



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

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

MATTER OF N-C-P-

DATE: JUNE 22, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a circus, seeks to temporarily employ the Beneficiary as a “performer” 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. Upon *de novo* review, we will dismiss the appeal.

I. LEGAL FRAMEWORK

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

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

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) largely restates this statutory definition, but adds a non-exhaustive list of fields of endeavor. In addition, the regulations provide that the proffered position must meet one of the following criteria to qualify as a specialty occupation:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

8 C.F.R. § 214.2(h)(4)(iii)(A). We have consistently interpreted the term “degree” to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proposed position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing “a degree requirement in a specific specialty” as “one that relates directly to the duties and responsibilities of a particular position”); *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000).

II. PROFFERED POSITION

In the H-1B petition, the Petitioner stated that the Beneficiary will serve as a “performer.” In its letter of support, the Petitioner stated that the Beneficiary “will be a performing circus artist in school assembly shows. [The Beneficiary] will be performing his juggling acts both solo and ensemble as well as performing on stilts and presenting his comedy pantomime chair act.”

In response to the Director’s request for evidence (RFE), the Petitioner provided the following job duties for the position:

The general duties of [the Petitioner’s] field artist (performer) are to perform and teach a variety of circus skills in public and private facilities in accordance with the structure and format of [the Petitioner’s] programs. . . .

Working in tandem with professional educators, [the Petitioner’s] field staff must be able to clearly articulate program goals to administrators, teachers, and parents. . . .

The specific duties and responsibilities of the field artists are to present each of the programs that are offered by the [Petitioner].

....

Additionally, [the Petitioner’s] employees may periodically be called upon to represent our organization by presenting at industry conferences, performing showcases or other events important to our continued success as an organization.

In addition, the Petitioner provided a description of the various programs it offers, such as assemblies, artist-in residence programs, student circus, and special events.

According to the Petitioner, the position requires a bachelor's degree in theater, performing arts, or a related field.

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.¹ 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.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)⁴ submitted in support of the H-1B petition, the Petitioner designated the proffered position under the occupational category "Entertainers and Performers, Sports and Related Workers, All Other" corresponding to the Standard Occupational Classification code 27-2099.⁵

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

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.

³ All of our references are to the 2016-2017 edition of the *Handbook*, which may be accessed in print or 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. Nevertheless, to satisfy the first criterion, 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 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).

⁵ 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

We note that there are occupational categories which are not covered in detail by the *Handbook*. The *Handbook* suggests that for at least some of the occupations, little meaningful information could be developed.

The text of the *Handbook* regarding the occupational category “Entertainers and Performers, Sports and Related Workers, All Other” is as follows:

All entertainers and performers, sports and related workers not listed separately.

- 2014 employment: **30,000**
- May 2016 median annual wage: **Data unavailable**
- Projected employment change, 2014–24:
 - Number of new jobs: **2,100**
 - Growth rate: **7 percent (As fast as average)**
- Education and training:
 - Typical entry-level education: **No formal educational credential**
 - Work experience in a related occupation: **None**
 - Typical on-the-job training: **Short-term on-the-job training**

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 support the assertion that at least a bachelor’s degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into this occupational category. According to the *Handbook*, the occupational category “Entertainers and Performers, Sports and Related Workers, All Other” falls into the group of occupations for which no formal education is needed for entry into these positions.

When the *Handbook* does not support the proposition that a proffered position is one that meets the statutory and regulatory provisions of a specialty occupation, it is the Petitioner’s responsibility to provide probative evidence (e.g., documentation from other objective, authoritative sources) that supports a finding that the particular position qualifies as a specialty occupation. For our determination, we will consider and weigh all of the evidence submitted.

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://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.*

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).

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 contemplates 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 often considered by us 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 other 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 attesting that such firms “routinely employ and recruit only degreed individuals.” Nor is there any other evidence relevant to this prong. Thus, based upon a complete review of the record of proceedings, we find that 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.

In support of its assertion that the proffered position qualifies as a specialty occupation, the Petitioner described the proffered position and its business operations. On appeal, the Petitioner asserts that “the position is unique and highly specialized as it requires advanced knowledge in these areas so that the performer can effectively teach [the] same to students.” In addition, the Petitioner states that the position “is more of a “circus education specialist.”

We reviewed the record in its entirety, but the evidence does not establish eligibility under this criterion. 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 Petitioner’s job descriptions, suggests that the particular 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. While related courses may be beneficial in performing certain duties of the position, the Petitioner has not demonstrated how an established curriculum of 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 the Beneficiary’s qualifications. However, the test to establish a position as a specialty occupation is not the education or experience of a proposed beneficiary, but whether the position itself requires at least a bachelor’s degree in a specific specialty, or its equivalent. The Petitioner did not sufficiently develop relative complexity or uniqueness as an aspect of the duties of the position, and it did not identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. Accordingly, the Petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

C. Third Criterion

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor’s degree in a specific specialty, or its equivalent, for the position.

The 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 a petitioner’s

⁶ The Petitioner’s designation of this position as a Level I, entry-level position undermines its claim that the position is particularly complex, unique, and specialized 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.

claimed self-imposed requirements, an organization could bring any individual with a bachelor's degree to the United States to perform any occupation as long as the petitioning entity 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 Director's RFE, the Petitioner submitted biographic statements about three individuals and a resume for a fourth individual, but it did not provide copies of the individual's academic diplomas or transcripts. The Petitioner also provided payment information for these individuals.⁷ Importantly, at least two of the individuals are not employees according to their Form 1099, Miscellaneous Income, statements. Therefore, without more, the Petitioner has not established the relevancy of the information to the matter here.

Moreover, the Petitioner's business operations were established in 1984, approximately 32 years prior to the filing of the petition. However, 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 these few individuals over a 32 year period is of its 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 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 it meets this criterion; however, relative specialization and complexity have not been sufficiently developed by the Petitioner as an aspect of the proffered position. That is, the proposed duties have not been described with sufficient specificity to establish that they are more specialized and complex than other positions in the occupational category that are not usually associated with at least a bachelor's degree in a specific specialty, or its equivalent. We also reiterate our earlier comments and findings regarding the implications of the position's wage level

⁷ Specifically, the documentation shows the following:

Form W-2, Wage and Tax Statement	Wages: \$7,403
Form 1099, Miscellaneous Income	Nonemployee compensation: \$3,500
Form 1099, Miscellaneous Income	Nonemployee compensation: \$3,540
Printouts for payments	Varying amounts

designation on the LCA. Thus, 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. BENEFICIARY'S QUALIFICATIONS

As the Petitioner did not demonstrate that the proffered position is a specialty occupation, we need not fully address other issues evident in the record. That said, we wish to identify an additional issue to inform the Petitioner that this matter should be addressed in any future proceedings.⁸

Specifically, the Petitioner did not submit an evaluation of the Beneficiary's foreign degree or sufficient evidence to establish that his degree is equivalent to a U.S. bachelor's degree in a specific specialty. As such, since evidence was not presented that the Beneficiary has at least a U.S. bachelor's degree in a specific specialty, or its equivalent, the petition could not be approved even if eligibility for the benefit sought had been otherwise established.

V. CONCLUSION

For the reasons discussed above, the Petitioner has not established eligibility for the benefit sought.

ORDER: The appeal is dismissed.

Cite as *Matter of N-C-P-*, ID# 521010 (AAO June 22, 2017)

⁸ In reviewing a matter *de novo*, we may identify additional issues not addressed below in the Director's decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003) ("The AAO may deny an application or petition on a ground not identified by the Service Center.").