not indicate whether such a preferred degree would be an associate's degree or a bachelor's or higher degree.

As the evidence of record does not establish that the particular position here proffered is one for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

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 a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or any other authoritative, objective, and reliable resource, reports a standard, industry-wide entry requirement of at least a bachelor's degree in a specific specialty or its equivalent. Also, there are no submissions from 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.⁴

The record does contain a letter from the membership director of the [REDACTED] as was noted above. As the proffered position is that of a web developer and not a graphic designer, however, this letter is irrelevant to determining whether this particular position qualifies as a specialty occupation. Even if it were relevant, the membership director of the [REDACTED] did not state that the [REDACTED] requires a minimum of a bachelor's degree in a specific specialty or its equivalent, or any specific level of education, as a minimum requirement for membership.

Counsel did provide nine vacancy announcements. They are for positions entitled Web UI Designer/Developer, Web Designer/Senior Designer, Senior Graphic Designer/Jack-of-all trades, Senior User Interface Designer, Graphic Designer/Technical Illustrator, Graphic Designer, Senior Online Graphic/Web Application Designer, Graphics Designer, and Web Designer. Although descriptions of duties accompany some of those announcements, those descriptions are insufficiently similar to the description of the duties of the proffered position to demonstrate that those positions are parallel to the proffered position.

In addition, two of the positions announced are with unidentified companies in unspecified industries. One announcement states that the position it announces is with "a leading provider of Internet marketing solutions for the lodging industry." Another position is with an unidentified company that calls itself an "exhibit company." Another one of the positions is with [REDACTED] of San Mateo, California, whose industry is unknown. One other position announced is with Fehr [REDACTED] a transportation consulting firm. Another position is with [REDACTED] a company specializing in 3D animation. Another position is with [REDACTED], which describes itself "the

⁴ The January 3, 2011 evaluation was provided by an individual who claims to be "a principal of [his] own design firm" but admits that he has no connection with the petitioner's industry.

global leader in timesheet and expense management software." The final vacancy announcement is for a position with Oracle On Demand, which is part of the Oracle Corporation. As the evaluator observed in the addendum to his evaluation, those companies do not appear to be in the petitioner's industry. Further, the record contains no evidence that those companies are similar to the petitioner in any other pertinent aspect.

Moreover, some of the postings do not state a requirement for a bachelor's or higher degree in a specific specialty or its equivalent. For instance, one announcement states that the position announced requires a "college degree," but not that the requisite degree must be a bachelor's degree or must be in any specific specialty. That announcement does not appear to require a minimum of a bachelor's degree in a specific specialty or its equivalent.

Another vacancy announcement states that the position announced requires a "Bachelor's degree or 3-5 years equivalent work experience. It does not indicate that the requisite bachelor's degree must be in any specific specialty. Further, there is no basis in the regulations upon which a minimum of three years of work experience may be deemed equivalent to a bachelor's degree in a specific specialty. *See generally* 8 C.F.R. § 214.2(h). For both reasons, that vacancy announcement does not require a minimum of a bachelor's degree in a specific specialty or its equivalent.

Yet another vacancy announcement states that the position it announces requires a bachelor's degree "or advanced training in visual communications." It does not state what type of advanced training the hiring authority would accept as a qualification for the position or whether it would be equivalent to a bachelor's degree in a directly related, specific specialty. That announcement does not make clear that a minimum of a bachelor's degree in a specific specialty or its equivalent is a requirement for that position.

Even if all of the vacancy announcements were in the petitioner's industry, which they are not; and were shown to be for vacancies within organizations similar to the petitioner, which they have not been shown to be, and stated that a bachelor's degree in a specific specialty or its equivalent is a prerequisite for the vacancies they announce, of which at least several do not, the petitioner has failed to demonstrate what statistically valid inferences, if any, can be drawn from nine vacancy announcements with regard to the common educational requirements for entry into parallel positions in similar organizations in the petitioner's industry.⁵

⁵ Although the size of the relevant study population is unknown, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from nine job postings with regard to determining the common educational requirements for entry into parallel positions in similar organizations in the petitioner's 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 parallel positions with companies similar

As the vacancy announcements provided do not establish that the petitioner has satisfied the requirement of the first alternative prong of 8 C.F.R. 214.2(h)(4)(iii)(A)(2), further analysis of the specific information contained in each of the vacancy announcements is unnecessary. That is, not every deficit of every vacancy announcement has been addressed.

For the foregoing reasons, the petitioner has not demonstrated that a requirement of a minimum of a bachelor's degree in a specific specialty or its equivalent is common to the petitioner's industry in parallel positions among similar organizations, and has not, therefore, 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 establishes that the particular position proffered in the instant case is so complex or unique that it can be performed only by an individual with a minimum of a bachelor's degree in a specific specialty or its equivalent.

The record contains insufficient evidence to differentiate the work of the proffered position from the work of web developer positions in general. The duties of the proffered position (such as integrate video and audio capability to the company website; ensure user accessibility to site; monitor site traffic, prepare analysis and reporting; establish and implement user interface design; and design and implement common user interface standards) are described in terms of functions common to web developer positions in general, and so have not been shown to be more complex or unique than the duties of other web developer positions, some of which, the *Handbook* indicates, may only require a minimum of a high school diploma for entry into the occupation.

Thus, the petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner's president appeared to indicate, in the letters submitted, that the petitioner has never previously hired anyone in the proffered position. In any event, the record contains no evidence pertinent to any web developers the petitioner has previously employed. The petitioner has not, therefore, provided any evidence for analysis under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).⁶

to the petitioner in the petitioner's industry required a bachelor's or higher degree in a specific specialty or its equivalent for parallel positions, it cannot be found that such a limited number of postings that may have been consciously selected could credibly refute the findings of the *Handbook* published by the Bureau of Labor Statistics that such a position may not require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

⁶ While a petitioner may believe or otherwise assert that a proffered position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. 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.*

Finally, the AAO will address the alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which is satisfied if the petitioner establishes that the nature of the specific duties is so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent.

Again, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. Developing brand graphic elements, designing and developing the company's website and online platforms, maintaining the company web portal, and composing graphic marketing communications contain insufficient indication of specialization and complexity requiring knowledge associated with a minimum of a bachelor's degree in a specific specialty or its equivalent. In other words, the proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than web developer positions that are not usually associated with at least a bachelor's degree in a specific specialty or its equivalent. Accordingly, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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

The record suggests an additional issue that was addressed in the decision of denial but that, nonetheless, also precludes approval of this visa petition.

Beyond the decision of the director, the petition must also be denied due to the petitioner's failure to provide a certified Labor Condition Application (LCA) that corresponds to the petition. Specifically, although the job title on the LCA submitted with the petition reads "Multimedia Production Artist," it was certified for SOC (O*NET/OES) Code 27-1024 or "Graphic Designers." For the reasons discussed, *supra*, the job as described by the petitioner, however, is best classified under SOC (O*NET/OES) Code 15-1099.04 or "Web Developers." As such, the petitioner was required to provide at the time of filing an LCA certified for SOC (O*NET/OES) Code 15-1099, not SOC (O*NET/OES) Code 27-1024, in order for it to be found to correspond to the petition.

To permit otherwise may result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A), by allowing that petitioner to simply submit an LCA for a different occupation and at a lower prevailing wage than the one being petitioned for. The LCA serves as the critical mechanism for enforcing section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). *See* 65 Fed. Reg. 80110, 80110-80111 (indicating that the wage protections in the Act seek "to protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring

Meissner, 201 F. 3d at 387. In other words, if a petitioner's degree requirement is only symbolic and the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

temporary foreign workers" and that this "process of protecting U.S. workers begins with [the filing of an LCA] with [DOL]."). According to section 212(n)(1) of the Act, an employer must attest that it will pay a holder of an H-1B visa the higher of the prevailing wage in the "area of employment" or the amount paid to other employees with similar experience and qualifications who are performing the same services. *See Patel v. Boghra*, 369 Fed.Appx. 722, 723 (7th Cir. 2010).

In this matter, this would result in an LCA certified for a Level I prevailing wage of \$38,272 per year for a graphic designer when a certified LCA should have been submitted for a web developer position with a minimum, Level I prevailing wage at that time of \$45,469 per year (or \$21.86 per hour). As such, the attested wage rate of \$21.00 per hour on the Form I-129 would fall below that required by law at that time for the proffered position of web developer for the petitioner.

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 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.

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 has been certified for the proper occupational classification, and the petition must be denied for this additional reason.

As a final note, the AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient evidence to demonstrate that the proffered position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation.

As discussed in this decision, the petitioner did not submit sufficient evidence regarding the proffered position to determine whether it will require a baccalaureate or higher degree in a specific specialty or its equivalent. Absent this determination that a baccalaureate or higher degree in a specific specialty or its equivalent is required to perform the duties of the proffered position, it also cannot be determined whether the beneficiary possesses that degree or its equivalent. Therefore, the AAO need not and will not address the beneficiary's qualifications further, except to note that, in any event, if the proffered position were found to be a graphic designer position as claimed by the petitioner, there is insufficient evidence to establish that the beneficiary is qualified to perform the

duties of a graphic designer position that requires a bachelor's or higher degree in a directly related specific specialty or its equivalent.

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 director's decision will be affirmed and the petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for the 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.