



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

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

MATTER OF T-K-, INC.

DATE: MAY 9, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, an advertising agency, seeks to temporarily employ the Beneficiary as a "copy writer" 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 asserts that the Beneficiary is qualified to serve in a specialty occupation position.

Upon *de novo* review, the Director's decision will be withdrawn and the petition will be remanded for entry of a new decision.

I. BENEFICIARY'S QUALIFICATIONS

The Director denied the petition, concluding that the Petitioner did not establish that the Beneficiary is qualified to perform the services in a specialty occupation. However, a beneficiary's credentials to perform a particular job are relevant only when the job is found to qualify as a specialty occupation. U.S. Citizenship and Immigration Services (USCIS) is 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) ("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]."). In the instant case, the record does not establish that the proffered position qualifies as a specialty occupation. Thus, we will remand the matter to the Director for review and issuance of a new

decision that first takes into account whether or not the proffered position is a specialty occupation before considering whether or not the Beneficiary is qualified for the position.

II. PROFFERED POSITION

The Petitioner indicates that the proffered position is for a part-time (25 hours per week) copywriter, and includes the following job duties for the position, in verbatim:¹

The beneficiary will write original material for corporate clients especially for TV/Web Commercials and prepares advertising copy in Japanese and English for business establishments in order to boost the sale of their goods and services, to promote their message, and to enhance their image. Specifically, she is performing the following duties:

Create and edit scripts in English and Japanese for TV and Web commercials, which is are major aspects of the services [REDACTED] provides for its domestic and international clients.

Write and edit engaging and appealing copy in both the English and Japanese languages for a variety of marketing materials, including advertisements, sales letters, brochures, publicity releases, flyers, direct mails, catalogs, trade journal articles, and related items for both print and online resources.

Develops and writes, creative copy to combine and highlight a company's corporate identity to drive sales. This includes firm brochures and commercial prose, commercial scripts, web dialogue, company catalogs, any product promotional materials, and describing services to unify a client's brand;

...

Managing creative copy projects from original concept to completion for multiple advertising medium to increase clients' customer base and market share;

Not only will she be the copy write, but she will supervise freelance copywriters in overload situations, collaborate with outside art directors/designers during the creative process, and provides project oversight to meet all deadlines and present finished products of the highest pedigree, that is pertinent to all sides involved. In order to prepare original copy that effective and efficiently promote goods and services, she will interact with clients and creative directors to obtain information regarding the key features of products, and, conveys the style, and projects the image desired by the client companies.

¹ We have not included the Petitioner's descriptions of the Beneficiary's actual skills within this section.

According to the Petitioner, the position requires a candidate with a bachelor's degree in a "field relating to English, Japanese, linguistics or [a] related [field]."

III. SPECIALTY OCCUPATION

Although not addressed in the Director's decision, the record as presently constituted does not establish that the proffered position qualifies for classification as a specialty occupation.

A. Legal Framework

Section 214(i)(1) 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.

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 submitted sufficient evidence to demonstrate that the proffered position qualifies as a specialty occupation.² Specifically, the record does not establish that the job duties require an educational background, or its equivalent, commensurate with a specialty occupation.³

1. Labor Condition Application

We first turn to the labor condition application (LCA)⁴ submitted in support of the H-1B petition, in which the Petitioner designated the proffered position under the occupational category “Writers and Authors” corresponding to the Standard Occupational Classification (SOC) code 27-3043 at a Level I wage. The Petitioner reports that a candidate must be able to converse with clients and develop advertisements, brochures, commercials, and marketing materials in Japanese and English in order to qualify for the proffered position. According to the Petitioner, the duties of the proffered position are more specialized and refined than other positions within the occupation.

The U.S. Department of Labor (DOL) guidance states that wage levels should be determined only after selecting the most relevant occupational code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer’s job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation. Factors to be considered when determining the wage level for a position include the complexity of the job duties, as well as the levels of judgment, supervision, and understanding required to perform the job duties.

DOL guidance states that a Level I (entry) 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.⁵ According to the DOL, a Level I wage should be considered for research fellows, workers in training, or internships.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 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, 545-546 (AAO 2015).

⁵ 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.

⁶ *Id.*

Therefore, the Petitioner's assertion that the proffered position requires a significant level of responsibility and expertise (including managing creative copy projects from original concept to completion and supervising freelance copywriters, as well as a foreign language requirement) does not appear to be reflected in the wage level chosen by it on the LCA.⁷ The statements regarding the claimed level of complexity, independent judgment, managerial duties, project oversight, and understanding required for the proffered position, as well as the additional language requirements, appear to be materially inconsistent with the certification of the LCA for a Level I position.⁸ This conflict challenges the overall credibility of the petition in establishing the nature of the proffered position and in what capacity the Beneficiary will be employed. Therefore, we are precluded from finding that the proffered position is a specialty occupation. Nevertheless, we will now analyze the evidence of record.

2. First Criterion

We turn now 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 DOL's *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁹

The Petitioner designated the position under the occupation "Writers and Authors" on the LCA, therefore, we reviewed the subchapter of the *Handbook* entitled "How to Become a Writer or Author." The *Handbook* reports, in relevant part, that "[a] college degree in English, journalism, or communications is generally required for a salaried position as a writer or author," many employers prefer candidates with these three degrees, and "[a] bachelor's degree is typically needed for a full-time job as a writer."¹⁰ The *Handbook* continues by stating that excellent writing skills are essential for these positions, and that writers and authors can come from a variety of backgrounds and

⁷ A petitioner must distinguish its proffered position from others within the occupation through the proper wage level designation to indicate factors such as complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties. *Id.* Through the wage level, the Petitioner reflects the job requirements, experience, education, special skills, or other requirements and supervisory duties. *Id.*

⁸ A language requirement other than English in a job offer generally is considered a special skill for all occupations (with the exception of Foreign Language Teachers and Instructors, Interpreters, and Caption Writers). In the instant case, the Petitioner has not established that its foreign language requirement has been reflected in the wage-level for the proffered position.

⁹ 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 we regularly review the *Handbook* on the duties and educational requirements of the wide variety of occupations that it addresses. To satisfy the first criterion, however, the burden of proof remains on the Petitioner to submit sufficient evidence to support a finding that its particular position would normally have a minimum, specialty degree requirement, or its equivalent, for entry.

¹⁰ For additional information regarding the occupational category "Writers and Authors," see the *Handbook*, Writers and Authors, available at <https://www.bls.gov/ooh/media-and-communication/writers-and-authors.htm#tab-4>.

experiences as long as they demonstrate strong writing skills. According to the *Handbook*, writers can obtain job experience through many sources, including high school and college newspapers, magazines, radio and television stations, advertising and publishing companies, or nonprofit organizations.

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. Rather, the *Handbook* states that a bachelor's degree is typically required for a full-time job and that most employers prefer workers who have a bachelor's degree in English, journalism, or communications. However, a *preference* for such a degree does not establish that it is normally the minimum requirement for entry into the particular position. Further, the *Handbook* discusses the degrees and employer preferences within the context of full-time employment, whereas the Petitioner is seeking to employ the Beneficiary on a part-time basis. Moreover, the *Handbook* emphasizes the importance of having strong writing skills and obtaining experience for entry into this occupation.

The Petitioner otherwise 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)(I).

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 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.

a. 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)).

The Petitioner has not submitted evidence with respect to this criterion.¹¹ Without more, 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 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 descriptions of the proffered position and general information regarding its business operations. While the Petitioner may believe that the position meets this prong of the regulations, the record lacks evidence supporting the Petitioner's claim. Further, the Petitioner designated the proffered position as an entry-level position within the occupational category by selecting a Level I wage.¹² 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 an individual with bachelor's degree or higher in a specific specialty, or its equivalent.

The Petitioner claims that the Beneficiary is well-qualified for the position, and references her qualifications. However, the test to establish a position as a specialty occupation is not the education or experience of a proposed beneficiary, but whether the position itself requires at least a bachelor's degree in a specific specialty, or its equivalent. The Petitioner did not sufficiently develop relative complexity or uniqueness as an aspect of the duties of the position, and it did not identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. Accordingly, the Petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

¹¹ 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.

¹² The Petitioner's designation of this position as a Level I, entry-level position undermines its claim that the position is particularly complex, specialized, or unique compared to other positions *within the same occupation*. Nevertheless, a Level I wage-designation does not preclude a proffered position from classification as a specialty occupation, just as a Level IV wage-designation does not definitively establish such a classification. In certain occupations (e.g., doctors or lawyers), a Level I, entry-level position would still require a minimum of a bachelor's degree in a specific specialty, or its equivalent, for entry. Similarly, however, a Level IV wage-designation would not reflect that an occupation qualifies as a specialty occupation if that higher-level position does not have an entry requirement of at least a bachelor's degree in a specific specialty, or its equivalent. That is, a position's wage level designation may be a relevant factor but is not itself conclusive evidence that a proffered position meets the requirements of section 214(i)(1) of the Act.

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 Petitioner does not claim to meet this criterion and has not submitted 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).

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.

The Petitioner's description of the proposed duties of the position does not establish that the duties are more specialized and complex than positions that are not usually associated with at least a bachelor's degree in a specific specialty, or its equivalent. We also incorporate our earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a Level I position (of the lowest of four assignable wage-levels) relative to others within the occupational category. Without further evidence, the Petitioner has not demonstrated that its proffered position is one with specialized and complex duties as such a position within this occupational category would likely be classified at a higher-level, requiring a substantially higher prevailing wage.¹³

Although the Petitioner asserts that the nature of the specific duties is specialized and complex, the record lacks sufficient evidence to support this claim. Thus, the Petitioner has submitted inadequate probative evidence to satisfy the criterion of the regulations at 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

Based on the foregoing discussion, although the Director's decision will be withdrawn, the evidence of record as presently constituted does not establish that the petition is approvable. Accordingly, we will remand this matter to the Director for further action and entry of a new decision.

¹³ For example, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems" and requires a significantly higher wage. *Prevailing Wage Determination Policy Guidance, supra*, at 6-7.

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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 T-K-, Inc.*, ID# 526742 (AAO May 9, 2017)