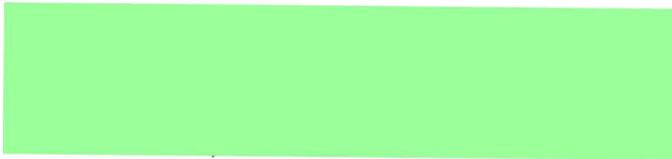




U.S. Citizenship
and Immigration
Services

(b)(6)



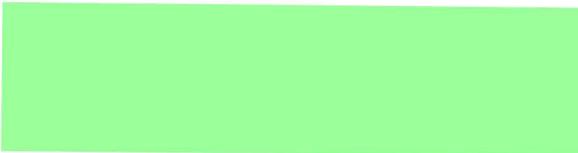
Date: Office: VERMONT SERVICE CENTER

JUN 26 2013
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,

for Michael T. Kelly
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.

In the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a business engaged in glass blowing/glass art with 12 employees. To employ the beneficiary in a position to which it assigned the job title "Design Engineer," the petitioner filed this visa petition 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).

Upon review of the petition as filed, the service center issued a request for additional evidence (an RFE). The RFE outlined the specialty occupation regulatory criteria and requested specific documentation to establish that the proffered position qualifies for classification as a specialty occupation.

The petitioner's response to the RFE included a brief from counsel, with a more detailed description of the duties of the proffered position, and other documentation.

Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish how the beneficiary's duties would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. The director, therefore, denied the petition, concluding that the petitioner failed to establish that the proffered position is a specialty occupation.

On appeal, counsel contends that the petitioner satisfied all of the criteria set forth at 8 C.F.R. 214.2(h)(4)(iii)(A) and that, therefore, petitioner established eligibility for the benefit sought. The appeal contests the director's decision, contending that it represents an incorrect application of the controlling regulations to the evidence in this record of proceeding.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the RFE; (3) the petitioner's response to the RFE; (4) the notice of the decision denying the petition; and (5) the Form I-290B and supporting materials. The AAO reviewed the record in its entirety and bases its decision upon consideration of the totality of the evidence in the record of proceeding, including all of the submissions on appeal.

For the reasons to be discussed below, the AAO finds that the director's decision to deny the petition for its failure to establish the proffered position as a specialty occupation was correct. Accordingly, the appeal will be dismissed, and the petition will be denied.

Later in this decision, the AAO will discuss an additional factor, beyond the decision of the director, which also precludes approval of the petition, namely, the petitioner's failure to establish that the beneficiary is qualified to perform the duties of a specialty occupation in accordance with the controlling regulations.

In deciding whether a proffered position qualifies as a specialty occupation, the AAO analyzes the evidence of record according to the statutory and regulatory framework below.

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

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

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

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

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

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that

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

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See* *Royal Siam Corp. v. Chertoff*, 484 F.3d 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.

As already noted, the Form I-129 states "Design Engineer" as the position's job title. The AAO observes that, in the context of this proceeding, the title itself does not denote a position within any of the Engineers occupational classifications. Further, the petitioner does not claim, and the evidence of record does not attempt to establish, that the position requires the application of a bachelor's degree or higher level a body of highly specialized knowledge in any field of engineering.

The Labor Condition Application (LCA) submitted by the petitioner to accompany 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 II prevailing wage rate.

At the designated section on the Form I-129 for the NAICS (North American Industry Classification System) code, the petitioner entered 327215, which is assigned to the industry classification "Glass Product Manufacturing Made of Purchased Glass." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "327215, Glass Product Manufacturing Made of Purchased Glass," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.¹

Among the allied documents submitted with the Form I-129 is a letter of support from the petitioner's Vice President. The letter's enclosures include, among other documents: (1) two one-page lists of commissions earned by the petitioner, which list a total of 35 such commissions (by (a) client name, (b) the type of art glass work that the petitioner produced for the client, and (c) the dollar amount of the commission earned); (2) a marketing poster that displays a photograph of one of the petitioner's art glass creations; (3) five pages of photographs of some of the petitioner's art-glass pieces; (4) a printout of the Home Page of the petitioner's Internet site, bearing the title "About Us"; (5) a photocopy of a one-page newspaper article, entitled [REDACTED]

Internet edition of the [REDACTED]; (6) a document entitled [REDACTED]

[REDACTED] and that purports to be an expert analysis of the U.S. educational-equivalency of the beneficiary's employment experience; (7) a copy of Professor Chu's resume; (8) copies of various letters regarding the beneficiary's employment history; and (9) from the 2010-11 edition of the Department of Labor's (DOL's) *Occupational Outlook Handbook* (hereinafter referred to as the *Handbook*), a copy of the *Handbook* chapter that addressed the Commercial and Industrial Designers occupational group (that is, the occupational group for which the LCA submitted in support of the petition was certified).

The service center issued an RFE on November 10, 2011, based upon the adjudicating officer's assessment that the Form I-129 and the documentation filed with it were insufficient to establish the proffered position as a specialty occupation. The RFE requested specific types of additional evidence that would be relevant to the specialty occupation issue.

On February 3, 2012, the petitioner filed a timely response to the RFE. That response consists of (1) a two-page letter of reply to the RFE, signed by the petitioner's Vice President; (2) an organizational chart depicting, by boxes and connecting lines, the positions in which people are employed by the petitioner - and the hierarchical relationship between those positions; (3) a three-page document, entitled "List of Employees with their Position & Education," which lists 12 positions, by name of the person in the position and by his or her highest level of education attained; (4) two pages which provide a description of each of the following types of position listed for the petitioner: (a) Design and Glass Engineer; (b) Production Manager; (c) Cold Shop

¹ The U.S. Census Bureau describes the North American Industry Classification System (NAICS) as "the standard used by Federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy." The NAICS Internet home page can be accessed at <http://www.census.gov/eos/www/naics/>.

Operator; (d) Assistant Gaffers; (e) Assistant Office Manager; and (f) Gallery Manager.

The last of the documents included in the RFE response is a two-page letter (on the letterhead of the [REDACTED] which is addressed "To whom it may concern." It is signed by a [REDACTED]

[REDACTED] Accompanying the letter is a seven-page document about [REDACTED] That biographical document opens with a one-page [REDACTED] and proceeds to a resume composed of the following segments: Education; Teaching, Lecture & Demonstration History; Professional Practice History; Academic Service; Affiliations; Honors/ Awards/Residencies, and Gallery Representation.

Again, the issue before the AAO is whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

At the outset, the AAO will address some salient aspects of the evidence in this record of proceeding.

The AAO will first address why it does not accord probative value to the aforementioned two-page letter from [REDACTED]

[REDACTED] letter, in part, opines that, as a matter of "industry standards," in glass facilities like the petitioner's "the minimum standard education for the design engineer is a bachelor of fine arts or BFA, with a focus on glass."

A critical and here decisive factor in determining the weight, if any, that the AAO should accord to [REDACTED] letter is the substance of whatever factual foundations the letter provides to support its ultimate conclusion as to the nature and level of education to perform the duties of the proffered position.

While the AAO does not question the level of academic achievement and professional positions claimed by the professor, the AAO finds that the professor has not provided sufficient factual and analytical foundations to establish that the opinion expressed in his letter merits evidentiary weight on the specialty occupation issue. In this regard, the AAO will now identify substantive, foundational weaknesses in the professor's document that precludes the AAO from according any substantial weight to it.

While the professor makes a statement with regard to the "industry standards" for design engineers in facilities such as the petitioner's, the professor cites no studies, treatises, authoritative publications or any other factual basis for his statement as to such standards in facilities such as the petitioner's. The AAO, therefore, accords no weight to that pronouncement, and the AAO also discards that statement as a reliable basis for any finding or conclusion in the letter. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

The AAO also observes that there is no indication that the professor actually visited the facility in question, observed the specific scope of work that would engage the beneficiary, or spoke with any of the persons employed there, so as to acquire first-hand knowledge of the nature of the particular position. Additionally, there is no indication that the professor attained from any documentation from or interviews with the petitioner's staff an understanding of the actual work that would engage the beneficiary. Rather, the professor's letter indicates that its author relied, partially but materially, upon two sets of evidence which are not provided with the professor's letter, namely, what the letter refers to as "the letter that [the petitioner] submitted with its petition along with other evidence about its scope of operations." Not only does the professor not provide for the AAO's evaluation those sets of evidence, but he also fails to identify their specific content and fails to analyze what particular aspects of that content, if any, contributed to his reaching his ultimate conclusion about the educational requirements.² This lack of supportive documentary evidence and analysis thereof fatally undermines the value of the professor's opinion as presented in his letter.

Further, the AAO also finds that the professor accepts for granted that the beneficiary would be working as a "design engineer," but that the professor nowhere explains how he arrived at that conclusion. Thus, the AAO finds that the professor's letter is even further devalued by its failure to support its unexplained assumption that the beneficiary is one who would actually be working as a "design engineer" at the level about which the professor opined.

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). For the reasons discussed above, the AAO accords to [redacted] letter no probative weight on the issue of the educational requirements for the proffered position.

The documents filed with the Form I-129 include a letter of support, wherein the petitioner provided a narrative description of the proffered position's duties, in pertinent part:

This position is critical to the future growth of [the petitioner] and its employment of Americans in art glass production. While [the petitioner's glass designer] designs the glass art works, the production of these works involves careful management of glass production equipment ranging from glass furnaces, annealing ovens, automatic safety shut-off solenoids, as well as and [sic] the necessary combustion lines, welding equipment, cold shop equipment which involves polishing and grinding machines, diamond cutters, etc. The industrial designer oversees technicians and equipment for the different phases of the glass making process, which involves working with very high temperatures needed to have molten glass, adding colors, mixing colors, making sculptures and connecting disparate molded pieces of glass to form on larger piece, proper

² The petitioner should note that, in the AAO will not assume that the "the letter that [the petitioner] submitted with its petition along with other evidence about its scope of operations" have been submitted elsewhere in this record of proceeding.

cooling of the glass objects and when cooled down, the finish out of these pieces in the cold shop department with the polishing and grinding machines, cutters, etc. and packing of these objects for shipment and or delivery and installation.³

The AAO notes that the petitioner states that the position requires a bachelor's degree in industrial design or the equivalent in vocational training and work experience in art glass manufacture. However, as reflected in this decision, the AAO concludes that the evidence in the record of proceeding is not sufficient to support the petitioner's assertion.

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

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.

The petitioner claims that the proffered position is akin to the Commercial and Industrial Designers occupational classification as described in the *Handbook*. The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁴ This claim contrasts with the director's decision, which determined that the proffered position more closely comported with, and therefore should be analyzed as belonging to, the Industrial Production Managers occupational group.

As will now be discussed, however, the AAO concurs with neither the petitioner nor the director, but, instead, finds that, to the extent that they are described on the record of proceeding, the proposed duties and the proffered position that they comprise most closely comport with the First-Line Supervisors of Production and Operating Workers occupational group. The AAO reaches this conclusion based upon its independent, *de novo* review of the totality of evidence within the record of proceeding.⁵

³ The AAO observes that the record of proceeding contains three job titles that are used to reference the proffered position. On the LCA, the position is titled, "Design Engineer;" the support letter titles the position, "Industrial Engineer;" and the organization chart references the position as "Art Glass Engineer." While this is not material to the outcome of the appeal, it does suggest a lack of attention to detail and accuracy.

⁴ The AAO's references to the *Handbook* are to the 2012-2013 edition available online. The *Handbook*, which is available in printed form, may also be accessed on the Internet at <http://www.bls.gov/ooh/>.

⁵ The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

To determine whether the duties of the proffered position support the petitioner's characterization of its proposed employment, the AAO turns to the 2012-2013 online edition of the *Handbook* for its discussion of the Commercial and Industrial Designers occupational classification. The *Handbook* describes this occupational group as follows:

What Industrial Designers Do

Industrial designers develop the concepts for manufactured products, such as cars, home appliances, and toys. They combine art, business, and engineering to make products that people use every day. Industrial designers focus on the user experience in creating style and function for a particular gadget or appliance.

Duties

Industrial designers typically do the following:

- Research who will use the product and the various ways it might be used
- Sketch out ideas or create blueprints
- Use computer software to develop virtual models of different designs
- Examine materials and production costs to determine manufacturing requirements
- Work with other specialists to evaluate whether their design concepts will fill the need at a reasonable cost
- Evaluate product safety, appearance, and function to determine if a design is practical
- Present designs and demonstrate prototypes to clients for approval

Industrial designers generally focus on a particular product category. For example, some design medical equipment, while others work on consumer electronics products, such as computers or smart phones. Other designers develop ideas for new bicycles, furniture, housewares, or snowboards.

They imagine how consumers might use a product and test different designs with consumers to see how each design looks and works. Industrial designers often work with engineers, production experts, and marketing specialists to find out if their designs are feasible and to apply their colleagues' professional expertise to their designs. For example, industrial designers may work with marketing specialists to develop plans to market new product designs to consumers.

Computers are a major tool for industrial designers. They use computer-aided design software (CAD) to sketch ideas because computers make it easy to make changes and show alternatives. If they work for manufacturers, they may also use

computer-aided industrial design software (CAID) to create specific machine-readable instructions that tell other machines exactly how to build the product. Management analysts, often called management consultants, propose ways to improve an organization's efficiency. They advise managers on how to make organizations more profitable through reduced costs and increased revenues.

Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, 2012-13 Edition*, Industrial Designers, on the Internet at <http://www.bls.gov/oooh/arts-and-design/industrial-designers.htm> (visited June 21, 2013).

Based upon the entirety of the record of proceeding, the AAO finds that the job duties described by counsel do not, in fact, comport with the Industrial Designers occupational classification. Additionally, the AAO finds materially significant the fact that the petitioner explicitly ascribed the design of its glass art works to another person in the petitioner's business. Additionally, the AAO notes that the petitioner's earlier quoted description of the proffered position focused upon the position's responsibilities for careful management of glass production equipment and for oversight of the technicians and equipment involved in the glass-making process.⁶ Further, the AAO finds, the petitioner's information regarding the proffered position and its constituent duties clearly do not align with the *Handbook's* information, quoted earlier in this decision, regarding the Industrial Designers occupational classification. For ease of comparison, the AAO repeats immediately below its earlier quotation from the record with regard to the proffered position and its constituent duties:

This position is critical to the future growth of [the petitioner] and its employment of Americans in art glass production. While [the petitioner's glass designer] designs the glass art works, the production of these works involves careful management of glass production equipment ranging from glass furnaces, annealing ovens, automatic safety shut-off solenoids, as well as and [sic] the necessary combustion lines, welding equipment, cold shop equipment which involves polishing and grinding machines, diamond cutters, etc. The industrial designer oversees technicians and equipment for the different phases of the glass making process, which involves working with very high temperatures needed to have molten glass, adding colors, mixing colors, making sculptures and connecting disparate molded pieces of glass to form on larger piece, proper cooling of the glass objects and when cooled down, the finish out of these pieces in the cold shop department with the polishing and grinding machines, cutters, etc. and packing of these objects for shipment and or delivery and installation.

However, for argument's sake, the AAO will now address why the proffered position would not satisfy this first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), even if the position were analyzed as belonging within the Commercial and Industrial Designers occupational classification, as the petitioner claims it does.

⁶ Additionally, the AAO observes that the petitioner referred to the proffered position as a design engineer on the LCA, but referred to the position as an industrial designer and an art glass engineer elsewhere in the record of proceeding. While this fact is not in itself decisive, it reflects a lack of attention to detail to the proffered position description.

That the *Handbook* does not indicate that industrial designer positions normally require at least a bachelor's degree in a specific specialty is evident in the following discussion in the "How to Become an Industrial Designer" section of its chapter "Industrial Designers," which does not specify as a requirement for entry a bachelor's degree in a particular major or academic concentration:

How to Become an Industrial Designer

A bachelor's degree is usually required for most entry-level industrial design jobs. It is also important for industrial designers to have a professional portfolio with examples of their best design projects.

Education

A bachelor's degree in industrial design, architecture, or engineering is usually required for entry-level industrial design jobs. Most design programs include the courses that industrial designers need in design: sketching, computer-aided design and drafting (CADD), industrial materials and processes, and manufacturing methods.

The National Association of Schools of Art and Design accredits approximately 300 postsecondary colleges, universities, and independent institutes with programs in art and design. Many schools require successful completion of some basic art and design courses before entry into a bachelor's degree program. Applicants also may need to submit sketches and other examples of their artistic ability.

Many programs provide students with the opportunity to build a professional portfolio of their designs by collecting examples of their designs from classroom projects, internships, or other experiences. Students can use these examples of their work to demonstrate their design skills when applying for jobs and bidding on contracts for work.

An increasing number of designers are also getting a Master of Business Administration (MBA) to gain business skills. Business skills help designers understand how to fit their designs into a firm's overall business plan.

Work Experience

Industrial designers typically demonstrate their knowledge and skill by promoting their best designs from previous projects. Work experience is another way to build a good reputation and establish expertise in an industrial design specialty.

Advancement

Experienced designers in large firms may advance to chief designer, design department head, or other supervisory positions. Some designers become teachers in design schools or in colleges and universities. Many teachers continue to consult privately or operate small design studios in addition to teaching. Some experienced designers open their own design firms.

Bureau of Labor Statistics, U.S. Department of Labor, Occupational Outlook Handbook, 2012-13 Edition, Industrial Designers, on the Internet at <http://www.bls.gov/ooh/arts-and-design/industrial-designers.htm> (visited June 21, 2013).

As evident in the excerpt above, the *Handbook* indicates that industrial designers do not constitute an occupational group that normally requires a specialty occupation level of education, that is, at least a U.S. bachelor's degree *in a specific specialty*, or its equivalent, for entry into the occupation in the United States. More specifically, the *Handbook* states that "A bachelor's degree is usually required for most entry-level industrial design jobs. It is also important for industrial designers to have a professional portfolio with examples of their best design projects." That is to say, based upon the information in the *Handbook*, a position's inclusion within the Industrial Designers occupational classification is not sufficient in itself to establish that the particular position is one that normally requires at least a bachelor's degree, or the equivalent, in a specific specialty, as is required to satisfy this criterion. In this regard, the AAO also notes that the fact that the *Handbook's* reporting of only a "usual for most" education entry-threshold indicates that there is no categorical barring from the occupation persons without a bachelor's degree in a specific specialty and also indicates that a particular position may be included within the occupational group even if its performance does not require at least a bachelor's degree, or the equivalent, in a specific specialty.

In any event, the AAO emphasizes that this discussion of the Industrial Designer occupational group is, in the context of this appeal, academic only and not a material or decisive aspect of the AAO's decision. This discussion is rendered so by the fact that the AAO finds, as already stated, that the evidence of record fails to establish the proffered position as that of an industrial designer.

As will now be discussed, the AAO also does not agree with the director's finding that the proffered position should be analyzed as one within the Industrial Production Managers occupational classification. Accordingly, that finding is withdrawn. Here follows a relevant section of the *Handbook*, whose information, the AAO finds, differs materially from the petition's job and duty descriptions.

What Industrial Production Managers Do

Industrial production managers oversee the daily operations of manufacturing and related plants. They coordinate, plan, and direct the activities used to create a wide range of goods, such as cars, computer equipment, or paper products.

Duties

Industrial production managers typically do the following:

- Decide how best to use a plant's workers and equipment to meet production goals
- Ensure that production stays on schedule and within budget
- Hire, train, and evaluate workers
- Analyze production data
- Write routine production reports
- Monitor a plant's workers to ensure they meet performance and safety requirements
- Create ways to make the production process more efficient
- Determine whether new machines are needed, or whether overtime work is necessary
- Fix any production problems that may arise

Depending on the size of the manufacturing plant, industrial production managers may oversee the entire plant or just one area of it.

Industrial production managers are responsible for carrying out quality control programs to make sure the finished product meets a prescribed level of quality. They generally choose from a number of programs that are standard in manufacturing industries, such as ISO 9000 or Six Sigma. These programs help a manager identify defects in products, identify the cause of the defect, and solve the problem creating it. For example, a manager may determine that a defect is being caused by parts from an outside supplier. The manager can then work with the supplier to improve the quality of the parts.

Industrial production managers work closely with managers from other departments. For example, the procurement (buying) department orders the supplies that the production department uses. A breakdown in communication between these two departments can cause production slowdowns. Just-in-time production techniques mean that companies keep inventory low, so communication among managers in each department and suppliers is important.

They also communicate with other departments, such as sales, warehousing, and research and design, to assure the company's success.

Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, 2012-13 Edition*, Industrial Production Managers, on the Internet at <http://www.bls.gov/ooh/management/industrial-production-managers.htm> (visited June 21, 2013).

As noted already, the AAO finds that, to the extent described in the record of proceeding, the proffered position and its constituent duties most closely comport with the "First-Line

Supervisors of Production and Operating Workers” occupational classification (SOC code 51-1011.00). The AAO analyzes the record of proceeding accordingly.

The following informational segments are excerpted from the O*NET Online Summary Report for First-Line Supervisors of Production and Operating Workers, accessed on the Internet at <http://www.onetonline.org/link/summary/51-1011.00> (visited June 21, 2013).

The O*NET introduces this occupational group as follows:

Directly supervise and coordinate the activities of production and operating workers, such as inspectors, precision workers, machine setters and operators, assemblers, fabricators, and plant and system operators.

Sample of reported job titles: Production Supervisor, Manufacturing Supervisor, Team Leader, Shift Supervisor, Production Manager, Supervisor, Assembly Supervisor, Plant Manager, Department Manager, Molding Supervisor

The O*NET describes the Tasks generally associated with this occupational classification as follows:

- Enforce safety and sanitation regulations.
- Direct and coordinate the activities of employees engaged in the production or processing of goods, such as inspectors, machine setters, and fabricators.
- Confer with other supervisors to coordinate operations and activities within or between departments.
- Plan and establish work schedules, assignments, and production sequences to meet production goals.
- Inspect materials, products, or equipment to detect defects or malfunctions.
- Observe work and monitor gauges, dials, and other indicators to ensure that operators conform to production or processing standards.
- Conduct employee training in equipment operations or work and safety procedures, or assign employee training to experienced workers.
- Interpret specifications, blueprints, job orders, and company policies and procedures for workers.
- Keep records of employees' attendance and hours worked.

- Read and analyze charts, work orders, production schedules, and other records and reports to determine production requirements and to evaluate current production estimates and outputs.

The following excerpt, which contains the totality of the *Handbook's* information on this occupational category, clearly indicates that a bachelor's degree, or the equivalent, in a specific specialty is not normally a minimum requirement for entry into this occupational group:

Production Occupations

First-Line Supervisors of Production and Operating Workers

(O*NET 51-1011.00)

Directly supervise and coordinate the activities of production and operating workers, such as inspectors, precision workers, machine setters and operators, assemblers, fabricators, and plant and system operators. Excludes team or work leaders.

- 2010 employment: **588,500**
- May 2010 median annual wage: **\$53,090**
- Projected employment change, 2010-20:
 - Number of new jobs: **10,900**
 - Growth rate: **2 percent (little or no change)**
- Education and training:
 - Typical entry-level education: **Postsecondary non-degree award**
 - Work experience in a related occupation: **1 to 5 years**
 - Typical on-the-job-training: **None**

Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, 2012-13 Edition*, First-Line Supervisors of Production and Operating Workers, which may be found on the Internet in the appropriate section at <http://www.bls.gov/ooh/About/Data-for-Occupations-Not-Covered-in-Detail.htm#managementoccupations> s.htm (visited June 21, 2013).

Next, the AAO incorporates its earlier comments with respect to the two-page opinion letter [REDACTED] and submitted to support the assertion that the proffered position requires, at a minimum a baccalaureate degree. As earlier explained, the AAO accords no probative weight to [REDACTED] towards satisfying this or any other criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Nor does the record of proceeding contain any persuasive documentary evidence from any 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."

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 closely related to the position's duties, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

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

As stated earlier, 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 (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. at 1102).

As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent. Also, there are no submissions from professional associations 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.

Of course, there is the letter from [REDACTED] wherein the professor expresses an opinion regarding industry standards for hiring individuals to fill positions at art glass production facilities. However, for the reasons already discussed and hereby incorporated into the present analysis, the AAO finds no probative value in the professor's opinions as expressed in the letter.

For the reasons stated above, 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).

Now, the AAO looks to 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."

The petitioner and counsel do not expressly state that the proffered position is so complex or unique, but counsel does maintain that the design engineer is critical to the future growth of the petitioner, and that the position involves careful management of glass production equipment. However, the record lacks credible evidence showing that the proffered position is "so complex or unique that it can be performed only by an individual with a degree." In fact, the AAO finds, the evidence of record does not distinguish the proffered position as more complex or unique than other positions in the occupational group that can be performed by persons with a bachelor's degree, or the equivalent, in a specific specialty. 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 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Also, the AAO finds that, as evident in the excerpts earlier in the decision, the petitioner presents the proffered position, and its constituent duties, in terms of generalized functions that would be generic to the occupational classification in general, and which, accordingly, do not establish relative specialization and complexity as distinguishing dimensions of the particular position here proffered, let alone as aspects elevating the proffered position above those that can be performed by persons without at least a bachelor's degree, or the equivalent, in a specific specialty.

In sum, for the reasons explained above, the petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Next, the AAO evaluates the record of proceeding to see whether the petitioner has established that it normally requires a degree or its equivalent for the position, pursuant to the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

To satisfy this criterion, the record must establish that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F.3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty or its equivalent as the minimum for entry into the occupation as required by section 214(i)(1) of the Act. To interpret the regulation any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position – and without consideration of how a beneficiary is to be specifically employed – then any alien with a bachelor's degree in specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

The petitioner's RFE response includes a February 2, 2012, from the petitioner's Vice President, wherein she explained that the current Art Glass Engineer & Designer who designs and directs or oversees production of the art glass pieces holds a BFA degree, and has also completed additional studies in art glass. The Vice President also explains that a former employee, who

was charged with implementing glass art designs and overseeing the individuals producing the art glass held a BFA degree.

As a preliminary matter, the AAO observes that the Vice President neither asserts nor provides documentation establishing that the two positions are the same position as the one that is the subject of this petition. Therefore, the petitioner has not established the letter to be relevant to the matter now before the AAO.

Even if counsel had established that these two positions were, in fact, the same position as the proffered position, the record lacks documentary evidence establishing the nature and sources of the degrees. Again, 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 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

Even more fundamentally, however, the AAO notes that the degrees held by two people are not in and of themselves evidence of the minimum qualifications for which the positions were recruited. Further, without more, the AAO will not accept two instances as sufficient evidence to establish a relevant recruiting and hiring history where, as here, the petitioner asserts that it has been in business since 1998.

In sum, the petitioner has not satisfied the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties whose nature is so specialized and complex that their performance would require knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty.

The AAO finds that the evidence of record simply does not develop relative specialization and complexity as a distinguishing aspect of the nature of the proposed duties. In other words, the proposed duties have not been described and documented with sufficient specificity to establish that their nature is more specialized and complex than the nature of such generally described duties in other positions in the pertinent occupational category whose performance would not require knowledge usually associated with at least a bachelor's degree in a specific specialty.

Thus, the AAO concludes that the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that it has satisfied any of the additional, supplement requirements 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. Accordingly, the appeal will be dismissed, and the petition will be denied.

Beyond the decision of the director, the AAO also finds that petitioner has failed to establish that the beneficiary is qualified to perform the duties of a specialty occupation. Thus, even if the proffered position had been established as a specialty occupation (which is not the case), the

pertinent evidence in the record of proceeding would not establish that the beneficiary held the requisite educational credentials to serve in any specialty occupation position.

Specifically, the claimed educational equivalency was based entirely on the beneficiary's experience, and the evidence on record regarding the beneficiary's experience lacked translation certifications and did not clearly demonstrate progressive positions. Moreover, there is no evidence that the evaluator has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience and that the beneficiary also has recognition of expertise in the specialty through progressively responsible positions directly related to the specialty. See 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) and (D)(1). As such, since evidence was not presented that the beneficiary has at least a U.S. bachelor's degree in any specific specialty, or its equivalent, the petition could not be approved even if eligibility for the benefit sought had been otherwise established. Therefore, for this additional reason, the petition may not be approved.

Although not noted by the director, the evidence of record fails to establish that, at the time of the petition's filing, the beneficiary held either a U.S. bachelor's degree in a specific specialty or a combination of education, training, and/or experience equivalent to such a degree, as required by the beneficiary-qualification regulations at 8 C.F.R. § 214.2(h)(4)(iii)(C) and (D). 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 process of this review that the AAO noted this material deficiency.

At this juncture it is appropriate to note, further, that, as the evidence of record does not establish the professor as the type of academic official that the pertinent USCIS regulation, at 8 C.F.R. § 214.2(h)(4)(iii)(D)(1), recognizes as competent to render an opinion upon educational equivalency of training and/or experience for H-1B beneficiary-qualification purposes, and, as the professor does not provide a substantive factual and analytical bases for his statement that the beneficiary's "experience and knowledge far exceed that of one with a [BFA]," that professor's evaluation is not sufficient to establish that the beneficiary has attained the equivalent of a U.S. degree in any specialty at all.

Again, the AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791.

At this point the AAO will note its fundamental finding that the petitioner's reliance upon the evaluation of experience that it secured from [REDACTED], was misplaced.

In the evaluation of experience prepared for the petitioner, [REDACTED] who identifies himself as an [REDACTED] opined that the beneficiary's employment experience is equivalent to a U.S. bachelor's degree in fine arts (BFA), with a concentration in industrial design. The AAO accords no weight to the professor's purported assessment of the educational equivalency of the beneficiary's experience.

The AAO finds that the evidence in this record of proceeding does not establish that USCIS regulations would recognize [REDACTED] the expert as competent to render a reliable evaluation of experience and/or training in the specialty that the petitioner claims for this petition. See 8 C.F.R. § 214.2(h)(4)(iii)(D)(I) (which indicates that, to merit consideration towards establishing a beneficiary's qualifications to serve in a specialty occupation position, an evaluation of training and/or experience must have been provided by "an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience.")

The AAO also notes problems with the four employment-verification letters pertinent to the beneficiary's prior employment, three of which were written in Spanish.

The three employment-verification letters in Spanish were accompanied by translations into English, but did not bear a proper translation certification statement that would identify the translator, and the record also lack's certification of the translator's English and Spanish Language proficiency skills. See 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding. Additionally, those letters as presented in English do not establish the substantive nature of the beneficiary's experience, nor do they delineate the baccalaureate-level knowledge that the beneficiary might have acquired through his employment experience. Even more problematic is the fact that these letters do not demonstrate that beneficiary also has recognition of expertise in the specialty through progressively responsible positions directly related to the specialty. See 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) and (D)(1). Due to these evidentiary weaknesses, the AAO finds that the letters do not carry any probative weight, and therefore do not serve as an adequate foundation for the experience evaluation rendered by [REDACTED]

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.