



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

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

MATTER OF [REDACTED]

DATE: JUNE 14, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, an adult day program, seeks to temporarily employ the Beneficiary as a “special education teacher” 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 had not demonstrated that the Beneficiary is qualified to perform services in a specialty occupation.

On appeal, the Petitioner submits a letter and asserts that the Director’s conclusion was erroneous, noting that the Beneficiary is qualified to perform the duties of the proffered position by virtue of her foreign degree which is equivalent to a U.S. bachelor’s degree in elementary education.

We conduct *de novo* review on appeal, and note that a beneficiary’s credentials for the proffered position are relevant only when we find the position to be a specialty occupation.¹ As we will discuss below, the record of proceedings does not establish that the proffered position qualifies as a specialty occupation. Thus, we will remand the matter to the Director for further review of the record and to issue a new decision.

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:

¹ *Cf. Matter of Michael Hertz Assocs.*, 19 I&N Dec. 558, 560 (Comm’r 1988) (“The facts of a beneficiary’s background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation].”).

- (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 its letter of support, the Petitioner stated that it “operates an Adult Day Program that provides training program[s] for developmentally disabled adult consumers/students.” The Petitioner claimed that the Beneficiary will teach developmentally disabled adults between the ages of 18 and 59, and provided the following overview of the duties of the proffered position:

- Develop and maintain programs for self help and self care skills; develop and implement the program to assist the consumers/students with the ability to interact with others, making one's needs known and responds to instructions; oversee the direct care staff in the implementation of the skill development program, as well as the program budget,

TIME TO BE SPENT: 15%

- Develop and implement a program for consumers/students' self advocacy and employment skills; develop and implement a program pertaining to community integration skills such as accessing community services; provide leadership in module making and design for skills training for consumers/students' business development program;

TIME TO BE SPENT: 15%

- Develop behavior management techniques to help improve behaviors of the consumers/students; participate in module development and implementation for each client's behavioral development, necessary for day program management. [D]evelop a program to improve the consumers/students social and recreational skills;

TIME TO BE SPENT: 15%

- Develop and Implement Individual Program Plan curricula; provide individualized instructions for both the consumers and for the staff members who directly care for them; directly deliver individual and group learning experience to assist each consumer/student served in obtaining his / her IPP objective.

TIME TO BE SPENT: 30%

- Gather daily data, consolidate and analyze the data for each client to determine and facilitate the appropriate level of services necessary for each individual's social, mental and intellectual needs; participate in consumer/student's assessment, planning and evaluation process.

TIME TO BE SPENT: 15%

- Coordinate progress with physicians, psychologist, parents, community care workers etc.; assist in the development of detailed patient plans; assist in pre-admission evaluations of prospective clients to determine the level of ability and determine interest in ability to participate in the education and skill development programs.

TIME TO BE SPENT: 10%

Regarding the educational requirements for the proffered position, the Petitioner stated that "a Bachelor's degree with concentration in Education, or social work or related field is required."

III. ANALYSIS

Upon review of the record in its totality and for the reasons set out below, we determine that the Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation.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. 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.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 "Special Education Teachers, All Other," corresponding to the Standard Occupational Classification code 25-2059.⁶

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

³ 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.

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

⁵ The Petitioner is required to submit a certified LCA 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, 545-546 (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 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://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.*

Preliminarily, we note that the Director found the proffered position akin to that of a special education teacher, and concluded that a degree in special education was required to perform the duties of such a position. The Director relied on the 2015-2016 edition of the *Handbook*, which provides an overview of the educational and certification requirements for special education teachers employed in public or private school settings.

However, the Petitioner operates an adult day center and provides vocational, social, and personal development training. The Petitioner specifically states in its letter of support that it “is not primarily an education institute.” Further, it states that a state certification or license is not required to perform the duties of the proffered position as its position does not focus on the instruction of individuals in grades K-12. It appears, therefore, that the Director incorrectly classified the proffered position as that of a special education teacher in a public or private school, which differs from the Petitioner’s classification of the proffered position here.⁷ Thus, we withdraw the Director’s findings with regard to the educational requirements for the proffered position.

Turning now to whether the proffered position here is a specialty occupation, we reviewed the *Handbook* regarding the occupational category “Special Education Teachers, All Other.” While the *Handbook* is a career resource offering information on hundreds of occupations, there are occupational categories which are not covered in detail by the *Handbook* (instead it only includes summary data⁸), as well as occupations for which the *Handbook* does not provide any information. Bureau of Labor Statistics, U.S. Dep’t of Labor, *Occupational Outlook Handbook*, Data for Occupations Not Covered in Detail (2016-17 ed.).

The *Handbook* does not provide a detailed narrative account for this occupational category, but provides summary data. The *Handbook* states that the typical entry-level education for this occupation is a bachelor’s degree, but does not indicate a specific specialty. Thus, the *Handbook* does not support the claim that the occupational category here is one for which normally the minimum requirement for entry is a baccalaureate degree (or higher) in a specific specialty, or its equivalent. Moreover, the Petitioner has not provided documentation from another probative source to substantiate its assertion regarding the minimum requirement for entry into this particular position. Thus, the Petitioner has not satisfied the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

⁷ The Director appears to have considered the proffered position as that of a special education teacher in one of the alternate occupational categories applicable only to those individuals employed in public or private schools: 25-2052 (Kindergarten and Elementary School); 25-2053 (Middle School); and 25-2054 (Secondary School). Here, the proffered position was classified under 20-2059 to distinguish the position from one within the public or private school sectors.

⁸ The occupational categories for which the *Handbook* only includes summary data includes a range of occupations, including for example, postmasters and mail superintendents; agents and business managers of artists, performers, and athletes; farm and home management advisors; audio-visual and multimedia collections specialists; clergy; merchandise displayers and window trimmers; radio operators; first-line supervisors of police and detectives; crossing guards; travel guides; agricultural inspectors, as well as others.

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 establish 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 discussed, the Petitioner has not established that its proffered position is one for which the *Handbook*, or other independent, authoritative source, reports a requirement for at least a bachelor’s degree in a specific specialty, or its equivalent. Thus, we incorporate by reference the previous discussion on the matter. Also, there are no submissions from the industry’s professional association indicating that it has made a degree a minimum entry requirement. Furthermore, the Petitioner did not submit any letters or affidavits from similar firms or individuals in the Petitioner’s industry to establish that such firms “routinely employ and recruit only degreed individuals.”

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

2. Second Prong

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

Here, the evidence of record does not credibly demonstrate relative complexity or uniqueness as aspects of the proffered position. Specifically, it is unclear how the special education teacher 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. For instance, the Petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties of the proffered position. While related courses may be beneficial in performing certain duties, the evidence of record does not demonstrate 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 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 evidence of record 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 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 generally Defensor*, 201 F.3d at 387-88. 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.

The record of proceeding does not contain sufficient evidence demonstrating the Petitioner's hiring history for the proffered position. As the record of proceedings does not demonstrate that the Petitioner normally requires at least a bachelor's degree in a specific specialty or its equivalent for the proffered position, the Petitioner has not satisfied 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.

We reviewed the Petitioner's statements regarding the proffered position and its operations, noting that it provides "vocational, social, and personal development training to prepare its consumers/students for transition into competitive and supported employment." However, relative specialization and complexity have not been sufficiently developed by the Petitioner as an aspect of the proffered position.

We note the Petitioner's designation of the position in the LCA as a Level I position (the lowest of four assignable wage-levels) relative to others within the same occupational category.⁹ 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).

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

Absent a determination that the proffered position is a specialty occupation that requires at least a baccalaureate or higher degree in a specific specialty or its equivalent, it cannot be determined whether the Beneficiary possesses that degree or its equivalent.¹⁰ As the Petitioner was not previously accorded the opportunity to address the deficiencies in the record regarding the specialty occupation nature of the proffered position, we will remand the matter for further review of this issue. The Director may request any additional evidence considered pertinent to the new determination.

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* [REDACTED], ID# 354160 (AAO June 14, 2017)

⁹ The Petitioner's designation of this position as a Level I, entry-level position undermines its assertion 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.

¹⁰ We observe that one of the evaluations of the Beneficiary's foreign education states that the Beneficiary's education is equivalent to a U.S. bachelor's degree in elementary education. The record does not sufficiently demonstrate that the Beneficiary's degree is related to the proposed duties, which require her to work with adults between the ages of 18 and 59.