



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

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

MATTER OF S-I-, INC.

DATE: JULY 27, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a computer 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 Vermont Service Center denied the petition, concluding that the evidence of record does 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 the decision.¹

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

¹ On appeal, the Petitioner asserts that the Director did not provide it with an opportunity to address the Director's concerns. Notably, the Director may deny a petition if the evidence does not demonstrate eligibility. 8 C.F.R. § 103.2(b)(8).

In the instant case, however, the Director, in her discretion, issued a request for evidence (RFE), notifying the Petitioner that the evidence submitted was insufficient to establish eligibility and provided the Petitioner with an opportunity to supplement the record. The Director stated that the Petitioner could submit any evidence that it believed would establish specialty work for the Beneficiary. In response, the Petitioner submitted several documents, including evidence that raised additional concerns. For instance, the Petitioner stated to the Director that the Beneficiary would be employed onsite at an office property that it owned. Yet, it submitted documentation showing that [REDACTED] – a distinct and separate entity – owned the office property. The Petitioner provided no explanation of any relationship between itself and [REDACTED] thus, *inter alia*, calling into question whether the Beneficiary's work would be onsite or offsite. The Director was not required to issue another RFE. *Id.* Rather, the burden is on the Petitioner to establish eligibility for the benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012).

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 stated that the Beneficiary will serve as a “programmer analyst.” In a letter submitted with the initial petition, the Petitioner provided the following description of the Beneficiary’s duties:

As a Programmer Analyst, [the Beneficiary] will be assigned to provide software development and programming services for [the Petitioner’s] [REDACTED] or its [REDACTED]. During his assignment, [the Beneficiary] will be involved in the analysis, design, development, re-engineering and implementation of

software applications. [The Beneficiary] will utilize his technical skills and professional experience on C#, N-Hibernate, ADO.Net, WWF, ASP.Net, MVC, JQuery and other Client/Server techniques.

Either independently or as a team member, [the Beneficiary] will be responsible for determining client requirements, performing system analysis and design, program coding, implementation, documentation, and maintenance support as required by the client. [The Beneficiary] will prepare technical reports, user and instructional manuals as required by the Project Manager and will also provide on-site/offsite maintenance and support to the client on various customized system packages, including debugging, modification, fine tuning and code organization.

In the same letter, the Petitioner stated that the position requires a bachelor's degree or equivalent to perform the job duties.

III. ANALYSIS

For the reasons set out below, we have determined that the Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation.² Specifically, the record (1) does not describe the position's duties with sufficient detail; and (2) does not establish that the job duties require an educational background, or its equivalent, commensurate with a specialty occupation.³

A. Description of the Duties

A crucial aspect of this matter is whether the Petitioner has described the duties of the proffered position such that we may discern the nature of the position. The Petitioner has not done so here. For example, it did not provide information with regard to the order of importance or frequency of occurrence (e.g., regularly, periodically, or at irregular intervals) with which the Beneficiary will perform the duties. Thus, the record does not specify which tasks are major functions of the proffered position.

Further, the duties themselves are vague. For instance, the Petitioner claims that the Beneficiary will be "involved" in various aspects of software applications, but the term "involved" lacks sufficient information about the Beneficiary's specific role and the complexity of the task. According to the Petitioner, the Beneficiary will also "utilize" certain skills and experience; however, the Petitioner does not state how this will translate to specific duties. The Petitioner reports that the Beneficiary will "[e]ither independently or as a team member" be responsible for various tasks and "will prepare" reports and manuals as required by the project manager. Yet these statements lack

² Although some aspects of the regulatory criteria may overlap, we will address each of the criteria individually.

³ 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.

adequate information to determine how much independent judgement is required from the Beneficiary - and the amount of supervision he will receive.

The Petitioner must substantiate that it has H-1B caliber work for the Beneficiary. Here, the Petitioner has not established the substantive nature of the work to be performed by the Beneficiary, which 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 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.

B. Position Requirements

The Petitioner has provided inconsistent information regarding the minimum requirements for the proffered position. The Petitioner initially stated that the proffered position requires an individual with a bachelor's degree or equivalent. The Petitioner did not provide any further specifications. We interpret the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. However, the Petitioner did not indicate a bachelor's degree in a specific specialty (or its equivalent) was required for the position.

In a letter submitted with the appeal, the Petitioner states (on page four) that the skills for the position are associated with a bachelor's degree in computer engineering. Later, the Petitioner claims (on page 5) that that the position requires a degree in computer science, engineering, information technology or a closely related field.

The Petitioner did not provide an explanation for the variances in the requirements. The Petitioner must establish eligibility at the time of filing the petition. 8 C.F.R. § 103.2(b)(1). It may not make material changes to a petition in an effort to make a deficient petition conform to U.S. Citizenship and Immigration Services (USCIS) requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

Thus, for the above reasons, the petition cannot be approved. 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).⁴

⁴ We hereby withdraw the Director's statement that the position of programmer analyst is traditionally considered a specialty occupation. The Director does not cite to any authoritative or objective source to support this statement.

C. 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.⁵

On the labor condition application (LCA),⁶ the Petitioner designated the proffered position under the occupational category "Computer Programmers" corresponding to the SOC code 15-1131.⁷ Thus, 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." Bureau of Labor Statistics, U.S. Dep't of Labor, *Occupational Outlook Handbook*, Computer Programmers (2016-17 ed.). Thus, the *Handbook* does not support the Petitioner's assertion that a bachelor's degree is required for entry into this occupation. Rather, the *Handbook* reports that the occupation accommodates less than a bachelor's degree in a specific specialty.

On appeal, the Petitioner cites to the DOL's Occupational Information Network (O*NET) summary report. Without explanation, the Petitioner repeatedly references the occupation "Computer Systems Analysts" rather than "Computer Programmers." O*NET identifies these occupations as distinct and separate. As the record lacks an explanation for this inconsistency, we must question the accuracy of the information provided by the Petitioner, and whether the Petitioner's statements are correctly attributed to this particular Beneficiary and position.

The summary report for "Computer Programmers" provides general information regarding the occupation; however, it does not support the Petitioner's assertion regarding the educational

⁵ 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.

⁶ The Petitioner states on the LCA that it is requesting certification for 60 computer programmers to work onsite. If the Petitioner hires 60 additional workers, its workforce will increase by over 40%. The record lacks evidence to demonstrate that the Petitioner will need or have sufficient work for the onsite services of 60 computer programmers for the requested validity period.

⁷ The Petitioner classified the proffered position at a Level II wage. 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. DOL's wage-level guidance specifies that a Level II designation is reserved for positions involving only moderately complex tasks requiring 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://flcdatacenter.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.*

requirements for these positions. For example, the Specialized Vocational Preparation (SVP) rating cited within O*NET's Job Zone designates this occupation as 7 < 8. An SVP rating of 7 to less than ("<") 8 indicates that the occupation requires "over 2 years up to and including 4 years" of training. While the SVP rating indicates the total number of years of vocational preparation required for a particular position, it is important to note that it does not describe how those years are to be divided among training, formal education, and experience – and it does not specify the particular type of degree, if any, that a position would require.⁸

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).

D. 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. Furthermore, the Petitioner has not offered evidence from an industry professional association, or from firms or individuals in the industry, indicating such a degree is a minimum requirement for entry into the position. Consequently, the Petitioner has not met the first prong.

⁸ For additional information, see the O*NET Online Help webpage available at <http://www.onetonline.org/help/online/svp>.

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.

In support of the petition, the Petitioner provided information regarding the proffered position and its business operations. In the appeal, the Petitioner claims that it requires "more" than the basics, that it requires a mix of programming skills and techniques.

When discussing H-1B employment, the Petitioner's description must be comprehensive enough to properly ascertain the minimum educational requirements necessary to perform those duties. While a few related skills and techniques may be beneficial 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 Petitioner's job description lacks sufficient details establishing, for instance, the complexity or uniqueness of the job duties, supervisory duties (if any), independent judgment required, or the amount of supervision received. The Petitioner has not distinguished the proffered position as more complex or unique from other positions that can be performed by persons without such a degree.

Further, the Petitioner has designated the proffered position as a Level II position on the LCA.⁹ 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 position is not so complex or unique that the duties can only be performed by an individual with bachelor's degree or higher in a specific specialty, or its equivalent.¹⁰

The Petitioner claims that the Beneficiary is well-qualified for the position, and references the Beneficiary's education and experience as evidence that the proffered position is a specialty occupation. However, the test to establish a position as a specialty occupation is not the education or

⁹ The Petitioner's designation of this position as a Level II position undermines its claim that the position is particularly complex, specialized, or unique compared to other positions *within the same occupation*. Nevertheless, a Level II 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 low level position would still require a minimum of a bachelor's degree or higher 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.

¹⁰ 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 a bachelor's degree or higher in a specific specialty (or its equivalent) is required.

experience of a proposed beneficiary, but whether the position itself requires at least a bachelor's degree in a specific specialty, or its equivalent. Here, 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. Thus, it cannot be concluded that the Petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

E. 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 USCIS 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.

On appeal, the Petitioner does not offer arguments or evidence to establish that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position. Therefore, it has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

F. 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 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 II 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).

IV. CONCLUSION

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.¹¹

ORDER: The appeal is dismissed.

Cite as *Matter of S-I, Inc.*, ID# 623016 (AAO July 27, 2017)

¹¹ In the appeal, the Petitioner repeatedly references *Residential Finance Corp. v. USCIS*, 839 F. Supp. 2d 985 (S.D. Ohio 2012). The record, however, lacks evidence establishing that the facts of the instant petition are analogous to those in *Residential Finance*. Moreover, we agree with the proposition that “[t]he knowledge and not the title of the degree is what is important” as long as a petitioner satisfies all of the statutory and regulatory provisions for a specialty occupation.