



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF N-S- INC

DATE: JULY 7, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

PETITION: FORM J-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, an information technology consulting services firm, seeks to temporarily employ the Beneficiary as a “computer programmer analyst” under the H-1B nonimmigrant classification for specialty occupations. See Immigration and Nationality Act (the Act) section 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The H-1B program allows a U.S. employer to temporarily employ a qualified foreign worker in a position that requires both (a) the theoretical and practical application of a body of highly specialized knowledge and (b) the attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum prerequisite for entry into the position.

The Director, Vermont Service Center, denied the petition. The Director concluded that the proffered position is not a specialty occupation.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the Director erred in finding that the proffered position is not a specialty occupation.

Upon *de novo* review, we will dismiss the appeal.¹

I. LAW

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

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

¹ We follow the preponderance of the evidence standard as specified in *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010).

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The regulation at 8 C.F.R. § 214.2(h)(4)(ii) largely restates this statutory definition, but adds a non-exhaustive list of fields of endeavor. In addition, the regulations provide that the proffered position must meet one of the following criteria to qualify as a specialty occupation:

- (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.

8 C.F.R. § 214.2(h)(4)(iii)(A). U.S. Citizenship and Immigration Services (USCIS) has consistently interpreted 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 proposed 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”); *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000).

II. PROFFERED POSITION

In the H-1B petition, the Petitioner stated that the Beneficiary will serve in-house as a computer programmer analyst. The Petitioner indicated that the Beneficiary will work on its “ [REDACTED] project, to “manage and collaborate digital content with various work streams of Organization.” The Petitioner described the proffered position as follows:

- Gathering requirements and documentation for application development
- Develop complex applications using ASP.Net, C#, .Net
- Designs, modifies, develops, writes and implements software programming applications
- Able to create and develop complex SQL queries
- Significant experience in managing multiple priorities
- Exceptional analytical skills, with strong attention to details and accuracy; as well as the ability to provide ad hoc analysis

The Petitioner further indicated that the position requires a bachelor’s degree or its equivalent in computer science or a related field.

III. ANALYSIS

Upon review of the record in its totality and for the reasons set out below, we determine that the Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation. Specifically, the Petitioner did not provide sufficient, credible evidence to establish in-house employment for the Beneficiary for the validity of the requested H-1B employment period.²

The Petitioner claimed that the Beneficiary would work in-house for the duration of the petition. However, the appointment letter addressed to the Beneficiary states “irrespective of any client location or project that you may be assigned to” implying that the Beneficiary may be assigned to other projects or locations, contrary to the Petitioner’s claim.

Further, the Petitioner does not describe in detail the specific duties, demands, level of responsibilities and requirements necessary for the proffered position. Instead, the Petitioner provides vague job descriptions that do not convey the specific tasks to be performed, the complexity of such tasks, and the substantive application of knowledge involved.

For example, the Petitioner states that the Beneficiary’s duties would include “gathering requirements and documentation for application development.” However, there is no further information of what specific tasks the Beneficiary will perform in furtherance of these overarching duties or what bodies of knowledge are required to perform such duties.

We also observe that some of the stated job responsibilities indicate that the Beneficiary would be expected to exercise significant judgment and expertise. For example, the stated job requirements indicate that the Beneficiary would be expected to possess “significant experience in managing multiple priorities” and be required to provide “ad hoc analysis” and write “complex SQL queries.” However, such responsibilities appear inconsistent with the Level II wage level selected here. Again, in designating the proffered position at a Level II wage, the Petitioner indicated that the Beneficiary would perform only “moderately complex tasks” that require only “limited judgment.” The Petitioner’s designation of the proffered position as a Level II position appears inconsistent with these responsibilities, and raises additional questions regarding the substantive nature of the proffered position.

Moreover, we find that the record of proceedings lacks sufficient documentation to substantiate the claim that the Petitioner has H-1B caliber work for the Beneficiary for the period of employment requested in the petition. Specifically, the statement of work (SOW) indicates that the project would be completed by March 2017. However, in the H-1B petition, the Petitioner requested a validity period through September 2018. The Petitioner did not indicate that the Beneficiary would be

² The Petitioner submitted documentation to support the H-1B petition, including evidence regarding the proffered position and its business operations. While we may not discuss every document submitted, we have reviewed and considered each one.

assigned to any other projects after March 2017. We therefore find that the Petitioner has not established that the petition was filed for non-speculative work for the Beneficiary, for the entire period requested, that existed as of the time of the petition's filing. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the Petitioner or Beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978).

That the Petitioner did not establish the substantive nature of the work to be performed by the Beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

Nevertheless, we will analyze the duties as described and the evidence of record to determine whether the proffered position as described would qualify as a specialty occupation.³

A. First Criterion

We turn first to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which requires that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position. To inform this inquiry, we recognize the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁴

On the labor condition application (LCA) submitted in support of the H-1B petition, the Petitioner designated the proffered position under the occupational category "Computer Systems Analysts" corresponding to the Standard Occupational classification code 15-1221.⁵

³ Although some aspects of the regulatory criteria may overlap, we will address each of the criteria individually.

⁴ All of our references are to the 2016-2017 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/ooh/>. We do not, however, maintain that the *Handbook* is the exclusive source of relevant information. That is, the occupational category designated by the Petitioner is considered as an aspect in establishing the general tasks and responsibilities of a proffered position, and USCIS regularly reviews the *Handbook* on the duties and educational requirements of the wide variety of occupations that it addresses. To satisfy the first criterion, however, the burden of proof remains on the Petitioner to submit sufficient evidence to support a finding that its particular position would normally have a minimum, specialty degree requirement, or its equivalent, for entry.

⁵ The Petitioner classified the proffered position at a Level II wage (the second lowest of four assignable wage levels). We will consider this selection in our analysis of the position. The "Prevailing Wage Determination Policy Guidance" issued by the DOL provides a description of the wage levels. A Level II wage rate is generally appropriate

We reviewed the chapter of the *Handbook* entitled “Computer Systems Analysts,” including the sections regarding the typical duties and requirements for this occupational category. The subchapter of the *Handbook* entitled “How to Become a Computer Systems Analyst” states the following about this occupation:

Education

Most computer systems analysts have a bachelor’s degree in a computer-related field. Because these analysts also are heavily involved in the business side of a company, it may be helpful to take business courses or major in management information systems.

Some employers prefer applicants who have a master’s degree in business administration (MBA) with a concentration in information systems. For more technically complex jobs, a master’s degree in computer science may be more appropriate.

Although many computer systems analysts have technical degrees, such a degree is not always a requirement. Many analysts have liberal arts degrees and have gained programming or technical expertise elsewhere.

Many systems analysts continue to take classes throughout their careers so that they can learn about new and innovative technologies and keep their skills competitive. Technological advances come so rapidly in the computer field that continual study is necessary to remain competitive.

Systems analysts must understand the business field they are working in. For example, a hospital may want an analyst with a background or coursework in health management, and an analyst working for a bank may need to understand finance.

U.S. Dep’t of Labor, Bureau of Labor Statistics, Occupational Outlook Handbook, 2016-17 ed., “Computer Systems Analysts,” <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-4> (last visited June 30, 2016).

According to the *Handbook*, the occupation accommodates a wide spectrum of educational credentials, including less than a bachelor’s degree in a specific specialty. Furthermore, while the *Handbook’s* narrative indicates that most computer systems analysts obtain a bachelor’s degree in a

for positions for which the Petitioner expects the Beneficiary to perform “moderately complex tasks that require limited judgment.” U.S. Dep’t of Labor, Emp’t & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://flicdata_center.com/download/NPW_HC_Guidance_Revised_11_2009.pdf. A prevailing wage determination starts with an entry level wage and progresses to a higher wage level after considering the experience, education, and skill requirements of the Petitioner’s job opportunity. *Id.*

computer-related field, a technical degree is not always a requirement and many analysts hold liberal arts degrees. Therefore, the *Handbook* does not report that at least a bachelor's degree *in a specific specialty*, or its equivalent, is normally the minimum requirement for entry into the occupation.

Thus, the *Handbook* does not support the claim that the occupational category is one for which normally the minimum requirement for entry is a baccalaureate degree (or higher) in a specific specialty, or its equivalent.⁶ Even if it did (which it does not), to satisfy the first criterion, the Petitioner must provide evidence to support a finding that the particular position proffered would normally have such a minimum, specialty degree requirement or its equivalent.

As noted, the job description lacks sufficient detail and concrete explanation to establish the substantive nature of the work within the context of the project, and the associated applications of specialized knowledge that their actual performance would require. For example, the Petitioner states that the Beneficiary would gather requirements and develop complex applications, but there is no further explanation as to who the users are or what particular tasks the Beneficiary would perform on a day-to-day basis, the complexity of such tasks, and the substantive application of knowledge involved. Further, the general description does not delineate the demands, level of responsibilities and requirements necessary for the performance of these duties.

In the instant case, the duties and requirements of the position as described in the record of proceedings do not indicate that this particular position proffered by the Petitioner 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 has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

B. Second Criterion

The second criterion presents two, alternative prongs: “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[.]” 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) (emphasis added). The first prong casts its gaze upon the common industry practice, while the alternative prong narrows its focus to the Petitioner's specific position.

⁶ When the *Handbook* does not support the proposition that a proffered position is one that meets the statutory and regulatory provisions of a specialty occupation, it is incumbent upon the Petitioner to provide persuasive evidence that the proffered position more likely than not satisfies this or one of the other three criteria, notwithstanding the absence of the *Handbook's* support on the issue. It is the Petitioner's responsibility to provide probative evidence (e.g., documentation from other objection, authoritative sources) that supports a finding that the particular position in question qualifies as a specialty occupation. Whenever more than one authoritative source exists, we will consider and weigh all of the evidence presented to determine whether the particular position qualifies as a specialty occupation.

1. First Prong

To satisfy this first prong of the second criterion, the Petitioner must establish that the “degree requirement” (i.e., a requirement of a bachelor’s or higher degree in a specific specialty, or its equivalent) is common to the industry in parallel positions among similar organizations.

As previously discussed, the Petitioner has not established that its proffered position is one for which the *Handbook*, or another independent, authoritative source, reports a standard industry-wide requirement for at least a bachelor’s degree in a specific specialty, or its equivalent. We incorporate by reference the previous discussion on the matter.

There are no submissions from the industry’s professional association(s) indicating that it has made a degree a minimum entry requirement. The Petitioner has also not submitted any vacancy announcements or other evidence in support of the assertion that a degree requirement is common to the Petitioner’s industry in parallel positions among similar organizations.

Therefore, 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 (1) in the Petitioner’s industry, (2) parallel to the proffered position, and also (3) located in organizations that are similar to the Petitioner.

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

2. Second Prong

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

Upon review, we find that the Petitioner has not sufficiently developed relative complexity or uniqueness as an aspect of the proffered position. 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 it may believe are so complex and unique. While a few related courses may be beneficial, or even required, in performing certain duties of the position, the Petitioner has not demonstrated 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 proffered position. The description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. The record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique from other positions within the specified occupational category that can be performed by persons without at least a bachelor’s degree in a specific specialty, or its equivalent.

Moreover, the evidence of record does not establish that this position is significantly different from other positions within the occupational category designated on the LCA such that it refutes the *Handbook's* information that a bachelor's degree in a specific specialty or its equivalent is not normally required for such positions.

The Petitioner did not sufficiently develop relative complexity or uniqueness as an aspect of the duties of the position, and it did not identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. Accordingly, the Petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

C. Third Criterion

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, we usually review the Petitioner's past recruiting and hiring practices, information regarding employees who previously held the position, and any other documentation submitted by a petitioner in support of this criterion of the regulations.⁷

The Petitioner has not provided any evidence that it has previously employed or recruited anyone as a computer systems analyst. Therefore, the evidence of record does not indicate that the Petitioner normally requires a baccalaureate or higher degree in a *specific specialty*, or its equivalent, for the proffered position under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

D. Fourth Criterion

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.

⁷ To satisfy this criterion, the record must establish that the specific performance requirements of the position generated the recruiting and hiring history. USCIS must examine the actual employment requirements and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F.3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty, or its equivalent, as the minimum for entry into the occupation as required by section 214(i)(1) of the Act. According to the Court in *Defensor*, "To interpret the regulations any other way would lead to an absurd result." *Id.* at 388. If USCIS were constrained to recognize a specialty occupation merely because a 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 beneficiary 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.*

Upon review of the record of the proceedings, we find that the Petitioner has not provided sufficient evidence to satisfy this criterion of the regulations. In the instant case, relative specialization and complexity have not been credibly 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. Therefore, the evidence of record does not establish that the duties which collectively constitute this position are significantly different from those of other positions located within the computer systems analyst occupational category such that it refutes the *Handbook's* finding that a bachelor's degree in a specific specialty, or the equivalent, is not required.

The Petitioner has not demonstrated in the record that its proffered position is one with duties sufficiently specialized and complex to satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

IV. CONCLUSION

The Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation.

The burden is on the Petitioner to show eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of N-S- Inc*, ID# 17417 (AAO July 7, 2016)