The Petitioner, a computer staffing company, seeks to temporarily employ the Beneficiary as an “IT consultant” 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 Petitioner did not establish that the Beneficiary is qualified to serve in a specialty occupation position in accordance with the applicable statutory and regulatory provisions.

In its appeal, the Petitioner submits additional evidence and asserts that the Beneficiary is qualified to serve in a specialty occupation position.

We are required to follow long-standing legal standards and determine first, whether the proffered position qualifies as a specialty occupation, and second, whether a beneficiary was qualified for the position at the time the nonimmigrant visa petition was filed. Cf. Matter of Michael Hertz Assoc., 19 I&N Dec. 558, 560 (Comm’r 1988). In the instant case, the record of proceedings does not establish that the proffered position qualifies as a specialty occupation. Therefore, the Director’s decision will be withdrawn and the petition will be remanded for review and entry of a new decision.

I. PROFFERED POSITION

The Petitioner stated that the Beneficiary will serve as an IT consultant on an in-house project.¹ According to the Petitioner, the Beneficiary would service on a project that was expected to

¹ The “Employment Offer Terms and Conditions” letter submitted with the Form I-129, Petition for a Nonimmigrant Worker, states that the Beneficiary is being offered the position of programmer analyst, not IT consultant. The record lacks a sufficient explanation for the inconsistency.
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conclude in December 2017. Nevertheless, the Petitioner requested that the Beneficiary be granted H-1B classification until December 2018.

In response to the request for evidence (RFE), the Petitioner confirmed the project is expected to end in late 2017 or early 2018. It provided the following job duties for the position:

75% of Time Allocated to:
1. Perform analysis, design, development, testing, and implementation of new data changes and user requests; utilizing experience with Client Server Technologies such as Java, JSP, Oracle SOA, Remedy, EJB, HTML, and STRUTS.
2. Strong database knowledge – database objects and structures, relational query building, data models, data marts and data provisioning, Oracle SQL and PL/SQL for data assessment and analytics.
3. Identify and perform unit tests using TDD approach.
4. Utilize Agile methodologies to complete all development activities on time and within budget.
5. Manage deliverables to meet milestone reviews and scheduled releases.
6. Utilize SQL skills and experience with TopLink, EclipseLink, JDBC, WebLogic and Oracle database.
7. Peer review other developers’ work for quality.
8. Write system design and application code documentation.
9. Perform job functions in accordance with established project standards and processes.
10. Will be working for a fast growing data solution team, developing cutting edge software that would help decrease optimal time for data processing.
11. Work closely with the technical team to shape the future tasks of the assignment and it’s software.
12. Work closely with in-house developers, offshore team to clarify specifications, create designs, code and review design and code.

15% of Allocated Time:
1. Will be working for a fast growing data solutions team, developing cutting edge software that would help decrease optimal time for data processing.
2. Work closely with the technical team to shape the future tasks of the assignment and its software.
3. Work closely with in-house developers, offshore team to clarify specifications, create designs, code and review design and code.

10% of Time Allocated to:
1. Providing Updates to technical manager with bi-weekly project status updates, including any technical development needs.
2. Participate in technical education coursework and/or professional seminar training as directed by Business Management Manager.

According to the Petitioner, the proffered position requires a bachelor’s degree in computer science, or a related technical discipline, or its equivalent.

II. SPECIALTY OCCUPATION

Although not addressed in the Director’s decision, we conclude that the record as presently constituted does not establish that the proffered position qualifies for classification as a specialty occupation. Accordingly, the Director should review this issue on remand.

A. Legal Framework

Section 214(i)(l) of the Act, 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.

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2 The Petitioner submitted documentation in support of 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.
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).

B. Analysis

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

1. Variances in the Petitioner’s Description

The Petitioner provided multiple job descriptions for the proffered position. In response to the RFE, the Petitioner submitted a letter listing the Beneficiary’s responsibilities while working on a project, which focus on developing a website. For example, the Petitioner stated the Beneficiary will “create website layout/user interface”; “responsible for maintaining, expanding, and scaling our site”; “cooperate with web designers to match visual design intent”; “[utilize] web server technologies;” and, “security setting and hack prevents.”

The Petitioner also submitted a job description with the percentage of time to be spent on the duties, however, the tasks provided above are not included – and the description does not have an emphasis on website development and maintenance. The Petitioner did not provide an explanation for the variances in the job descriptions.

We are unable to reconcile the Petitioner’s claims about the Beneficiary’s responsibilities. The record does not establish the substantive nature of the work to be performed by the Beneficiary, which therefore precludes a finding that the proffered position satisfies 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 entry into 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 perform a comprehensive analysis of the evidence provided pursuant to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).³

³ Although some aspects of the regulatory criteria may overlap, we will address each of the criteria individually.
2. 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)5 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 15-1131.6 We reviewed the Handbook’s subchapter entitled “How to Become a Computer Programmer,” which states, in pertinent part, that “some employers hire workers with an associate’s degree.”7 The Handbook does not indicate that a position by virtue of falling under the occupational category “Computer Programmers” satisfies the requirements for a specialty occupation.

In the instant matter, the Petitioner has not provided documentation from a probative source to substantiate its assertion regarding the minimum requirement for entry into this particular position. Thus, the Petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

3. 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

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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.

5 The Petitioner is required to submit a certified LCA to us to demonstrate that it will pay an H-1B worker the higher of either the prevailing wage for the occupational classification in the “area of employment” or the actual wage paid by the employer to other employees with similar experience and qualifications who are performing the same services. See Matter of Simeio Solutions, LLC, 26 I&N Dec. 542, 545-46 (AAO 2015).

6 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 Beneficiary will be expected to perform routine tasks that require limited, if any, exercise of judgment; (2) that he will be closely supervised and his work closely monitored and reviewed for accuracy; and (3) that he 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://tlcdatacenter.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.

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.

a. 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 two letters. 8 The first letter is from a recruiter at a company established in 2004 with 23 employees. The second letter is from the human resources manager at a computer consulting company established in 1997 with 27 employees.

The writers claim to hire computer programmers. The writers do not, however, provide any information about the number of people that they currently or in the past hired as computer programmers, nor did they describe the job duties and day-to-day responsibilities for these positions. The writers did not include information about the complexity of the job duties, supervisory duties (if any), independent judgment required or the amount of supervision received. Accordingly, it is unclear whether the duties and responsibilities of these positions are the same or similar to the proffered position. The record also lacks evidence supporting the writers’ statements and, without more, the letters lack sufficient information to demonstrate that the companies “routinely employ and recruit only degreed individuals.” See id.

The Petitioner has not provided sufficient evidence to establish that a bachelor’s degree in a specific specialty, or its equivalent, is common to the industry in parallel positions among similar

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8 We observe that portions of the wording of the letters match virtually verbatim, including grammatical and punctuation errors. When letters are worded the same (and include identical errors), it indicates that the words are not necessarily those of the authors and may cast some doubt on the letters’ validity.
organizations. Thus, the Petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

b. 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.

In support of its assertion that the proffered position qualifies as a specialty occupation, the Petitioner submitted job descriptions for the proffered position and information regarding its business operations. However, 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.

Moreover, the Petitioner’s designation of this position as a Level I, entry-level position located within the “computer programmers” occupational category does not support 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 an advanced 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.

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

4. 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 record must establish that a petitioner’s stated degree requirement is not a matter of preference for high-caliber candidates but is necessitated instead by performance requirements of the position. See Defensor v. Meissner, 201 F.3d at 387-88. Were we limited solely to reviewing the Petitioner’s
claimed self-imposed requirements, any individual with a bachelor’s degree could be brought to the United States to perform any occupation as long as the Petitioner created a token degree requirement. *Id.* Evidence provided in support of this criterion may include, but is not limited to, documentation regarding the Petitioner’s past recruitment and hiring practices, as well as information regarding employees who previously held the position.

In response to the RFE, the Petitioner submitted evidence relevant to 13 individuals, including their credentials and payroll documentation. In reviewing, the 2015 Form W-2, Wage and Tax Statement, submitted for 9 out of the 13 individuals, it appears that some wages vary considerably from the offered wage. For example, three individuals received salaries over $74,000, including one individual earning $88,847.60 for the year. In addition, three individuals received wages which are much lower than the offered wage, such as $45,000 and $38,150. Without further clarification from the Petitioner, it appears that these individuals’ salary varies considerably from the offered wage of $60,000. Accordingly, aside from job title, it is unclear whether the responsibilities of these individuals are the same or similar to the proffered position.

That is, the Petitioner does not explain or document the duties and responsibilities of these positions and how their knowledge compares to the proffered position, nor does it articulate the body of highly specialized knowledge required for these positions. The record lacks evidence establishing that their work has the same or similar substantive responsibilities, duties, and performance requirements as the proffered position.

The Petitioner was established in 2005 and currently has 46 employees. The Petitioner did not provide the total number of people it has employed to serve in the proffered position. Consequently, it cannot be determined how representative the Petitioner’s claim regarding 13 individuals (over a 12 year period of time) is of the Petitioner’s normal recruiting and hiring practices.

The Petitioner has not persuasively established that it normally requires at least a bachelor’s degree in a specific specialty, or its equivalent, for the position. Therefore, the Petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

5. 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.

Although the Petitioner generally refers to the Beneficiary’s duties as “specialized,” we find that the Petitioner has not sufficiently developed relative specialization and complexity as an aspect of the proffered position. The proposed duties have not been described with enough detail to show that they are more specialized and complex than other computer programmer positions that are not usually associated with at least a bachelor’s degree in a specific specialty, or its equivalent. The
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Petitioner does not establish how the generally described duties elevate the proffered position to a specialty occupation. We also incorporate our earlier discussion and analysis regarding the duties of the proffered position, and the designation of the position in the LCA as a Level I position, and not as the higher Level III (referring to “special skills or knowledge”) or Level IV (referring to “complex or unusual problems”) wage levels. For the reasons discussed above, the evidence of record does not meet 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.

III. CONCLUSION

The Director’s decision will be withdrawn as the present record does not establish that the Petitioner has met the threshold requirement that the proffered position is a specialty occupation, as section 214(i)(1) of the Act requires. Because the Director did not address this deficiency, we will remand this matter to the Director for further action and entry of a new decision.

ORDER: The decision of the Director is withdrawn. The matter is remanded for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Cite as Matter of I-T-, Inc., ID# 654772 (AAO Aug. 21, 2017)