



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

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

MATTER OF A-, INC.

DATE: MAY 16, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a 24-employee software development and computer programming services company, seeks to temporarily employ the Beneficiary as a "computer 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 California Service Center denied the petition, concluding that the Petitioner had not established that the proffered position is a specialty occupation.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the Director erred in her findings.

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 response to the Director’s request for evidence (RFE), the Petitioner submitted the following description of the Beneficiary’s duties:

Time spen[t] on duties – 40%

- Design, Analysis, Development, Testing, Deployment, Monitoring and Supporting of enterprise applications.
- High-level design documentation, requirements gathering, business analysis, software installation, software configuration and application development and maintenance activities.
- Designs and develops new software products or major enhancements.
- Responsible to deliver high quality software solutions while working with client’s delivery and output schedules with high performance and maintenance.
- Review, repair and modify software systems to ensure technical accuracy & reliability of programs using scientific analysis and mathematical models.
- Develop and maintain data and process models.
- Designs, develops, enhances, debugs, and implements software solutions.

Time spen[t] on duties – 40%

- Validating and testing models to ensure adequacy and reformulate models.

- Analyzing technology, resource needs, market demand to plan and assess the feasibility of project
- Correct errors by making appropriate changes and rechecking the program to ensure that the desired results are produced.
- Conduct trial runs of programs and software applications to be sure they will produce the desired information and that the instructions are correct.
- Review the existing applications design to suggest best practice development techniques to reduce the throughput of the applications and also configuration changes for high availability of applications.
- Responsible for end-to-end development of services which create innovative solutions and tools which match client specifications while maintaining a high level of client satisfaction.
- Resolves problems with software and responds to suggestions for improvements.

Time spent on duties – 20%

- Test applications and enhancements to the already existing applications/software as necessary
- Employ contemporary testing methods to ensure applications function properly and without error.
- Provide input regarding technical standards and customer requirements.
- Consult with hardware engineers and other engineering staff to evaluate interface between hardware and software and operational and performance requirements of overall system.
- Consult with customer concerning maintenance of software systems. May be required to co-ordinate installation of software system.
- Train on use of information systems and provide technical and de-bugging support.
- Perform systems analysis and problem resolution.

The Petitioner stated that the minimum education required for the performance of the position is a “Bachelor’s Degree in Computer Science, Computer Information Systems, or Engineering.”

III. ANALYSIS

The Petitioner has not demonstrated that it would employ the Beneficiary in a specialty occupation. Specifically, the record does not establish that the job duties require an educational background, or its equivalent, commensurate with a specialty occupation.¹

¹ 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.

In denying the petition, the Director stated that the Petitioner did not establish that the proffered position qualifies as a specialty occupation and that the Petitioner has sufficient work for the requested period of employment.² However, we find that the Petitioner has provided sufficient evidence to demonstrate that the Beneficiary will more likely than not be assigned to an internal project developing the company's proposed [Petitioner name] [REDACTED] software and that his work will not be driven by immediate client needs pursuant to a contract or work order. Therefore, the Director's conclusion as to this issue is withdrawn.

We do, however, concur with the Director that the proffered position does not qualify as a specialty occupation and we will perform a complete specialty occupation analysis under each of the four alternative criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) for the occupation of computer programmer, the occupation certified on the labor condition application (LCA).

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 LCA submitted in support of the H-1B petition, the Petitioner designated the proffered position under the occupational category "Computer Programmers" corresponding to the Standard Occupational Classification code 15-1131.⁴

The subchapter of the *Handbook* entitled "How to Become a Computer Programmer" states the following:

² The Director stated that absent evidence of work orders or agreements demonstrating the Beneficiary's work for clients, it had not established that specialty occupation work was available for the requested validity period.

³ 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.

⁴ 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. A Level II wage rate is generally appropriate for positions for which the Petitioner expects the Beneficiary to have a good understanding of the occupation, but who will only perform moderately complex tasks that require 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://fildatacenter.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.*

Most computer programmers have a bachelor's degree in computer science or a related subject; however, some employers hire workers with an associate's degree. Most programmers specialize in a few programming languages.

Education

Most computer programmers have a bachelor's degree; however, some employers hire workers who have an associate's degree. Most programmers get a degree in computer science or a related subject. Programmers who work in specific fields, such as healthcare or accounting, may take classes in that field to supplement their degree in computer programming. In addition, employers value experience, which many students gain through internships.

Most programmers learn a few computer languages while in school. However, a computer science degree gives students the skills needed to learn new computer languages easily. During their classes, students receive hands-on experience writing code, testing programs, fixing errors, and doing many other tasks that they will perform on the job.

To keep up with changing technology, computer programmers may take continuing education and professional development seminars to learn new programming languages or about upgrades to programming languages they already know.

Bureau of Labor Statistics, U.S. Dep't of Labor, *Occupational Outlook Handbook*, Computer Programmers, (2016-17 ed.).

According to the *Handbook*, the requirements to perform the duties of the computer programmer occupation incorporate a wide spectrum of educational credentials, including less than a bachelor's degree in a specific specialty. For example, the *Handbook* states that some employers hire workers who have an associate's degree. Furthermore, while the *Handbook's* narrative indicates that most computer programmers obtain a degree (either a bachelor's or associate's degree) in computer science or a related field, the *Handbook* does not report that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation.

In addition, the Occupational Information Network (O*NET) Summary Reports, referenced by the Petitioner, are also insufficient to establish that the proffered position qualifies as a specialty occupation normally requiring at least a bachelor's degree in a specific specialty, or its equivalent. O*NET OnLine does not state a requirement for a bachelor's degree for this occupation. Rather, it assigns this occupation a Job Zone "Four" rating, which groups it among occupations for which "most . . . require a four-year bachelor's degree, but some do not." O*NET OnLine Summary Report for "15-1131.00 – Computer Programmers," <http://www.onetonline.org/link/summary/15-1131.00> (last visited Apr. 24, 2017); O*NET OnLine Help – Job Zones, <http://www.onetonline.org/help/online/zones> (last visited Apr. 24, 2017). Further, O*NET OnLine does not indicate that four-year bachelor's degrees required by Job Zone Four

occupations must be in a specific specialty directly related to the occupation. Therefore, O*NET OnLine information is not probative of the proffered position being a specialty occupation.

The Petitioner has not provided sufficient documentation from a probative source to substantiate its assertion regarding the minimum baccalaureate degrees in a specific specialty required for entry into this particular position. 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 concentrates 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 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 another authoritative source, reports a requirement for at least a bachelor’s degree in a specific specialty, or its equivalent. We incorporate by reference the previous discussion on the matter.

In support of this criteria, the Petitioner provided six job announcements for positions with other companies. However, we are unable to determine that these companies are similar to the Petitioner. Although the Petitioner indicates the number of employees working for each of these companies, it does not articulate how this demonstrates their similarity to the Petitioner, particularly since the number of employees working for these companies varies from four to 48.⁵ Most of the announcements do not indicate the industry in which the prospective employer operates, whereas

⁵ The Petitioner indicates in the Form I-129 that it employs 24 individuals.

two others operate in dissimilar industries such as educational materials and emergency medicine. Although these job announcements state that a bachelor's degree in computer science or a related field is commonly required, there is no mention of bachelor's degrees in computer information systems or engineering, other degrees the Beneficiary contends would be sufficient. Further, consistent with the *Handbook*, one job announcement states that an associate's degree and prior experience would suffice. Accordingly, it is not possible to conclude from the provided advertisements that the positions are parallel to the proffered position in their duties and level of responsibility. The job advertisements do not establish that organizations similar to the Petitioner routinely employ individuals with degrees in a specific specialty, in parallel positions in the Petitioner's industry.

As the record does not include probative evidence that a "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, 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 this matter, the evidence of record does not distinguish the proffered position as unique from or more complex than other computer programmer positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

The Petitioner has designated the proffered position as a Level II position on the LCA, indicating that it is a position for an employee who has a good understanding of the occupation but who will only perform moderately complex tasks that require limited judgment. See U.S. Dep't of Labor, Emp't & Training Admin., *supra*. Therefore, it does not appear that the position is one with complex or unique duties relative to other computer programmer positions, as such a higher-level position would likely be classified at a Level III (experienced) or Level IV (fully competent) wage level, requiring a significantly higher prevailing wage.

We note that while a few related courses 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. Upon review, the record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

The Petitioner claims that the Beneficiary is well-qualified for the position, and references her 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 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).

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.

To satisfy this criterion, the record must establish that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. We must examine the actual employment requirements and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor*, 201 F.3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty, or its equivalent, as the minimum for entry into the occupation as required by section 214(i)(1) of the Act. According to the Court in *Defensor*, "To interpret the regulations any other way would lead to an absurd result." *Id.* at 388. If we were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position – and without consideration of how a beneficiary is to be specifically employed – then any beneficiary with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.*

In response to the Director's RFE, the Petitioner stated that it has "Five (5) individuals performing services in the capacity of a Computer Programmer Analyst." The Petitioner listed their names, titles, education levels, and provided supporting payroll and IRS W-2 Wage and Tax Statements confirming their employment. The list identified that these employees hold the equivalent of Bachelor's of Science and Master's degrees in mechanical engineering, electrical engineering, and computer science.

However, a list provided by the Petitioner reflects that only three of the five employees act in the capacity of "computer programmer analyst," while the other two employees are identified as "programmer analysts." The Petitioner has not explained or documented the difference between

these positions and their duties and responsibilities.⁶ Absent this evidence, we cannot conclude that all of the listed positions are the same as the proffered position. Further, the organizational chart also submitted in response to the Director's RFE reflects that it employs nine computer programmer analysts. The Petitioner has not resolved these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). As such, it appears that we have only been provided educational credentials for three of the company's nine computer programmer analysts. The Petitioner also did not submit information as to the duties and responsibilities of these three employees.

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 the job duties of the proffered position are specialized and complex. 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 Petitioner only provides a generic description of duties and responsibilities, including familiarity and experience with different technological platforms and applications it expects from the Beneficiary. The proposed duties have not been described with sufficient specificity 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. 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.

The Petitioner has not provided sufficient evidence that the duties, as generally described, require more than technical proficiency in the information technology field. The Petitioner has not demonstrated 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. The appeal will be dismissed for this reason.

⁶ An organizational chart submitted by the Petitioner also indicates there are positions titled "computer programmer analysts" and "programmer analysts."

Matter of A-, Inc.

IV. CONCLUSION

The appeal is dismissed because the Petitioner has not established that the proffered position is a specialty occupation.

ORDER: The appeal is dismissed.

Cite as *Matter of A-, Inc.*, ID# 523562 (AAO May 16, 2017)