



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

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

MATTER OF A-C-, LLC

DATE: APR. 19, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a construction firm, seeks to temporarily employ the Beneficiary as a “construction engineer” 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 of the Vermont Service Center denied the petition, concluding that the record did not establish that the proffered position qualifies as a specialty occupation.

On appeal, the Petitioner submits additional evidence and asserts that the Director erred in denying the petition.

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

I. LEGAL FRAMEWORK

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

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

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) 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). We have consistently interpreted the term “degree” 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 response to the Director’s request for evidence (RFE), the Petitioner provided the following job duties for the proffered position:

Job Description	Percentage of time to be spent on each duty
Inspect project sites to monitor progress and ensure conformance to design specifications and safety or sanitation standards.	40%
Maintain compliance with the safety-assurance plan so that work is accomplished in an environmentally sound manner using safe work practices.	20%
Anticipate and resolve problems encountered in the field to eliminate costly rework or retesting.	8%
Coordinate with clients to ensure proposed construction and work methods are clearly understood and accepted and ensure agreement on environmental and safety work plans for permitting.	8%
Provide input into the scheduling of projects to meet the client’s required deadline and maintain construction resources to acceptable levels.	5%
Monitor progress to ensure scheduling milestones are	5%

understood and are being met.	
Coordinate between the construction contractor and the project lead to resolve field discrepancies in design packages and material delays.	5%
Ensure equipment and manpower resources are being used efficiently.	5%
Review contractor work performance and project status updates.	4%

The Petitioner further clarified that the Beneficiary, as the construction engineer, “will not be performing construction duties such as electrical, plumbing or HVACR, and/or work on home improvement projects[,] instead he will be performing Engineerial [*sic*] professional duties.” The Petitioner also stated that the Beneficiary “does not need a license to work in the State of Maryland and/or to successfully perform as [its] Construction Engineer.”

The Petitioner stated that the minimum entry requirement for the proffered position is a bachelor’s degree in engineering or a related field.

III. ANALYSIS

For the reasons set out below, we have determined that the proffered position does not qualify as a specialty occupation. Specifically, the record does not establish that the job duties require an educational background, or its equivalent, commensurate with a specialty occupation.¹

As a preliminary matter, we will address the Director’s finding that the proffered position is more similar to a construction manager than a civil engineer. We agree with this finding.

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.² The *Handbook* states the following about the duties of construction managers:

Construction managers plan, coordinate, budget, and supervise construction projects from start to finish.

¹ 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.

² 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/>.

Duties

Construction managers typically do the following:

- Prepare cost estimates, budgets, and work timetables
- Interpret and explain contracts and technical information to other professionals
- Report work progress and budget matters to clients
- Collaborate with architects, engineers, and other construction specialists
- Select subcontractors and schedule and coordinate their activities
- Respond to work delays, emergencies, and other problems
- Comply with legal requirements, building and safety codes, and other regulations

Construction managers, often called *general contractors* or *project managers*, coordinate and supervise a wide variety of projects, including the building of all types of public, residential, commercial, and industrial structures, as well as roads, memorials, and bridges. Either a general contractor or a construction manager will oversee the construction phase of a project, although a construction manager may also consult with the client during the design phase to help refine construction plans and control costs.

Construction managers oversee specialized contractors and other personnel. They schedule and coordinate all construction processes so that projects meet design specifications. They ensure that projects are completed on time and within budget. Some managers may be responsible for several projects at once—for example, the construction of multiple apartment buildings.

Construction managers work closely with other building specialists, such as architects, civil engineers, and a variety of trade workers, including stonemasons, electricians, and carpenters. Projects may require specialists in everything from structural steel and painting to landscaping, paving roads, and excavating sites. Depending on the project, construction managers may interact with lawyers and local government officials. For example, when working on city-owned property or municipal buildings, managers sometimes confer with city inspectors to ensure that all regulations are met.

For projects too large to be managed by one person, such as office buildings and industrial complexes, a top-level construction manager hires other construction managers to be in charge of different aspects of the project. For example, each construction manager would oversee a specific phase of the project, such as structural foundation, plumbing, or electrical work, and choose subcontractors to complete it. The top-level construction manager would then collaborate and coordinate with the other construction managers.

To maximize efficiency and productivity, construction managers often perform the tasks of a cost estimator. They use specialized cost-estimating and planning software to allocate time and money in order to complete their projects. Many managers also use software to plan the best way to get materials to the building site.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2016-17 ed., Construction Managers, <https://www.bls.gov/ooh/management/construction-managers.htm#tab-2> (last visited Mar. 22, 2017).

We agree with the Director that the duties of the proffered position are more similar to construction managers than civil engineers. Most of the duties of the proffered position are centered around supervising and managing project sites, including the duties of “[i]nspect[ing] project sites to monitor progress and ensure conformance to design specifications,” “[a]nticipat[ing] and resolv[ing] problems encountered in the field,” “[c]oordinat[ing] with clients,” and monitoring progress, coordinating between contractors in the field, and reviewing performance of contractors. These duties are consistent with the *Handbook*’s summary of the duties of construction managers, i.e., that they “plan, coordinate, budget, and supervise construction projects from start to finish.” *Id.*

On appeal, the Petitioner asserts that the proffered position is more similar to a civil engineer because the proffered duties are “more complex, unique and specialized than a Construction Manager.” The Petitioner then provided an Internet printout listing the duties of a civil engineer identical to that provided in the *Handbook*, such as analyzing long range plans, survey reports, maps, and other data in order to plan projects; considering construction costs, government regulations, and other factors in planning the stages of, and risk analysis for, a project; compiling and submitting permit applications; performing and overseeing soil testing; testing building materials for use in particular projects; providing costs estimates to determine a project’s economic feasibility; using design software to plan and design structures in line with industry and government standards; performing or overseeing surveying operations to guide construction; presenting findings to the public; and managing the repair, maintenance, and replacement of public and private infrastructure. U.S. Dep’t of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2016-17 ed., Civil Engineers, <https://www.bls.gov/ooh/architecture-and-engineering/civil-engineers.htm#tab-2> (last visited Mar. 22, 2017).

However, the duties listed for a civil engineer are not comparable to the duties of the proffered position. In particular, the Petitioner highlights that 40% of the Beneficiary’s time will be spent on “[i]nspect[ing] project sites to monitor progress and ensure conformance to design specifications and safety or sanitation standards,” 20% of his time will be spent on “[m]aintain[ing] compliance with the safety-assurance plan so that work is accomplished in an environmentally sound manner using safe work practices,” and 16% of his time will be spent on “[a]nticipat[ing] and resolv[ing] problems encountered in the field to eliminate costly rework or retesting,” and “[c]oordinat[ing] with clients to ensure proposed construction and work methods are clearly understood and accepted and ensure agreement on environmental and safety work plans for permitting,” combined. Nevertheless, these

duties are outside of the scope of duties for civil engineers. While the *Handbook* does state that civil engineers “design, build, supervise, operate, and maintain construction projects and systems in the public and private sector,” it does not state that civil engineers inspect project sites to monitor progress, maintain safety compliance, coordinate with clients, coordinate among contractors, or review contractor work performance and project status updates. See U.S. Dep’t of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2016-17 ed., Civil Engineers, <https://www.bls.gov/ooh/architecture-and-engineering/civil-engineers.htm#tab-2> (last visited Mar. 22, 2017).

We must also take into account the lack of evidence establishing that the Petitioner actually provides civil engineering services. Specifically, the Petitioner asserts that it is a “commercial retail and industrial sector focused construction firm providing preconstruction services, design/build solutions, and project management duties in the [redacted] metropolitan area.” However, there is insufficient evidence to establish that the Petitioner actually designs and plans construction projects. In fact, the only invoices and work orders provided by the Petitioner solely include performing “framing work” on residential projects at a specific construction site. There are no invoices or other objective evidence establishing that the Petitioner designs and plans construction projects, such that it may require an in-house employee performing civil engineering work.

Thus, considering the duties of the proffered position and the lack of evidence establishing that the Petitioner provides civil engineering services, we are not persuaded by the Petitioner’s assertions that the proffered position is a civil engineer position. We find that the position is more likely than not a construction manager position, and any further discussion of the proffered position will proceed under this finding.

We will now discuss whether the proffered position qualifies for classification as a specialty occupation under the supplemental, additional criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

A. First Criterion

We turn first to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), 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 *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.³

³ Again, 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 we regularly review 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.

On the labor condition application submitted in support of the H-1B petition, the Petitioner designated the proffered position under the occupational category “Civil Engineers” corresponding to the Standard Occupational Classification code 17-2051. However, based on our finding that the proffered position is that of a construction manager rather than a civil engineer, we will refer to the occupational category “Construction Managers” corresponding to the Standard Occupational Classification code 11-9021.

The *Handbook* states the following with regard to the educational qualifications necessary for entrance into positions located within this occupational category:

Large construction firms increasingly prefer candidates with both construction experience and a bachelor’s degree in a construction-related field. While some individuals with a high school diploma and many years of experience in a construction trade may be hired as construction managers, these individuals are typically qualified to become self-employed general contractors.

Education

It is becoming increasingly important for construction managers to have a bachelor’s degree in construction science, construction management, architecture, or engineering. As construction processes become more complex, employers are placing greater importance on specialized education.

More than 100 colleges and universities offer accredited bachelor’s degree programs in construction science, building science, or construction engineering. These programs include courses in project control and management, design, construction methods and materials, cost estimation, building codes and standards, and contract administration. Courses in mathematics and statistics are also relevant.

More than fifty 2-year colleges offer construction management or construction technology programs. An associate’s degree combined with work experience is typical for managers who supervise smaller projects.

A few universities offer master’s degree programs in construction management.

Those with a high school diploma and several years of relevant work experience may qualify to become a construction manager, although most are qualified to become self-employed general contractors.

Training

New construction managers are typically hired as assistants and work under the guidance of an experienced manager. This training period may last several months to several years, depending on the firm.

Work Experience

If the typical education is not obtained, practical construction experience is important for jobseekers, because it reduces the need for initial on-the-job training. Internships, cooperative education programs, and previous work in the construction industry can provide that experience. Some construction managers become qualified solely through extensive construction experience, spending many years in carpentry, masonry, or other construction specialties.

Licenses, Certifications, and Registrations

Although not required, certification is becoming increasingly important for construction managers. Certification is valuable because it can demonstrate knowledge and experience.

The Construction Management Association of America awards the Certified Construction Manager (CCM) designation to workers who have the required experience and who pass a technical exam. It is recommended that applicants for this certification complete a self-study course that covers the professional role of a construction manager, legal issues, the allocation of risk, and other topics related to construction management.

The American Institute of Constructors awards the Associate Constructor (AC) and Certified Professional Constructor (CPC) designations to candidates who meet its requirements and pass the appropriate construction exams.

Some states require licensure for construction managers.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2016-17 ed., Construction Managers, <https://www.bls.gov/ooh/management/construction-managers.htm#tab-4> (last visited Mar. 22, 2017).

The *Handbook* indicates that construction experience and a bachelor's degree in a construction-related field is preferred by large firms; however, it also reports that some employers hire workers with a high school diploma and many years of experience. *See id.* That is, the *Handbook* reports that individuals, who have less than a bachelor's degree in a specific specialty, or its equivalent, can obtain construction manager positions. Thus, the *Handbook's* report is insufficient to conclude that simply by virtue of its occupational classification the position qualifies as a specialty occupation.

We also reviewed O*NET OnLine's assignment of a Job Zone "Four" rating to the construction managers occupation, which groups it among occupations for which "most . . . require a four-year bachelor's degree, but some do not." O*NET OnLine Summary Report for "11-9021.00 - Construction Managers," <https://www.onetonline.org/link/summary/11-9021.00> (last visited Mar. 22, 2017). However, O*NET OnLine does not indicate that four-year bachelor's degrees that may be required by Job Zone Four occupations must be in a specific specialty directly related to the

occupation. Therefore, the O*NET OnLine information is not probative of the proffered position being a specialty occupation.

The record lacks sufficient evidence to support a finding that the duties and requirements of the position, as described, 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)(I).

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.

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.

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

Here, there are no submissions from the industry’s professional association indicating that it has made a degree a minimum entry requirement.

In support of its assertion that the degree requirement is common to the Petitioner’s industry in parallel positions among similar organizations, the Petitioner submitted copies of advertisements for several positions entitled Construction Project Engineer, Construction Engineer, Project Engineer II, Civil/Structural Engineer, Construction Engineer Specialist, Construction Engineer I, and Foreign Service Construction Engineer. All of the advertisements require or prefer an engineering, architecture, or construction management degree; however, they also all require years of experience in addition to the bachelor’s degree whereas the Petitioner does not list an experience requirement.⁴ Further, most of the advertised positions prefer candidates certified as Professional Engineers. Even

⁴ We also note that two of the advertisements appear to accept equivalent work experience in place of a degree.

if all of the job postings indicated that a bachelor's or higher degree in a specific specialty, or its equivalent, were required, the Petitioner has not established that the submitted advertisements are relevant in that the posted job announcements are not for parallel positions in similar organizations in the same industry.

On appeal, the Petitioner submits additional advertisements, but does not address the Director's assertions that the previously submitted advertisements are not for parallel positions in similar organizations. The Director noted that the Petitioner is a two-person company and that the advertisements provided in response to the RFE were not comparable to the Petitioner's construction firm. The Director explained that one company has nearly 100,000 employees and provides services within the public and private sector, and another company provides services to the city of [REDACTED] including city infrastructure.

The additional advertisements have not been demonstrated to be similar to the Petitioner. For example, one of the advertisers, [REDACTED] has over 200 employees; [REDACTED] has been operating over 93 years and continues to expand throughout several states; [REDACTED] has over 1400 employees; [REDACTED] has 82,500 employees in over 40 countries; and the U.S. Department of State is a government organization. Although each of the advertisements is related to construction or engineering, the advertising entities do not appear to be similar to the Petitioner's organization, a two-person construction firm that primarily provides residential construction services. The Petitioner may not establish that an organization is similar unless the Petitioner establishes that similar characteristics are shared with the advertising organizations, such as number of employees, level of revenue, and the nature or type of organization to list a few factors that may be considered. Moreover, we note that it is reasonable to assume that the size of an employer's business has or could have an impact on the claimed duties of a particular position. *See EG Enters., Inc. v. Dep't of Homeland Sec.*, 467 F. Supp. 2d 728 (E.D. Mich. 2006). Thus, the size of a petitioner may be considered as a component of the nature of the petitioner's business, as the size impacts upon the actual duties of a particular position.

For these reasons, it cannot be found that the advertisements support a finding that a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the industry in parallel positions among similar organizations. The Petitioner has not satisfied the criterion of 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.

The record here does not credibly demonstrate relative complexity or uniqueness as aspects of the proffered position. Specifically, it is unclear how the proffered position, as described, necessitates

the theoretical and practical application of a body of highly specialized knowledge such that a person who has attained a bachelor's or higher degree in a specific specialty or its equivalent is required to perform them. Rather, we find that, as reflected in this decision's earlier quotation of duty descriptions from the record of proceeding, the evidence of record does not distinguish the proffered position as unique from or more complex than other construction manager positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

To begin with, the record does not credibly demonstrate exactly what the Beneficiary will do on a day-to-day basis such that complexity or uniqueness can even be determined. That is, while the Petitioner claims that the position will focus on "engineerial [*sic*] professional duties," the Petitioner does not demonstrate how the construction engineer's duties described require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty, or its equivalent, is required to perform them. On appeal, the Petitioner insists that the Beneficiary will be employed as a construction engineer, rather than a construction manager, but does not provide any additional information specifically pertaining to the actual duties of the proffered position. For example, the Petitioner previously indicated that the Beneficiary would devote more than half of his time to inspecting project sites and maintaining compliance with the safety-assurance plan. However, these duties are not sufficient to demonstrate that the proffered position requires the theoretical and practical application of a body of highly specialized knowledge.

The Petitioner claims that the Beneficiary is well qualified for the position, and references his qualifications. However, the test to establish a position as a specialty occupation is not the education or experience of a proposed beneficiary, but whether the position itself requires at least a bachelor's degree in a specific specialty, or its equivalent. 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. The Petitioner did not submit any evidence of previous or current employees in the same position as the Beneficiary's proffered position. Therefore, the Petitioner has not satisfied 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.

The Petitioner asserts that the job duties of the proffered position are specialized and complex. We have reviewed the Petitioner's description of duties for the proffered position. Although the Petitioner generally refers to the proffered position as "highly demanding and specialized," we find that the Petitioner has not sufficiently developed relative specialization and complexity as an aspect of the proffered position. The Petitioner only provides a generic description of duties and responsibilities, including "[i]nspect[ing] project sites," "[m]onitor[ing] progress," and "[a]nticipat[ing] and resolv[ing] problems encountered in the field to eliminate costly rework or retesting." We recognize that the Petitioner desires an employee who can successfully manage its construction projects, however the Petitioner has not established that the described duties require more than general proficiency in the construction management field. The Petitioner has not demonstrated 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).

Because the Petitioner has not satisfied one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it has not demonstrated that the proffered position qualifies as a specialty occupation.

IV. CONCLUSION

The appeal must be dismissed because the Petitioner did not establish that the proffered position is a specialty occupation.

ORDER: The appeal is dismissed.

Cite as *Matter of A-C-, LLC*, ID# 222749 (AAO Apr. 19, 2017)