



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

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

MATTER OF T-C-S-, INC.

DATE: APR. 28, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a software development and consulting firm, seeks to temporarily employ the Beneficiary as a 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 of the California Service Center denied the petition, concluding that the record did not establish that: (1) the proffered position qualifies as a specialty occupation; and (2) specialty occupation work will be available for the Beneficiary throughout the duration of the requested H-1B validity period.

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

The Petitioner indicated that the Beneficiary would be employed in the proffered position on an in-house project for its direct client, [REDACTED]. In its letter of support, the Petitioner provided the following list of job duties for the proffered position:

- Research, design and develop computer software systems, in conjunction with hardware choices, for medical, industrial, communications, scientific, engineering, commercial and financial applications which require use of advanced computational and quantitative methodologies;
- Apply principles and techniques of computer sciences and quantitative methodology & techniques to determine feasibility of design within time and cost constraints;
- Analyze the communications, informational, database and programming requirements; plan, develop, design, test and implement software programs for engineering applications and highly sophisticated network systems;
- Design, program and implement software application packages customized to meet specific needs;
- Review existing computer systems to determine compatibility with projected or identified needs; research and select appropriate system, including ensuring forward compatibility of existing systems;
- Review, repair and modify software programs to ensure technical accuracy and reliability of programs;

- Train users on use of software applications and computer systems developed; provide trouble shooting and debugging support.

In response to the Director's request for evidence (RFE), the Petitioner provided a brief list of job duties for the proffered position, accompanied by the percentage of time the Beneficiary would devote to each, as follows:

Requirement Gathering and Analysis	12%
Prepare Functional Test Specifications and Process Design Documents	10%
Design the Test Plans	15%
Develop the Test Scripts	20%
Coordinate with Development Team to Test the Application	5%
Data Migration to New Application	15%
Create or maintain database of known Testing Issues	4%
Fix Testing Issues	5%
Participate in product design reviews to provide input on functional requirements, product designs, schedules or potential problems	4%
Review Testing documentation to ensure technical accuracy, compliance or completeness, or to mitigate risks	10%

Also in response to the RFE, the Petitioner provided a letter from [REDACTED] describing the assigned project and listing the job duties of the proffered position as follows:

- Run EDI software systems; Review and Test all EDI transaction processing output and other applications systems;
- Review software documentation to ensure technical accuracy, compliance, or completeness, or to mitigate risks;
- Identify, analyze, and document problems with program function, output, online screen, or content;
- Define and execute replicable software verification test procedures to determine if documented requirements and established standards have been met;
- Compile test reports that provide comprehensive details of completed testing;
- Design and develop Requirement Traceability Matrix that projects the QA estimates with task details and man power details. Develop Test Strategy document that provides various tasks and functionality related to the end product;
- Provide support for preparing test cases, test execution and reporting. Plan and coordinate tests, and work with team to prioritize work from functional and technical perspective;
- Involved in designing in Quality Assurance process by authoring test cases pertaining to System Integration, functional testing, Performance Testing and Acceptance Testing;

- Work with development on prioritizing defects found and certify applications to Production after functional and Performance testing. Work with business and stake holders for product certification for User Acceptance Testing;
- Identify software defects and Investigate customer issues as needed[.]

The Petitioner stated that the minimum entry requirement for the proffered position is at least a bachelor's degree in computer science, engineering, or a related field. In its letter, [REDACTED] stated that the minimum entry requirement for the proffered position is a bachelor's degree or equivalent; [REDACTED] did not identify a specific specialty or field of study as a requirement for the bachelor's degree.

III. SPECIALTY OCCUPATION

Upon review, we have determined that the Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation.¹ Specifically, the record does not establish that the job duties require an educational background, or its equivalent, commensurate with a specialty occupation.²

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 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.³

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 Programmers" corresponding to the Standard Occupational Classification code 15-1131.⁴

¹ Although some aspects of the regulatory criteria may overlap, we will address each of the criteria individually.

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.

³ All of our references are to the 2016-17 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.

⁴ The Petitioner classified the proffered position at a Level I wage (the 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 I wage rate is generally appropriate for positions for which the Petitioner expects the Beneficiary to have a basic understanding of the occupation. This wage rate indicates: (1) that

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

Most computer programmers have a bachelor's degree in computer science or a related subject; however, some employers hire workers with an associate's degree. Most programmers specialize in a few programming languages.

Education

Most computer programmers have a bachelor's degree; however, some employers hire workers who have an associate's degree. Most programmers get a degree in computer science or a related subject. Programmers who work in specific fields, such as healthcare or accounting, may take classes in that field to supplement their degree in computer programming. In addition, employers value experience, which many students gain through internships.

Most programmers learn a few computer languages while in school. However, a computer science degree gives students the skills needed to learn new computer languages easily. During their classes, students receive hands-on experience writing code, testing programs, fixing errors, and doing many other tasks that they will perform on the job.

To keep up with changing technology, computer programmers may take continuing education and professional development seminars to learn new programming languages or about upgrades to programming languages they already know.

Licenses, Certifications, and Registrations

Programmers can become certified in specific programming languages or for vendor-specific programming products. Some companies require their computer programmers to be certified in the products they use.

Bureau of Labor Statistics, U.S. Dep't of Labor, *Occupational Outlook Handbook*, Computer Programmers (2016-17 ed.).

The *Handbook* indicates that most computer programmers have a bachelor's degree in computer science or a related subject; however, it also reports that some employers hire workers with an associate's degree. *See id.* That is, the *Handbook* reports that individuals, who have less than a

the Beneficiary will be expected to perform routine tasks that require limited, if any, exercise of judgment; (2) that she will be closely supervised and her work closely monitored and reviewed for accuracy; and (3) that she will receive specific instructions on required tasks and expected results. U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://flcdatcenter.com/download/NPWHC_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.*

bachelor's degree in a specific specialty, or its equivalent, can obtain computer programmer 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 computer programmers 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 "15-1131.00 - Computer Programmers," <https://www.onetonline.org/link/summary/15-1131.00> (last visited Apr. 26, 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 the 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)).

As previously discussed, the Petitioner has not established that its proffered position is one for which the *Handbook*, or another authoritative source, reports a 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.

In support of this criterion, the Petitioner submitted copies of advertisements for several positions all entitled Programmer Analyst. While some of the advertisements generally state that a bachelor's degree in computer science, engineering, business, or related fields is required, they also require years of experience (1-5) in addition to the bachelor's degree; and several even require a master's degree for eligibility.⁵ The Petitioner here has designated the proffered position as a wage Level I on the LCA (the lowest of four assignable wage levels), a wage level for an entry-level position that only requires a basic understanding of the occupation, which is in contrast to most of the advertised positions that are for more senior positions. Further, even 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.

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.

While the Petitioner may believe that the position meets this prong of the regulations, we note, however, the record lacks evidence supporting the Petitioner's claim. For example, the Petitioner designated the proffered position as an entry-level position within the occupational category by selecting a Level I wage.⁶ This designation, when read in combination with the evidence presented and the *Handbook's* account of the requirements for this occupation, suggests that the particular

⁵ We also note that one of the advertisements states that the education requirement is "preferred but not necessary."

⁶ The Petitioner's designation of this position as a Level I, entry-level position undermines its claim that the position is particularly complex, specialized, or unique compared to other positions *within the same occupation*. Nevertheless, a Level I wage-designation does not preclude a proffered position from classification as a specialty occupation, just as a Level IV wage-designation does not definitively establish such a classification. In certain occupations (e.g., doctors or lawyers), a Level I, entry-level position would still require a minimum of a bachelor's degree in a specific specialty, or its equivalent, for entry. Similarly, however, a Level IV wage-designation would not reflect that an occupation qualifies as a specialty occupation if that higher-level position does not have an entry requirement of at least a bachelor's degree in a specific specialty, or its equivalent. That is, a position's wage level designation may be a relevant factor but is not itself conclusive evidence that a proffered position meets the requirements of section 214(i)(1) of the Act.

position is not so complex or unique that the duties can only be performed an individual with bachelor's degree or higher in a specific specialty, or its equivalent.⁷

Also, 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 involves focusing on research, analysis, and design of computer-based solutions for defined, scientific, or engineering problems, the Petitioner does not demonstrate how the programmer analyst'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.

For instance, here, the Petitioner stated that the proffered position requires a bachelor's degree in computer science, engineering, or a related field. However, the Petitioner's client, [REDACTED] for whom the Beneficiary will be performing work in the proffered position, did not identify a specific specialty or field of study required for the position. While the Petitioner identified certain fields which may be beneficial, or even essential, in performing certain duties of a programmer analyst position, the Petitioner has not demonstrated how an established curriculum of the related 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 Petitioner claims that the Beneficiary is well qualified for the position, and references her 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.

In response to the RFE, the Petitioner stated that it included a list of employees in similar positions, along with degree certificates and recent pay stubs, as evidence that it normally requires a bachelor's degree for the position. The Petitioner further stated that all of the listed employees have different educations, but a minimum of a bachelor's degree in a related field and have all been approved for

⁷ The evidence of record does not establish that this position is significantly different from other positions within the occupational category such that it refutes the *Handbook's* information to the effect that some courses are advantageous to obtaining such a position, but not specifying that the degree must be in a specific specialty.

programmer analyst positions. However, we note that documentary evidence of this information was not submitted.

The Petitioner also submitted two of its job advertisements for Programmer Analyst positions to demonstrate that it normally requires a bachelor's degree in a specific specialty for the proffered position. Of the advertisements submitted, one requires a bachelor's degree, or equivalent, in computer science, engineering (any), or a related field, plus two years of experience; and the other does not list any education or experience requirements within the advertisement. Given that one position does not provide information about the educational requirements and the other requires two years of experience in addition to a bachelor's degree, it appears that the one advertised position with relevant information is for a more senior position than that of the proffered position. Again, the Petitioner has designated the proffered position as a wage Level I on the LCA (the lowest of four assignable wage levels), a wage level for an entry-level position that only requires a basic understanding of the occupation, which is in contrast to the internal position advertised that is for a more senior position. As such, we cannot determine that the proffered position is the same or similar to the advertised internal positions such that we can conclude that the Petitioner normally requires a bachelor's degree in a specific specialty, or its equivalent for this position.

Accordingly, 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 refer to our earlier comments and findings with regard to the implication of the Petitioner's designation of the proffered position in the LCA as a Level I wage, and hence one not likely distinguishable by relatively specialized and complex duties. We have also reviewed the Petitioner's description of duties for the proffered position and [REDACTED] version submitted in response to the RFE. While we understand that the Beneficiary must have technical knowledge in order to perform these duties, the Petitioner has not sufficiently explained how these duties require the theoretical and practical application of a body of highly specialized knowledge, and the 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. Upon review of the totality of the record, the record does not include probative evidence that the duties require more than technical proficiency in the computer programming field. 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).

As the Petitioner has not established that it satisfies any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position qualifies as a specialty occupation.

Finally, we also find that the record of proceedings lacks sufficient evidence that the Petitioner has H-1B caliber work for the Beneficiary for the period of employment requested in the petition. It is incumbent upon the Petitioner to demonstrate it has sufficient work to require the services of a person with at least a bachelor's degree in a specific specialty, or its equivalent, to perform duties at a level that requires the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty for the period specified in the petition.

On the Form I-129, the Petitioner requested that the Beneficiary be granted H-1B classification from October 1, 2016, to September 2, 2019. The Petitioner submitted its Master Service Agreement (MSA) with [REDACTED] the client for which the Beneficiary will be assigned to work, stating that the agreement will remain effective from March 16, 2016, until it is terminated by either party. However, the specific Statement of Work (SOW) between the Petitioner and [REDACTED] for the specific project assigned to the Beneficiary, lists the start date of the project as August 15, 2016, and the end date as December 31, 2018. The listed end date falls short of the Beneficiary requested validity period by approximately nine months.

In response to the RFE, the Petitioner submitted a letter from [REDACTED] specifically addressing the project for which the Beneficiary will be assigned and specifically naming the Beneficiary for assignment to said project. The letter first states that the "[d]uration of the project will be for a period of 25 months with a possible extension," and later states that "the duration of this project is ongoing in duration and expected to exceed three years."

Here, the Petitioner's SOW with its client, combined with the letter from its client, indicates that the project assigned to the Beneficiary in the proffered position will exist for, at most, 30 months. Although the client's letter states that the Beneficiary will be working on an "ongoing project," and that there will be "a possible extension" beyond 25 months, we cannot conclude that the proffered position will continue to exist for the duration of the requested H-1B status period. The petition will be denied for this additional reason.

V. CONCLUSION

The appeal must be dismissed because the Petitioner did not establish that: (1) the proffered position qualifies as a specialty occupation; and (2) specialty occupation work will be available for the Beneficiary throughout the duration of the requested H-1B validity period.

ORDER: The appeal is dismissed.

Cite as *Matter of T-C-S-, Inc.*, ID# 397093 (AAO Apr. 28, 2017)