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

U.S. Citizenship and Immigration Services

(b)(6)

DATE: MAR 19 2014 OFFICE: VERMONT SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (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,

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 visa petition, the petitioner describes itself as a gift item manufacturer and wholesale distributor company established in 1992. In order to employ the beneficiary in what it designates as an ornamental metalwork designer position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, counsel for the petitioner 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 the AAO 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 and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

For the reasons that will be discussed below, the AAO agrees with the director that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

I. FACTUAL AND PROCEDURAL BACKGROUND

In the petition signed on March 8, 2013, the petitioner indicates that it is seeking the beneficiary's services as an ornamental metalwork designer on a full-time basis at the rate of pay of $45,000 per year.[1] In the undated letter of support, the petitioner claims that the beneficiary will be responsible for the following duties in the proffered position:

> In this capacity [as an ornamental metalwork designer], he will prepare sketches and rough drawings of the proposed objects of art or jewelry items, and coordinate the design of future articles with customers. This process requires virtuosity in miniature drawing and composition. Then he will select the appropriate metals, gemstones, enamels and other materials suitable for the design and specific technological processes that require special knowledge of material strength and jewelry technology. He will take a leading role in the process of fabrication of new objects of art and jewelry items. He will create the models of objects in modeling wax or special modeling substances, will conduct a final coordination of the item's

[1] Notably, the petitioner mistakenly and repeatedly referenced the beneficiary in the letter of support in the feminine pronoun case. The record provides no explanation for this inconsistency. Thus, the AAO must question the accuracy of the letter and whether the information provided is correctly attributed to this particular position and beneficiary.

> outlook with a customer. This stage is a key phase in the overall process and takes the majority of the designer's time. Creating of the model in metal requires superior engraving skills. Ornamental Metalwork Designer is also responsible for the design and creating of special devices for the production line that require the designer to be a well-rounded professional in all aspects of jewelry manufacturing.

The petitioner further states, "For this position a Bachelor's Degree in Design is essential." Later in the letter, the petitioner claims that the position requires "a highly specialized knowledge of arts and design in general, and styles or ornamental metalwork, in particular." The petitioner continues by asserting that "only individuals who received education and professional training in Russia can meet [the petitioner's] needs."

In the support letter, the petitioner stated that "[the beneficiary] possess the equivalent of [a] U.S. Bachelor of Design in Jewelry and Metalsmithing." Additionally, the petitioner stated that the beneficiary possesses relevant experience and skills. With the Form I-129 petition, the petitioner submitted copies of the beneficiary's foreign academic credentials and employment record, as well as a credential evaluation from [2] The credential evaluation indicates that the beneficiary's foreign education is "equivalent to U.S. Bachelor of Science Degree in Engineering / Industrial Design, with a major in Ornamental Material Design, granted by a regionally accredited academic institution in the United States."[3]

The petitioner also submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification of "Fine Artists, including Painters, Sculptors, and Illustrators" - SOC (ONET/OES Code) 27-1013, at a Level II wage.

The director found the evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on April 22, 2013. The petitioner was asked to submit probative evidence to establish that a specialty occupation position exists for the beneficiary. The director outlined the specific evidence

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[2] In order to equate a beneficiary's credentials to a U.S. baccalaureate or higher degree, the provisions at 8 C.F.R. § 214.2(h)(4)(iii)(D)(3) indicates that a petitioner may submit an evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials. The petitioner should note that, in accordance with this provision, the AAO will accept a credentials evaluation service's evaluation of *education only*, not training and/or work experience.

[3] In addition, the credential evaluation indicates that the beneficiary's foreign education and professional experience amount to the equivalent of a "U.S. Bachelor of Design Degree in Jewelry and Metalsmithing, granted by a regionally accredited academic institution in the United States." However, 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 in accordance with 8 C.F.R. § 214.2(h)(4)(iii)(D)(*1*). Furthermore, the petitioner has not provided sufficient probative evidence to establish that the beneficiary has recognition of expertise in the specialty through progressively responsible positions directly related to the specialty in accordance with 8 C.F.R. § 214.2(h)(4)(iii)(C)(*4*). The beneficiary's credentials to perform a particular job, however, are relevant only when the job is found to be a specialty occupation.

to be submitted.

On June 10, 2013, the petitioner and counsel responded to the RFE. In a letter dated June 22, 2013, the petitioner provided a revised job description of the proffered position. Specifically, the petitioner stated that the beneficiary's duties and responsibilities would be as follows:

- Generation of the idea for the new jewelry articles or designing the article using the description suggested by [the] customer that requires the erudition in artistic styles and history of arts.

- Preparation of sketches and rough drawings of the proposed items and coordination [of] the design of future objects with customers that demands [sic] virtuosity in miniature drawing and composition.

- Selection of the appropriate metals, gemstones, enamels, or other materials suitable for the design and specific technological processes that calls for special knowledge of material strength and jewelry technology.

- Creation of the models of objects in modeling wax or special modeling substances, final coordination of the outlook of the item with the customer. This stage is a key phase in the overall process and takes the majority of the designer's time.

- Consequent creation of the model in metal require the engraving skills.

- Creation of master-model for the future technological process in the production line.

- Designing and creation of special devices for the production line that requires the designer to be a well rounded professional in all aspects of jewelry manufacturing.

- Creation and preparation of the description of technological procedures for every step in the production line.[4]

In addition, the petitioner stated that "[t]he proposed position requires at a minimum a baccalaureate degree in the field of jewelry design from the accredited college or university."

In response to the RFE, the petitioner and counsel submitted additional documentation in support of the petition, including:

- a letter from

[4] Bullets added by the AAO for clarity.

- a letter from
- a letter from
- a letter from ;
- a letter from
- a letter from
- a letter from
- a letter from
- a letter from
- letters from the petitioner listing its current and former employees, along with copies of related documents;
- photos described by the petitioner as the beneficiary's work product;[5]
- marketing/promotional materials; and
- evidence of the petitioner's job advertisements and related documents.[6]

The director reviewed the information provided by the petitioner and counsel to determine whether the petitioner had established 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, or its equivalent. The director denied the petition on June 24, 2013. Counsel submitted an appeal of the denial of the H-1B petition.

II. BEYOND THE DIRECTOR'S DECISION

[5] The documents do not contain the beneficiary's name or any other information connecting him to the documents or the images in the documents. Further, the materials are undated and do not indicate the specific purpose for which they were prepared.

[6] It must be noted that the advertisement in was illegible. Consequently, the position and/or the information regarding the requirements for the position cannot be ascertained.

The AAO reviewed the record of proceeding in its entirety and, as will be discussed later in the decision, the AAO agrees with the director that the petitioner has not established that the proffered position qualifies as a specialty occupation. Moreover, the AAO has identified several, additional issues that preclude the approval of the H-1B petition that were not identified by the director. Consequently, even if the petitioner overcame the basis for the director's denial of the petition (which it has not), it could not be found eligible for the benefit sought.[7]

More specifically, the record of proceeding contains discrepancies between what the petitioner claims about the level of responsibility and requirements inherent in the proffered position set against the contrary level of responsibility and requirements conveyed by the wage level indicated in 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 "Fine Artists, including Painters, Sculptors, and Illustrators" - SOC (ONET/OES) code 27-1013. The wage level for the proffered position in the LCA corresponds to a Level II position. The prevailing wage source is listed in the LCA as the OFLC (Office of Foreign Labor Certification) Online Data Center.[8] The LCA was certified on March 26, 2013, and signed by the petitioner on March 27, 2013. The AAO notes 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.[9]

Prevailing wage determinations start with a Level I (entry) and progress to a wage that is

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

[8] The Occupational Employment Statistics (OES) program produces employment and wage estimates for 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/.

[9] 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.

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.[10] The U.S. Department of Labor (DOL) emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

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

> **Level II** (qualified) wage rates are assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation. They perform moderately complex tasks that require limited judgment. An indicator that the job request warrants a wage determination at Level II would be a requirement for years of education and/or experience that are generally required as described in the O*NET Job Zones.

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.

As noted above, a requirement for years of education and/or experience that are generally required as described in the O*NET Job Zones would be an indication that a wage determination at Level II would be proper classification for a position. The occupational category "Fine Artists, including Painters, Sculptors, and Illustrators," has been assigned an O*NET Job Zone 3, which groups it among occupations for which medium preparation is needed. More specifically, most occupation in this zone "require training in vocational schools, related on-the-job experience, or an associate's degree." *See* O*NET OnLine Help Center, at http://www.onetonline.org/help/online/zones, for a discussion of Job Zone 3.[11]

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[10] 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.

[11] The AAO hereby incorporates into the record of proceeding the O*NET OnLine Help Center printout from the Internet for Job Zone 3 available at http://www.onetonline.org/help/online/zones (last visited March 18, 2014).

The designation of the proffered position at a Level II on the LCA suggests that the petitioner's academic and/or professional experience requirements for the proffered position would be equate to training in a vocational school, related on-the-job experience, or an associate's degree as stated for occupations designated as O*NET Job Zone 3. In the instant case, the petitioner's stated requirements for the proffered position vary throughout the record, but it asserts that at least a bachelor's degree is necessary for the position.[12]

Furthermore, in the instant case, the petitioner and counsel claim that the duties of the proffered position are complex, unique and/or specialized.[13] In the undated letter of support, the petitioner states that the beneficiary "will take a leading role in the process of fabrication of new objects of art and jewelry items." In addition, the petitioner states that "[t]he responsibilities given to [the] Ornamental Metalwork Designer are much more complex than those assigned to the 'lower end' jewelers or our Bench Workers." According to the petitioner, the beneficiary will serve in a key position and that the position requires "expertise." The petitioner further claims that the proffered position requires "highly specialized knowledge of arts and designs in general, and styles of

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[12] The petitioner's stated requirements for the proffered position will be discussed in more detail later in the decision.

[13] The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." Level III and a Level IV wage rates are described as follows:

> **Level III** (experienced) wage rates are assigned to job offers for experienced employees who have a sound understanding of the occupation and have attained, either through education or experience, special skills or knowledge. They perform tasks that require exercising judgment and may coordinate the activities of other staff. They may have supervisory authority over those staff. A requirement for years of experience or educational degrees that are at the higher ranges indicated in the O*NET Job Zones would be indicators that a Level III wage should be considered.
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> Frequently, key words in the job title can be used as indicators that an employer's job offer is for an experienced worker. Words such as 'lead' (lead analyst), 'senior' (senior programmer), 'head' (head nurse), 'chief' (crew chief), or 'journeyman' (journeyman plumber) would be indicators that a Level III wage should be considered.
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> **Level IV** (fully competent) wage rates are assigned to job offers for competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. These employees receive only technical guidance and their work is reviewed only for application of sound judgment and effectiveness in meeting the establishment's procedures and expectations. They generally have management and/or supervisory responsibilities.

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.

ornamental metalwork, in particular." According to the petitioner, the position involves "a unique Russian jewelry style, therefore, only individuals who received education and professional training in Russian can meet [the petitioner's] needs." The petitioner states that the work conditions for the proffered position are difficult and the schedule demanding. The petitioner continues by stating that the beneficiary will add to the petitioner's "success as a premier entity."

The petitioner reports that "[o]ne Ornamental Metalworker Designer with a BA degree and European background provides a workload for at least 4 other workers in jewelry manufacture, such as caster, jeweler, enamellist, [and] diamond setter." Thereafter, in the April 30, 2013 letter, submitted in response to the director's RFE, the petitioner states that "[o]ne Ornamental Metalworker Designer with [a] baccalaureate degree and European background will be able to provide a workload for at least 10 other workers in jewelry manufacture, such as caster, jeweler, enamellist, [and] diamond setter." (No explanation for the variance was provided.)

Furthermore, in response to the RFE, the petitioner submitted several job postings and related documents from 2010. The documentation indicates that the ornamental metalwork design position requires a bachelor's degree and three to five years of experience, and that the degree must be from In the appeal brief, counsel claims that the proffered position "is much more complicated than a mere Jeweler" and has "highly sophisticated and demanding set of tasks and skills." He emphasizes the "complexity, specialization and uniqueness of the proffered position and the duties."

The AAO, therefore, questions the level of complexity, independent judgment and understanding actually required for the proffered position, as the LCA was certified for a Level II position. This above characterization of the position and the claimed duties, responsibilities and requirements conflict with the wage-rate element of the LCA, which, as reflected in the discussion above, is indicative of a comparatively low-level position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have attained, either through education or experience, a good understanding of the occupation. Furthermore, he will be expected to perform moderately complex tasks that require limited judgment.

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 $43,930 per year on the LCA corresponds to a Level II for the occupational

category of "Fine Artists, including Painters, Sculptors, and Illustrators" for [redacted].[14] Notably, if the proffered position were designated as a higher level position, the prevailing wage at that time would have been $58,885 per hour for a Level III position, and $73,819 per year 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.[15] 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.

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. As previously mentioned, 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).

The regulation at 20 C.F.R. § 655.730(b) states, in pertinent part, that "[i]t is the employer's responsibility to ensure that ETA [(the DOL's Employment and Training Administration)] receives a complete and accurate LCA." DOL indicates that its LCA certification process is cursory and does not involve substantive review and that the petitioner is responsible for the completeness and accuracy of the information entered in the LCA. E.g., 20 C.F.R. § 655.715; 20 C.F.R. § 655.730(b); 20 C.F.R. § 655.740(a)(2) and (c); Form ETA 9035CP (Labor Condition Application Cover Pages).

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[14] For additional information regarding the prevailing wage for fine artists, including painters, sculptors, and illustrators in [redacted] *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 [redacted] (last visited March 18, 2014).

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

While DOL is the agency that certifies LCA applications before they are submitted to U.S. Citizenship and Immigration Services (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. The H-1B petition must be supported by an LCA consistent with the petition. 20 C.F.R. § 655.737(e)(1). 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 II position. This conflict undermines the overall credibility of the petition. The AAO finds 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.

As such, a review of the enclosed LCA indicates that the information provided therein 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, which if accepted as accurate would result in the beneficiary being offered a salary below that required by

law. As a result, even if it were determined that the proffered position were a higher-level and more complex position as described and claimed elsewhere in the petition in support of the petitioner's assertions that this position qualifies as a specialty occupation, the petition could still not be approved for these additional reasons.[16]

III. REVIEW OF THE DIRECTOR'S DECISION

Specialty Occupation

The AAO will now address the director's basis for denial of the petition, namely that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, the AAO agrees with the director and finds that the evidence fails to establish that the position as described constitutes a specialty occupation. For efficiency's sake, the AAO hereby incorporates 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)(l) of the Act, 8 U.S.C. § 1184(i)(l), 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,

[16] Fundamentally, it appears that (1) the petitioner previously claimed to DOL that the proffered position is a Level II 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 a Level II 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.

> mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

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

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

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

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), 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. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

The issue before the AAO is whether the petitioner has provided sufficient evidence to establish that it would employ the beneficiary in a specialty occupation position. To make this determination, the AAO turns to the record of proceeding. To ascertain the intent of a petitioner, USCIS must look to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

In the instant case, the petitioner and counsel have provided inconsistent information regarding the requirements for the proffered position. For instance:

- In the undated letter of support, the petitioner stated, "For this position a Bachelor's Degree in Design is essential." The petitioner continues by asserting that "only individuals who received education and professional training in Russia can meet [its] needs."

- In the April 30, 2013 letter, submitted in response to the director's RFE, the petitioner stated that "[t]he proposed position requires at a minimum a baccalaureate degree in the field of jewelry design from the accredited college or university."

- In response to the RFE, the petitioner submitted a job posting which indicate "BS Fine Arts Metalwork Design + 5yr exp." is required for the ornamental metalwork designer position.

- Furthermore, the petitioner provided another job posting, which indicates that a

"Bachelor's degree from and minimum 3 years of professional work experience" required for the ornamental metalwork designer position.

- The petitioner also submitted a letter from which states that the proffered position requires a "Bachelor's degree in Art and Industrial Design."

- In the appeal brief, counsel claims that "the position and its duties heavily emphasize the design aspect, which indeed requires the BA degree in Arts and Design."

While the some of the statements have some similar aspects, no explanation for the variances was provided.[17]

The AAO notes that if the requirements to perform the duties and job responsibilities of a proffered position are a combination of a general bachelor's degree and experience such that the standards at both section 214(i)(1)(A) and (B) of the Act have been satisfied, then the proffered position may qualify as a specialty occupation. *See Tapis Int'l v. INS*, 94 F. Supp. 2d 172 (D. Mass. 2000). The AAO does not find, however, that any position can qualify as a specialty occupation based solely on the claimed requirements of a petitioner. Instead, 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. Furthermore, the AAO does not find (1) that a specialty occupation is determined by the qualifications of the beneficiary being petitioned to perform it; or (2) that a position may qualify as a specialty occupation even when there is no specialty degree requirement, or its equivalent, for entry into a particular position in a given occupational category.

First, USCIS cannot determine if a particular job is a specialty occupation based on the qualifications of the beneficiary. A beneficiary's credentials to perform a particular job are relevant only when the job is first found to qualify as a specialty occupation. USCIS is required instead to follow long-standing legal standards and determine first, whether the proffered position qualifies as a specialty occupation, and second, whether an alien beneficiary was qualified for the position at the time the nonimmigrant visa petition was filed. *Michael Hertz Assoc.*, 19 I&N Dec. 558, 560 (Comm'r 1988) ("The facts of a beneficiary's background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation].").

Second, in promulgating the H-1B regulations, the former Immigration and Naturalization Service (INS) made clear that the definition of the term "specialty occupation" could not be expanded "to

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[17] The petitioner and its counsel have provided inconsistent information as to the 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. 591-92.

include those occupations which did not require a bachelor's degree in the specific specialty." 56 Fed. Reg. 61111, 61112 (Dec. 2, 1991). More specifically, in responding to comments that "the definition of specialty occupation was too severe and would exclude certain occupations from classification as specialty occupations," the former INS stated that "[t]he definition of specialty occupation contained in the statute contains this requirement [for a bachelor's degree in the specific specialty or its equivalent]" and, therefore, "may not be amended in the final rule." *Id.*

In the instant case, as discussed, the petitioner has provided varying accounts of the requirements of the position. Upon review of the record, however, the petitioner has not asserted and the record of proceeding does not support the conclusion that the petitioner's claimed requirement of a degree plus experience is equivalent to a bachelor's or higher degree in a specific specialty.

Furthermore, upon review of the duties of the proffered position submitted by the petitioner with the initial petition and in response to the RFE, the AAO notes that the petitioner did not provide any information with regard to the order of importance and/or frequency of occurrence with which the beneficiary will perform the functions and tasks. Thus, the petitioner failed to specify which tasks were major functions of the proffered position and it did not establish the frequency with which each of the duties would be performed (e.g., regularly, periodically or at irregular intervals). As a result, the petitioner did not establish the primary and essential functions of the proffered position.

Moreover, the petitioner's job descriptions for the proffered position fail to convey either the substantive nature of the work that the beneficiary would actually perform, or any particular body of highly specialized knowledge that would have to be theoretically and practically applied to perform the proffered position. The petitioner did not provide sufficient details regarding the nature and scope of the beneficiary's employment or any substantive evidence regarding the actual work that the beneficiary would perform. Without a meaningful job description, the record lacks evidence sufficiently concrete and informative to demonstrate that the proffered position requires a specialty occupation's level of knowledge in a specific specialty. The tasks as described fail to communicate (1) the actual work that the beneficiary would perform, (2) the complexity, uniqueness and/or specialization of the tasks, and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty.

Nevertheless, the AAO will address each criterion of the regulations for the purpose of providing a comprehensive discussion on this issue. 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 whether the proffered position qualifies as a specialty occupation, the AAO first turns 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 the AAO when determining these criteria include: whether the *Handbook*, on which the AAO routinely relies 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)).

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.[18] As previously mentioned, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Fine Artists, including Painters, Sculptors, and Illustrators." The AAO observes that this occupational category is included in the *Handbook* under the occupational designation entitled "Craft and Fine Artists."[19]

The AAO reviewed the chapter of the *Handbook* entitled "Craft and Fine Artists," including the sections regarding the typical duties and requirements for this occupational category.[20] However, the *Handbook* does not indicate that "Craft and Fine Artists" comprise an occupational group for which normally the minimum requirement for entry is at least a bachelor's degree in a specific specialty, or its equivalent.

The subchapter of the *Handbook* entitled "How to Become a Craft or Fine Artist" states, in part, the following about this occupation:

> **Education**
> Formal schooling beyond a high school diploma is rarely required for craft and fine artists. However, it is difficult to gain adequate artistic skills, without some formal education in the fine arts.
>
> Most craft and fine artists have at least a high school diploma. High school classes like art, shop, and home economics can teach prospective artists some of the basic skills they will need, such as drawing, woodworking, or sewing.

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[18] The *Handbook*, which is available in printed form, may also be accessed on the Internet, at http://www.stats.bls.gov/oco/. The AAO's references to the *Handbook* are to the 2014 – 2015 edition available online. The AAO hereby incorporates into the record of proceeding the chapter of the *Handbook* regarding "Craft and Fine Artists."

[19] The *Handbook* states that "[f]ine artists, including painters, sculptors, and illustrators, create original works of art for their aesthetic value, rather than for a functional one." U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Craft and Fine Artists, available on the Internet at http://www.bls.gov/ooh/arts-and-design/craft-and-fine-artists.htm#tab-1 (last visited March 18, 2014).

[20] For additional information regarding the occupational category "Craft and Fine Artists," *see* U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Craft and Fine Artists, on the Internet at http://www.bls.gov/ooh/arts-and-design/craft-and-fine-artists.htm#tab-1 (last visited March 18, 2014).

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

Independent schools of art and design also offer postsecondary training, which can lead to a certificate in an art-related specialty or to an associate's, bachelor's, or master's degree in fine arts.

In 2013, the National Association of Schools of Art and Design (NASAD) accredited approximately 330 postsecondary institutions with programs in art and design. Most of these schools award a degree in art.

Medical illustrators must have a demonstrated artistic ability and a detailed knowledge of human and animal anatomy, living organisms, and surgical and medical procedures. They usually need a bachelor's degree combining art and premedical courses. Most medical illustrators, however, choose to get a master's degree in medical illustration. Four accredited schools offer this degree in the United States.

Education gives artists an opportunity to develop their portfolio, which is a collection of an artist's work that demonstrates his or her styles and abilities. Portfolios are essential, because art directors, clients, and others look at them when deciding whether to hire the artist or to buy their work.

Those who want to teach fine arts at public elementary or secondary schools usually must have a teaching certificate in addition to a bachelor's degree. Advanced degrees in fine arts or arts administration are usually necessary for management or administrative positions in government, management positions in private foundations, and teaching positions in colleges and universities. For more information on workers who teach art classes, see the profiles on kindergarten and elementary school teachers, middle school teachers, high school teachers, and postsecondary teachers.

* * *

Training

Craft and fine artists improve their skills through practice and repetition. They can train in several ways other than—or in addition to—formal schooling. Craft and fine artists can train with simpler projects before attempting something more ambitious.

Some craft and fine artists learn on the job from more experienced artists. Others attend noncredit classes or workshops or take private lessons, which may be offered in artists' studios or at community colleges, art centers, galleries, museums, or other

> art-related institutions.
>
> Still other craft and fine artists work closely with another artist on either a formal or informal basis. Formal arrangements may include internships or apprenticeship programs. Artists hired by firms often start with relatively routine work. While doing this work, however, they may observe other artists and practice their own skills.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Craft and Fine Artists, available on the Internet at http://www.bls.gov/ooh/arts-and-design/craft-and-fine-artists.htm#tab-4 (last visited March 18, 2014).

When reviewing the *Handbook*, the AAO must again note that the petitioner designated the proffered position as a Level II position (out of four possible wage-levels). This designation is indicative that the beneficiary is expected to have a good understanding of the occupation and that he will perform moderately complex tasks that require limited judgment relative to others within the occupation. Further, as previously discussed, this designation suggests that the petitioner's academic and/or professional experience requirements for the proffered position would be equate to training in a vocational school, related on-the-job experience, or an associate's degree as stated for occupations designated under O*NET Job Zone 3.

The *Handbook* does not support the assertion that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into these positions. The *Handbook* reports that formal schooling beyond a high school diploma is rarely required for craft and fine artists. According to the *Handbook*, most craft and fine artists have at least a high school diploma. The *Handbook* continues by discussing various academic options available to artist, including courses available in high school, as well as post-secondary training such as a certificate-program, associate's degree, bachelor's degree, or master's degree. According to the *Handbook*, artists can train in several ways other than, or in addition to, formal schooling. Upon review, the *Handbook* does not support the assertion that the proffered position falls under 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.

In response to the director's RFE, the petitioner and counsel submitted a letter by from the The letter is dated May 29, 2013. In the letter, Mr. claims that the proffered position is a specialty occupation and requires a "Bachelor's degree in Art and Industrial Design."

Mr. provided a summary of his professional experience and attached a copy of his curriculum vitae.[21] Mr. claims that he is qualified to comment on the position of ornamental metalwork

[21] The petition was submitted in April 2013. Mr. resume indicates that he has served as an assistant professor at the since 2003. His most recent publication, grant, and selected commission were over a decade prior to the H-1B submission, and his most recent exhibit was in 2005 (eight years prior to the H-1B submission). Thus, it appears that his most recent experience has been primarily in the academic setting, specifically at the

designer because of the position he holds, and has held, at the [22] Mr. notes, however, that the letter is strictly his opinion and not the opinion of the community college.

The AAO reviewed the opinion letter and Mr. curriculum vitae in their entirety; however, the documentation is not persuasive in establishing the proffered position qualifies as a specialty occupation position. It does not constitute probative evidence of the proffered position satisfying any criterion described at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Mr. opinion letter and curriculum vitae do not cite specific instances in which his past opinions have been accepted or recognized as authoritative on this particular issue. There is no indication that he has conducted any research or studies pertinent to the educational requirements for such positions (or parallel positions) in the petitioner's industry for similar organizations, and no indication of recognition by professional organizations that he is an authority on those specific requirements. His curriculum vitae does not reflect that he has published any works on the academic/experience requirements for ornamental metalwork design positions (or related issues).

Based upon a complete review of Mr. letter and curriculum vitae, the AAO finds that he has failed to provide sufficient information regarding the basis of his claimed expertise on this particular issue. The documentation does not establish his expertise pertinent to the academic requirements or hiring practices of organizations seeking to fill positions similar to the proffered position in the instant case. Without further clarification, it is unclear how his education, training, skills or experience would translate to expertise or specialized knowledge regarding the current recruiting and hiring practices of gift item manufacturers and wholesale distributors (as designated by the petitioner in the Form I-129) or similar organizations for ornamental metalwork designer positions (or parallel positions). Furthermore, Mr. does not reference or discuss any studies, surveys, industry publications, authoritative publications, or other sources of empirical information which he may have consulted in the course of any evaluative process that he may have followed.

Mr. provides a brief, general description of the petitioner's business activities, however, he does not demonstrate or assert in-depth knowledge of the petitioner's specific business operations or how the duties of the position would actually be performed in the context of the petitioner's business enterprise. For instance, there no evidence that he has any in-depth knowledge of the petitioner's business operations gained through such means as visiting the petitioner's premises, observing the petitioner's employees, interviewing them about the nature of their work, or documenting the knowledge that they apply on the job.

Further, Mr. does not discuss the duties of the proffered position in any substantive detail. To the contrary, he simply listed the tasks in bullet-point fashion with little discussion. As a result, it is

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[22] According to the website, the college offers two-year professional technical degrees. For additional information, see the website on the Internet, available at

not evident that he analyzed the duties prior to formulating his letter. Furthermore, it must be noted that the job duties submitted by Mr. differs from the job description provided by the petitioner to USCIS. While some of the tasks stated by Mr. overlap with the petitioner's description, no explanation was provided as to the reason the job duties submitted by Mr. do not correspond to the job description provided by the petitioner to USCIS.

Importantly, there is no indication that the petitioner advised Mr. that it designated the proffered position as a Level II position (out of four assignable levels) on the LCA, thereby characterizing the proffered position as a relatively low-level fine artist position relative to others within the occupation. That is, the wage rate indicates that the beneficiary will be expected to perform moderately complex tasks that require limited judgment. Furthermore, such classification suggests that the education/experience requirements of the proffered position are consistent with the assigned O*NET Job Zone 3, specifically, falling under a group of occupations for which most "require training in vocational schools, related on-the-job experience, or an associate's degree." It appears that Mr. would have found this information relevant for his opinion letter. Moreover, without this information, the petitioner has not demonstrated that Mr. possessed the requisite information necessary to adequately assess the nature of the petitioner's position and appropriately determine parallel positions based upon the job duties and responsibilities.

Mr. does not provide a substantive, analytical basis for his opinion and ultimate conclusion. His opinion does not relate his conclusion to specific, concrete aspects of this petitioner's business operations to demonstrate a sound factual basis for the conclusion about the educational requirements for the particular position here at issue. Moreover, he did not support his conclusions by providing copies or citations of any research material used. He has not provided sufficient facts that would support the assertion that the proffered position requires at least a bachelor's degree in a specific specialty (or its equivalent).

In summary, and for each and all of the reasons discussed above, the AAO concludes that the opinion letter rendered by Mr. is not probative evidence to establish the proffered position qualifies as a specialty occupation. The conclusions reached by Mr. lack the requisite specificity and detail and are not supported by independent, objective evidence demonstrating the manner in which he reached such conclusions. Further, the opinion is not in accord with other information in the record.

The AAO may, in its discretion, use as advisory opinions or statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International,* 19 I&N Dec. 791 (Comm. 1988). As a reasonable exercise of its discretion, and for the reasons discussed above, the AAO finds the advisory opinion letter as not probative of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). For efficiency's sake, the AAO hereby incorporates the above discussion and analysis regarding Mr. opinion letter into its analyses of each criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel refers to an unpublished AAO decision for the position of painting restorer. While counsel claims that it "is a very similar case," he has provided no evidence to substantiate his

assertion. For instance, counsel has failed to establish that the position in the referenced case is similar to the proffered position, including such factors as the duties and responsibilities of the positions, 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. Additionally, there is no evidence to suggest that the employer in the referenced unpublished decision designated its H-1B position under the same occupational category and wage level in the LCA as the proffered position. While counsel claims that the unpublished decision is relevant here, he failed to substantiate this assertion. The facts in the unpublished decision do not appear to be analogous to those in this proceeding.[23]

When any person makes an application for a "visa or any other document required for entry, or makes an application for admission [. . .] the burden of proof shall be upon such person to establish that he is eligible" for such relief. 8 U.S.C. § 1361; *see also Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972). Furthermore, any suggestion that USCIS must review unpublished decisions and possibly request and review each case file relevant to those decisions, while being impractical and inefficient, would also be tantamount to a shift in the evidentiary burden in this proceeding from the petitioner to USCIS, which would be contrary to section 291 of the Act, 8 U.S.C. § 1361. Accordingly, the AAO was not required to request and/or obtain a copy of the case file relevant to the unpublished decision cited by counsel.

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

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)(*1*).

Next, the AAO will review the record regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*). This prong alternatively calls for a petitioner to establish that a

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[23] More importantly, even if the facts of this case were analogous to those in the unpublished decision, the cited case is not a precedent decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

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.

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).

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, the AAO incorporates by reference the previous discussion on the matter.

The AAO acknowledges that the record of proceeding contains an opinion letter from Mr. However, as previously discussed in detail, the AAO finds that the opinion letter does not merit probative weight towards satisfying any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) or establishing the proffered position qualifies as a specialty occupation.

In the Form I-129 petition, the petitioner stated that it is a gift item manufacturer and wholesale distributor company established in 1992, with eight employees. The petitioner claims that it has a gross annual income of over $2.5 million and a net annual income of approximately $215,800. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 33991.[24] This NAICS code is designated for "Jewelry and Silverware Manufacturing." The U.S. Department of Commerce, Census Bureau website describes this NAICS code by stating the following:

> This industry comprises establishments primarily engaged in one or more of the following: (1) manufacturing, engraving, chasing, or etching jewelry; (2) manufacturing, engraving, chasing, or etching metal personal goods (i.e., small articles carried on or about the person, such as compacts or cigarette cases); (3) manufacturing, engraving, chasing, or etching precious metal solid, precious metal clad, or pewter flatware and other hollowware; (4) stamping coins; (5) manufacturing unassembled jewelry parts and stock shop products, such as sheet, wire, and tubing; (6) cutting, slabbing, tumbling, carving, engraving, polishing, or faceting precious or semiprecious stones and gems; (7) recutting, repolishing, and setting gem stones; and (8) drilling, sawing, and peeling cultured and costume pearls. This industry includes establishments primarily engaged in manufacturing precious

[24] 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 March 18, 2014).

solid, precious clad, and precious plated jewelry and personal goods.

U.S. Dep't of Commerce, U.S. Census Bureau, 2012 NAICS Definition, 33991 – Jewelry and Silverware Manufacturing, on the Internet at http://www.census.gov/cgi-bin/sssd/naics/naicsrch (last visited March 18, 2014).

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 support of the assertion that the proffered position is a specialty occupation under this criterion of the regulations, the petitioner and counsel submitted letters from The AAO reviewed the letters in their entirety. However, contrary to the purpose for which the letters were submitted, they are not persuasive in establishing the proffered position as a specialty occupation position under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO reviewed the letters and observes that the documents lack sufficient information regarding the organizations to conduct a meaningfully substantive comparison of the business operations to the petitioner. Notably, the petitioner failed to provide any supplemental information to establish that the organizations are similar to the petitioner. Thus, from the onset, this prong of the regulations has not been established by the writers.

Moreover, while Mr. and Mr. state that they possess degrees, it must be noted that they also indicate that they are the owners of the companies. Without further information, it has not been established that they serve in the same or similar positions to the proffered position. The educational level of individuals who hold dissimilar positions is not relevant to the instant issue of whether the proffered position qualifies as a specialty occupation.

Furthermore, the writers failed to provide any specific job duties and day-to-day responsibilities for their ornamental metalwork designer positions. 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 these positions to determine whether they are the same or parallel to the proffered position. Additionally, the writers did not provide any documentary evidence to corroborate that they currently or in the past employed individuals in parallel positions to the proffered position, nor did they provide any documentation to substantiate their claimed academic requirements.

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

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

USCIS examines each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence. The evidence submitted, however, fails to establish that the petitioner's proffered position qualifies for the requested classification under the applicable statutory and regulatory provisions. It is not the volume of documentation that establishes eligibility for the benefit sought, but rather the relevance, probative value, and credibility of the documentation – both individually and within the context of the totality of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010).

The record of proceeding contains information regarding the proffered position and the petitioner's business operations, including printouts from the petitioner's website, a letter from a letter from a letter from , a letter from photos described by the petitioner as depicting the beneficiary's work product, and marketing/promotional materials mentioning the petitioner. While the petitioner submitted various documents relating to its operations, the AAO notes that the petitioner did not establish how the documents relate to the beneficiary's day-to-day responsibilities and how such documents demonstrate that its particular position is so complex or unique that it can only be performed only be an individual with a baccalaureate (or higher degree) in a specific specialty, or its equivalent.

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. That is, the petitioner has not developed or established complexity or uniqueness as attributes of the proffered position (through the job duties, the petitioner's business operations or by any other means) that would require the services of a person with at least a bachelor's degree in a specific specialty, or its equivalent. 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 an ornamental metalwork 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, the LCA indicates a wage level based upon the occupational classification "Fine Artists, including Painters, Sculptors, and Illustrators" at a Level II wage. This designation indicates that it is a position for an employee who has a good understanding of the occupation but who will only perform moderately complex tasks that require limited judgment. Without further evidence, it is 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."[25]

Therefore, the evidence of record does not establish that this position is significantly different from other craft and fine artist positions such that it refutes the *Handbook's* information to the effect that a baccalaureate is not required for such positions. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than craft and fine artist 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 and professional experience will assist him in carrying out the duties of the proffered position.[26] However, as previously mentioned, 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 and attainment of at least a baccalaureate-level degree in a specialized area, or its equivalent, for entry into the position. 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, the AAO finds 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. To this end, USCIS usually reviews 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-

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[25] For additional information on wage levels, *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.

[26] In support of this assertion, the petitioner submitted documentation regarding the beneficiary's academic and professional credentials, along with letters of recommendation and pictures that it claims depict the beneficiary's work product.

caliber candidates but is necessitated by performance requirements of the position. In the instant case, the record does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or the equivalent.

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

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.

The petitioner claims that it employ two workers in the proffered position: and Notably, the petitioner did not provide the job duties and day-to-day responsibilities of the positions that it claims are the same as the proffered position. The petitioner did not provide any information regarding the complexity of the job duties, supervisory duties (if any), independent judgment required or the amount of supervision received. Accordingly, the petitioner has not established that the duties and responsibilities of these individuals are the same or similar to the proffered position.

Furthermore, the documentation provided by the petitioner does not support its claim with regard to these employees. While the petitioner submitted copies of the employees' diplomas and Forms

W-2, Wage and Tax Statements, the AAO observes that the documentation indicates that one of the employees was compensated $54,611 in 2012 and the other employee was compensated $41,064 in 2012. The documentation indicates that one of the individuals is paid significantly higher than the salary offered to the beneficiary, and the other one is paid less than the offered salary to the beneficiary. Thus, this strongly suggests that they are employed in different positions. The petitioner did not provide an explanation for the variances in the wages. Without more, the documentation does not establish that the petitioner satisfied this criterion of the regulations.

In addition, the petitioner provided documentation regarding several other employees who were granted H-1B classification. The petitioner did not indicate, however, that these individuals were employed in the proffered position. Thus, the petitioner has not established the relevancy of the documentation to this matter. That is, the educational level of individuals who hold dissimilar positions is not relevant to the instant issue of whether the proffered position qualifies as a specialty occupation.

In response to the director's RFE, the petitioner submitted several job postings and related materials from 2010 (approximately three years prior to the filing of the H-1B petition).

- For instance, the petitioner submitted an advertisement confirmation email from the New York Post. The email is dated May 10, 2010; however, the email indicates that the advertisement will run on May 9, 2010 (one day prior to the email date) and May 16, 2010. The document indicates "BS Fine Arts Metalwork Design + 5 yr exp."

- In addition, the petitioner submitted an advertisement and invoice for a job posting that appeared in the on July 1, 2010, which also indicates "BS Fine Arts Metalwork Design + 5 yr exp."

- The petitioner also provided a job posting that appeared in the dated April 2010. The posting indicates "Bachelor's degree from and minimum 3 years of professional work experience."

The job requirements for the advertised positions appear to differ significantly from each other, as well as from the requirements as stated in the instant H-1B petition. They contain requirements of varying amounts of experience, as well as including the restrictive requirement of requiring a degree from a particular college. The petitioner stated in the Form I-129 petition that it has eight employees and was established in 1992 (approximately 21 years prior to the submission of the H-1B petition). The petitioner has not established that these few advertisements (that appear to encompass a period of a few months in 2010) are representative of the petitioner's normal requirements for the proffered position.

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

§ 214.2(h)(4)(iii)(A).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of 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.

The petitioner and its counsel assert 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 and its counsel submitted documentation regarding the proffered position and the petitioner's business operations, including the documentation previously outlined. Upon review of the record of the proceeding, the AAO notes that 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.

The AAO incorporates its earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a Level II position (out of four possible wage levels). Without further evidence, it is not credible that the petitioner's proffered position is one with specialized and complex duties compared to others within the occupation 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.[27] 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."

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

For the reasons related in the preceding discussion, the petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.[28]

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[27] If the proffered position were designated as a higher level position, the prevailing wage for the occupational category in New York, New York at that time would have been $58,885 per year for a Level III position, and $73,819 per year for a Level IV position.

[28] The AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient evidence to demonstrate that the proffered position is a specialty occupation. In other

IV. CONCLUSION AND ORDER

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1043, *aff'd*, 345 F.3d 683; *see also Soltane v. DOJ*, 381 F.3d 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 appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate 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; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

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words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation.