

(b)(6)



U.S. Citizenship
and Immigration
Services

[REDACTED]

DATE: **JUL 28 2014** OFFICE: CALIFORNIA SERVICE CENTER FILE [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

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

On the Form I-129, Petition for Nonimmigrant Worker, the petitioner describes itself as a manufacturer and wholesaler of women's footwear established in 2005. In order to employ the beneficiary in what it designates as a product designer position, the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on November 15, 2013, concluding that the petitioner failed to establish that the proffered position is a specialty occupation in accordance with the applicable statutory and regulatory provisions. Counsel for the petitioner subsequently filed an appeal. On appeal, counsel asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements.

The record of proceeding before us contains: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) the Form I-290B, Notice of Appeal or Motion, and supporting materials. We reviewed the record in its entirety before issuing our decision.¹

For the reasons that will be discussed below, we agree with the director's decision that the petitioner has failed to establish eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

I. FACTURAL AND PROCEDURAL HISTORY

In the petition signed on April 1, 2013, the petitioner indicates that it is seeking the beneficiary's services as a product designer on a part-time basis (30 hours per week) at the rate of pay of \$28,969.20 per year. In the April 1, 2013 letter of support, the petitioner states that "[the beneficiary] is responsible for creating and developing innovative footwear collections by analyzing fashion market trends and preparing new product proposals for manager's approval." Further, the petitioner states that the beneficiary's job duties will include the following:

- Gather and analyze fashion market trends and competitors' products to conceptualize new footwear designs to meet the diverse needs of consumers; Utilize digital compositing applications to create preliminary product designs and technical drawings;
- Cooperate with sales and marketing team to balance innovative designs with functional requirements that provide superior fit and comfort; Research, examine, and determine materials to support the fundamentals of footwear construction;

¹ We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

Combine chromatology with shoe materials texture to create visual effects that identify attractive patterns and convey fashion statements;

- Prepare detail manufacturing drawings with product layouts and specifications for prototype productions; Test, evaluate, and investigate prototypes for functionality and aesthetic appeal; Present new product design and prototype to manager for approval; Design packaging and marketing collaterals including catalogs, product photo shoots, advertising, and marketing materials.

In addition, the petitioner claims that "[t]he job duties required for the instant position necessitate that an individual be familiar with theoretical and academic concepts in Design, Design Innovation, Industrial Design, and related areas." The petitioner also claims that "[t]hese concepts typically are taught in college's-level classes in Design Concept, Design Processing, and Product Design." Notably, the petitioner does not indicate that the minimum academic requirement for the position is a *bachelor's degree* in a specific specialty, or its equivalent.

With the initial petition, the petitioner submitted copies of the beneficiary's foreign academic credentials, as well as a credential evaluation from the Foundation for International Services, Inc. The evaluation states that the beneficiary's foreign education is "equivalent of a bachelor's degree in industrial design and a master's degree in design from a regionally accredited college or university in the United States."

The petitioner also submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. We note that the LCA designation for the proffered position corresponds to the occupational classification of "Commercial and Industrial Designers" - SOC (ONET/OES Code) 27-1021, at a Level I (entry level) wage. In addition, the petitioner submitted photos of its product and its 2011 Income Tax Return.

Upon review of the documentation, the director found the evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on July 31, 2013. The director outlined the specific evidence to be submitted.

On September 20, 2013, the petitioner and counsel responded to the RFE. In a letter dated September 10, 2013, the petitioner provided the percentage of time the beneficiary would spend performing the duties of the position listed in the letter of support.

In response to the RFE, the petitioner and counsel also submitted: (1) an excerpt entitled "Industrial Designers" from the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook* (hereinafter the *Handbook*), 2012-13 Edition; (2) a letter from [REDACTED] President of [REDACTED] (3) job vacancy announcements; (4) H-1B approval notices for [REDACTED], along with his foreign academic credentials and credential evaluation; (5) the petitioner's Quarterly Contribution Return and Report of Wages for 2013 (quarter 2); (6) the petitioner's internal posting for the proffered position, dated March 1, 2013; (7) the petitioner's 2012 Income Tax Return; and (8) the petitioner's 2013 Market Research/Trend Report.

The director reviewed the documentation and found it insufficient to establish eligibility for the benefit sought. Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish how the beneficiary's immediate duties would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. The director denied the petition on November 15, 2013. Counsel submitted an appeal of the denial of the H-1B petition. With the Form I-290B, counsel submitted a brief and additional evidence.²

II. LAW AND ANALYSIS

A. Standard of Proof

In the brief, counsel references the preponderance of the evidence standard. We note that with respect to the preponderance of the evidence standard, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010), states in pertinent part the following:

Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.

* * *

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case.

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

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

* * *

Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. *See INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

As footnoted above, we conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In doing so, we apply the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon our review of the present matter pursuant to that standard, however, we find that the evidence in the record of proceeding does not support counsel's contentions that the evidence of record requires that the petition at issue be approved. Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, we find that the director's determination in this matter were correct. Upon our review of the entire record of proceeding, and with close attention and due regard to all of the evidence, separately and in the aggregate, submitted in support of this petition, we find that the petitioner has not established that its claims are "more likely than not" or "probably" true. As the evidentiary analysis of this decision will reflect, the petitioner has not submitted relevant, probative, and credible evidence that leads us to believe that the petitioner's claims are "more likely than not" or "probably" true.

B. The LCA Wage Level Does Not Correspond to the Petition

Preliminarily, we find beyond the decision of the director, that the petitioner has not submitted an LCA that supports its claims in the petition. That is, we observe that the record of proceeding contains discrepancies between what the petitioner claims about the level of responsibility inherent in the proffered position set against the contrary level of responsibility conveyed by the wage level indicated by the LCA submitted in support of petition. As previously discussed, the petitioner submitted an LCA in support of the petition that designated the proffered position to the corresponding occupational category of "Commercial and Industrial Designer" - SOC (ONET/OES) code 27-1021. The wage level for the proffered position in the LCA corresponds to a Level I (entry) position. The prevailing wage source is listed in the LCA as the OES (Occupational Employment Statistics) OFLC (Office of Foreign Labor Certification) Online Data Center.³ The

³ The Occupational Employment Statistics (OES) program produces employment and wage estimates for

LCA was certified on March 29, 2013. We note that by completing and submitting the LCA, and by signing the LCA, the petitioner attested that the information contained in the LCA was true and accurate.

Wage levels should be determined only after selecting the most relevant Occupational Information Network (O*NET) occupational code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.⁴

Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) position after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties.⁵ DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

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

over 800 occupations. See Bureau of Labor Statistics, U.S. Department of Labor, on the Internet at <http://www.bls.gov/oes/>. The OES All Industries Database is available at the Office of Foreign Labor Certification (OFLC) Data Center, which includes the Online Wage Library for prevailing wage determinations and the disclosure databases for the temporary and permanent programs. The Online Wage Library is accessible at <http://www.flcdatacenter.com/>.

⁴ For additional information regarding prevailing wage determinations, see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

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

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

See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

The petitioner and its counsel claim that the proffered position involves complex, unique and/or specialized duties. Further, in the September 10, 2013 letter of support, the petitioner claims that "the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a bachelor's degree in Design, Design Innovation, Industrial Design, and related areas." The petitioner further states that "[t]he complex job duties of our product designer appear to encompass those normally performed by industrial designer [*sic*]."

On appeal, counsel states that "[a] review of the job duties submitted by the petitioner also shows the complexity and uniqueness of the proffered position." In addition, counsel indicates that the proffered position is a "complex job." Counsel further claims that "the product designer, as part of the Petitioner's professional team, is performing specialized and complex daily duties."

Upon review of the assertions regarding the proffered position, we must question the stated requirements for the proffered position, as well as the level of complexity, independent judgment and understanding that are actually needed for the proffered position as the LCA is certified for a Level I entry-level position. This characterization of the position and the claimed duties, responsibilities and requirements as described in the record of proceeding conflict with the wage-rate element of the LCA selected by the petitioner, which, as reflected in the discussion above, is indicative of a comparatively low, entry-level position relative to others within the occupation. Furthermore, a Level I designation is appropriate for a position such as a research fellow, a worker in training, or an internship.

Under the H-1B program, a petitioner must offer a beneficiary wages that are at least the actual wage level paid by the petitioner to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the application. See section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A); *Patel v. Boghra*, 369 Fed.Appx. 722, 723 (7th Cir. 2010). 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 temporary foreign workers" and that this "process of protecting U.S. workers begins with [the filing of an LCA] with [DOL]").

The prevailing wage of \$18.57 per hour on the LCA corresponds to a Level I for the occupational category of "Commercial and Industrial Designers" for ██████████ County ██████████ (California).⁶ Notably, if the proffered position were designated as a higher level position, the prevailing wage at that time would have been \$23.47 per hour for a Level II position, \$28.38 per hour for a Level III position, and \$33.28 per hour for a Level IV position.

The petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the correct wage level in order for it to be found to correspond to the petition.⁷ To permit otherwise would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, by allowing that petitioner to simply submit an LCA for a different wage level at a lower prevailing wage than the one that it claims it is offering to the beneficiary. Therefore, the petitioner has failed to establish that it would pay an adequate salary for the beneficiary's work, as required under the Act, if the petition were granted for a higher-level and more complex position as claimed elsewhere in the petition.

Moreover, this aspect of the LCA undermines the credibility of the petition, and, in particular, the credibility of the petitioner's assertions regarding the demands, level of responsibilities and requirements of the proffered position. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

⁶ For additional information regarding the prevailing wage for commercial and industrial designers in ██████████ County, see the All Industries Database for 7/2012 - 6/2013 for this occupation at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatacenter.com/OesQuickResults.aspx?code=27-1021&area=31084&year=13&source=1>).

⁷ To promote the U.S. worker protection goals of a statutory and regulatory scheme that allocates responsibilities sequentially between DOL and the U.S. Department of Homeland Security (DHS), a prospective employer must file an LCA and receive certification from DOL before an H-1B petition may be submitted to USCIS. See 8 C.F.R. § 214.2(h)(4)(i)(B)(1); 20 C.F.R. § 655.700(b)(2). Upon receiving DOL's certification, the prospective employer then submits the certified LCA to USCIS with an H-1B petition on behalf of a specific worker. See 8 C.F.R. § 214.2(h)(2)(i)(A), (2)(i)(E), (4)(iii)(B)(1). DOL reviews LCAs "for completeness and obvious inaccuracies," and will certify the LCA absent a determination that the application is incomplete or obviously inaccurate. Section 212(n)(1)(G)(ii) of the Act. In contrast, USCIS must determine whether the attestations and content of an LCA correspond to and support the H-1B visa petition. 20 C.F.R. § 655.705(b); see generally 8 C.F.R. § 214.2(h)(4)(i)(B).

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

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

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part (emphasis added):

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition, whether the occupation named in the [LCA] is a specialty occupation . . . 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, provided the proffered position was in fact found to be a higher-level and more complex position as asserted by the petitioner and counsel elsewhere in the petition, the petitioner would have failed to submit a valid LCA that corresponds to the claimed duties and requirements of the proffered position. That is, the LCA submitted in support of the petition would then fail to correspond to the level of work, responsibilities and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work, responsibilities and requirements in accordance section 212(n)(1)(A) of the Act and the pertinent LCA regulations.

The statements regarding the requirements and claimed level of complexity, independent judgment and understanding required for the proffered position are materially inconsistent with the certification of the LCA for a Level I entry-level position. Accordingly, this conflict undermines the overall credibility of the petition. We find that, fully considered in the context of the entire record of proceeding, the petitioner failed to establish the nature of the proffered position and in what capacity the beneficiary will actually be employed.

For the foregoing reasons, a review of the enclosed LCA indicates that the information provided does not correspond to the level of work and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work and requirements in accordance with the pertinent LCA regulations. As found above, as a result, even if it were

determined that the petitioner overcame the basis for the director's for denial of the petition, the petition could still not be approved.⁸

C. Specialty Occupation

We will now address the director's basis for denial of the petition, namely that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, we agree with the director and find that the evidence fails to establish that the position as described constitutes a specialty occupation. For efficiency's sake, we hereby incorporate the above discussion and analysis into the record of proceeding regarding the beneficiary's proposed employment.

The primary issue for consideration 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 employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

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

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

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

Specialty occupation means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the

⁸ Fundamentally, it appears that (1) the petitioner previously claimed to DOL that the proffered position is a Level I, entry-level position to obtain a lower prevailing wage; and (2) the petitioner is now claiming to USCIS that the position is a higher-level and more complex position in order to support its claim that the position qualifies as a specialty occupation. The petitioner cannot have it both ways. Either the position is a more senior and complex position (based on a comparison of the petitioner's job requirements to the standard occupational requirements) and thereby necessitates a higher required wage, or it is an entry-level position for which the lower wage offered to the beneficiary in this petition is acceptable. To permit otherwise would be directly contrary to the U.S. worker protection provisions contained in section 212(n)(1)(A) of the Act and its implementing regulations.

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 387. To avoid this 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), 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.

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

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To make its determination as to whether the proffered position qualifies as a specialty occupation, we first turn to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Factors considered by us when determining these criteria include: whether the *Handbook*, on which we routinely rely for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty 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)).

We recognize the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁹ As previously mentioned, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Commercial and Industrial Designers."

⁹ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. Our references to the *Handbook* are to the 2014 – 2015 edition available online. We hereby incorporate the chapter of the *Handbook* regarding the occupational category "Industrial Designers" into the record of proceeding.

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

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

A bachelor's degree is usually required for most entry-level industrial design jobs. It is also important for industrial designers to have an electronic 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 [REDACTED] 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 getting a Master's of Business Administration (MBA) to gain business skills. Business skills help designers understand how to fit their designs to meet the cost limitations a firm may have for the production of a given product.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Industrial Designers, on the Internet at <http://www.bls.gov/ooh/arts-and-design/industrial-designers.htm#tab-4> (last visited July 25, 2014).

The *Handbook* does not state that a baccalaureate or higher degree *in a specific specialty*, or its equivalent, is normally the minimum requirement for entry into the occupation. The *Handbook* reports that a bachelor's degree in industrial design, architecture, or engineering is usually required

for entry-level industrial design positions. However, in general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty (or its equivalent)" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty (or its equivalent)," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required body of highly specialized knowledge is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added)."¹⁰

Here, although the *Handbook* indicates that positions in this occupation usually need a bachelor's degree, the *Handbook* also indicates that baccalaureate degrees in various fields are acceptable for entry into the occupation. The *Handbook* does not indicate that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation.¹¹ Thus, it does not support the proffered position as qualifying as a specialty occupation.

It is incumbent upon the petitioner to provide persuasive evidence that the proffered position qualifies as a specialty occupation under this criterion, notwithstanding the absence of the

¹⁰ Whether read with the statutory "the" or the regulatory "a," both readings denote a singular "specialty." Section 214(i)(1)(b) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). Still, we do not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty.

¹¹ For example, the field of engineering is a broad category that covers numerous and various specialties, some of which are only related through the basic principles of science and mathematics, e.g., nuclear engineering and aerospace engineering. Therefore, it is not readily apparent that a general degree in engineering or one of its other sub-specialties, such as chemical engineering or nuclear engineering, is closely related to industrial design or that engineering or any and all engineering specialties are directly related to the duties and responsibilities of the particular position proffered in this matter.

Here and as indicated above, the petitioner, who bears the burden of proof in this proceeding, fails to establish either (1) that industrial design, architecture, and engineering in general are closely related fields or (2) that engineering or any and all engineering specialties are directly related to the duties and responsibilities of the proffered position. Absent this evidence, it cannot be found that the particular position proffered in this matter has a normal minimum entry requirement of a bachelor's or higher degree in a specific specialty or its equivalent. Accordingly, as the evidence of record fails to establish a standard, minimum requirement of at least a bachelor's degree *in a specific specialty* or its equivalent for entry into the particular position, it does not support the proffered position as being a specialty occupation and, in fact, supports the opposite conclusion.

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

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

Next, we will review the record of proceeding regarding the first of the two alternative prongs found at 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 (1) to the petitioner's industry; and (2) for positions within that industry that are both: (a) parallel to the proffered position, and (b) located in organizations that are similar to the petitioner.

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

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* (or other objective, authoritative source) reports a standard, industry-wide requirement of at least a bachelor's degree in a specific specialty, or its equivalent. Thus, we incorporate by reference our previous discussion on the matter.

For the petitioner to establish that an organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such evidence, documentation submitted by a petitioner is generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and the organization share the same general characteristics, such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). It is not sufficient for the petitioner and counsel to claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion.

In the Form I-129 petition, the petitioner describes itself as a manufacturer and wholesaler of women's footwear established in 2005, with 24 employees. The petitioner claims that it has a gross annual income of \$18,214,624 and a net annual income of \$472,833. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 316214.¹² Notably, the U.S. Department of Commerce, Census Bureau website states that "316214 is not a valid 2012 NAICS code." See U.S. Dep't of Commerce, U.S Census Bureau, 2012 NAICS Definition, 561310, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited July 25, 2014). The correct NAICS code is 31610, which is designated for "Footwear Manufacturing." The U.S. Department of Commerce, Census Bureau website describes this NAICS code by stating "[t]his industry comprises establishments primarily engaged in manufacturing footwear (except orthopedic extension footwear). *Id.*

In response to the director's RFE, the petitioner submitted a letter from [REDACTED] President of [REDACTED] in support of the assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations. We reviewed the letter from Mr. [REDACTED] (the writer) and observe that it states that the company is a female footwear manufacturer, with 14 employees. In addition, the writer states that he only hires "designers with at least a bachelor's degree in Design, Fashion Design, Industrial Design, and related areas to design our private and brand name label shoes." Notably, the writer failed to provide any specific job duties and day-to-day responsibilities for his designer position. There is no information regarding the complexity of the job duties, supervisory duties (if any), independent judgment required or the amount of supervision received. Accordingly, there is insufficient information regarding the duties and responsibilities of Mr. [REDACTED] designer position to determine whether it is the same or parallel to the proffered position. Moreover, we observe that the writer did not provide any documentary evidence to corroborate that he currently or in the past employed individuals in parallel positions to the proffered position, nor did he provide any documentation to substantiate the claimed academic requirements. The writer has failed to submit any probative evidence of his recruitment and hiring practices. Thus, the letter is insufficient to establish that a degree requirement in a specific specialty, or its equivalent, is common to the petitioner's industry in parallel positions among similar organizations.

In support of the assertion that the proffered position is a specialty occupation under this criterion of the regulations, the petitioner also submitted copies of job advertisements in response to the RFE. However, upon review of the documents, we find that the petitioner's reliance on the job announcements is misplaced. Notably, the petitioner did not provide any independent evidence of how representative these job advertisements are of the particular advertising employers' recruiting history for the type of jobs advertised. Further, as they are only solicitations for hire, they are not evidence of the employers' actual hiring practices.

¹² According to the U.S. Census Bureau, the North American Industry Classification System (NAICS) is used to classify business establishments according to type of economic activity and each establishment is classified to an industry according to the primary business activity taking place there. See <http://www.census.gov/eos/www/naics/> (last visited July 25, 2014).

Furthermore, some of the advertisements do not appear to be for parallel positions. More specifically, the petitioner submitted a posting for a designer A position with [REDACTED] which requires a degree and "5-8 years of Footwear Product Design." The petitioner also provided a posting for a women's senior footwear designer position with [REDACTED] which requires a degree and "5+ years of experience in footwear design and product development, preferably in women's footwear." In addition, the petitioner provided a posting for a senior designer position with [REDACTED] which requires a degree and "[t]here years plus of footwear design experience." As previously discussed, the petitioner designated the proffered position on the LCA through the wage level as a Level I (entry level) position. The advertised positions appear to be for more senior positions than the proffered position. More importantly, the petitioner has not sufficiently established that the primary duties and responsibilities of the advertised positions are parallel to the proffered position.

Additionally, contrary to the purpose for which the advertisements were submitted, the postings do not establish that at least a bachelor's degree in a specific specialty, or its equivalent, is required for the positions. For instance, the petitioner submitted an advertisement ([REDACTED]) that states that disparate fields (fine arts, industrial design or related degree) are acceptable. Again, since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in disparate fields would not meet the statutory requirement that the degree be "in *the* specific specialty," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added).

As the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary. That is, not every deficit of every job posting has been addressed. The evidence does not establish that the proffered position qualifies as a specialty occupation under this criterion of the regulations.¹³

¹³ 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 these advertisements with regard to determining the common educational requirements for entry into parallel positions in similar companies. *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 the position of product designer for companies that are similar to the petitioner and in the same industry requires a bachelor's or higher degree in a specific specialty, or its equivalent, (which they do not) it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not require at least a baccalaureate degree in a specific specialty, or its equivalent, for entry into the occupation in the United States.

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

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

We acknowledge that the petitioner and its counsel may believe that the proffered position is so complex and/or unique that it can be performed only by an individual with at least a bachelor's degree. In support of this assertion, the petitioner provided documents regarding its business operations, including photos of its product; its 2011 and 2012 Income Tax Returns; and a copy of its 2013SS Market Research/Trend Report. However, upon review of the record of proceeding, we find that the petitioner has failed to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position. That is, we reviewed the record in its entirety and find that the petitioner has not provided sufficient documentation to support a claim that its particular position is so complex or unique that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent.

Specifically, the petitioner failed to demonstrate how the product design duties described require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty, or its equivalent, is required to perform them. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties of the proffered position. While related courses may be beneficial, or even essential, in performing certain duties of a product designer position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the petitioner's proffered position.

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. Again, we incorporate by reference and reiterate our earlier discussion that the LCA indicates that the position is a low-level, entry position relative to others within the occupation. Based upon the wage rate, the beneficiary is only required to have a basic understanding of the occupation. Moreover, the wage rate indicates that the beneficiary will perform routine tasks that require limited, if any, exercise of independent judgment; her work will be closely supervised and monitored; she will receive specific instructions on required tasks and expected results; and her work will be reviewed for accuracy.

Without further evidence, it is simply not credible that the petitioner's proffered position is complex or unique as such a position would likely be classified at a higher-level, such as a Level III (experienced) or Level IV (fully competent) position, requiring a significantly higher prevailing

wage. For instance, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."¹⁴

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

The petitioner claims that the beneficiary's academic background will assist her in carrying out the duties of the proffered position. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area (or its equivalent). The petitioner does not sufficiently explain or clarify which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. Upon review of the record of proceeding, we find that the petitioner has failed to establish the proffered position as satisfying the second prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position. We usually review the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

To merit approval of the petition under this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency in its prior recruiting and hiring for the position. Further, it should be noted that the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. While a petitioner may believe or otherwise assert that a proffered position requires a specific degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the petitioner artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F.3d at 388. In other words, if a petitioner's stated degree requirement is only designed to artificially meet the

¹⁴ For additional information regarding wage levels as defined by DOL, see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

standards for an H-1B visa and/or to underemploy an individual in a position for which he or she is overqualified and if the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

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

In response to the director's RFE, the petitioner submitted the foreign academic credentials, a credential evaluation, H-1B approval notices, and a Quarterly Contribution Return and Report of Wages for 2013 (quarter 2) of its product designer, [REDACTED]. On appeal, the petitioner submitted a copy of its letter to USCIS, dated March 19, 2009, which lists Mr. [REDACTED] job duties. In addition, the March 19, 2009 letter indicates that the product design position requires a bachelor's degree in industrial design, fashion design or closely related field. Notably, the requirement is not consistent with the petitioner's claimed requirements for the proffered position as stated in the April 1, 2013 letter of support.

Further, we observe that the quarterly report indicates that Mr. [REDACTED] is being paid \$12,230.31 per quarter (\$48,921.24 per year). The rate of pay for Mr. [REDACTED] is significantly higher than the offered salary to the beneficiary of \$28,969.20 per year, even when considering the beneficiary will work 30 hours per week. Based upon the rate of pay, it appears that Mr. [REDACTED] is employed in a more senior or different position. Thus, it does not appear that the duties and responsibilities of this individual are the same or similar to the proffered position.

The petitioner also submitted two internal job postings. The job posting dated March 1, 2013 indicates that the product designer position requires a "Bachelor [sic] Degree in Design, Design Innovation, Industrial Design, or relate." However, the posting dated March 2, 2009 indicates "Bachelor [sic] Degree in Industrial Design, Fashion Design, or relate." No explanation for the variance was provided by the petitioner.

Moreover, the petitioner stated in the Form I-129 petition that it has 24 employees and that it was established in 2005 (approximately eight years prior to the submission of the H-1B petition). The petitioner did not provide the total number of people it has employed to serve in the proffered position. Consequently, it cannot be determined how representative the petitioner's claim regarding *one individual over an eight-year period* is of the petitioner's normal recruiting and hiring practices. It must be noted that without further information, the submission of the educational credentials of one individual is not persuasive in establishing that the petitioner normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the position.

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

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

In the instant case, the petitioner provided documents regarding its business operations, including the documentation previously outlined. We acknowledge that the petitioner and its counsel may believe that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. Upon review of the record of the proceeding, however, we find that the petitioner has not provided probative evidence to satisfy this criterion of the regulations. In the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. That is, the proposed duties have not been described with sufficient specificity to establish that they are more specialized and complex than positions that are not usually associated with at least a bachelor's degree in a specific specialty, or its equivalent.

Moreover, we incorporate our earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a low, entry-level position relative to others within the occupational category. The petitioner designated the position as a Level I position (the lowest of four assignable wage-levels), which DOL indicates is appropriate for "beginning level employees who have only a basic understanding of the occupation." Without further evidence, it is simply not credible that the petitioner's proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level III (experienced) or IV (fully competent) position, requiring a substantially higher prevailing wage. As previously discussed, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."

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

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

III. CONCLUSION

An application or petition that fails to comply with the technical requirements of the law may be denied by us 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 we deny a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that we abused our discretion with respect to all of our 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, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.