



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

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

MATTER OF G- INC

DATE: OCT. 12, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

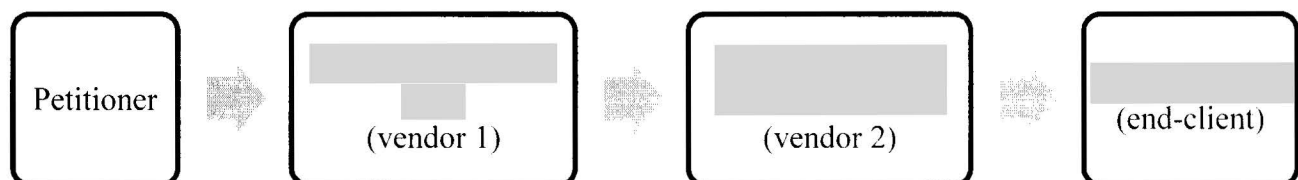
The Petitioner, an information technology consulting firm, seeks to temporarily employ the Beneficiary as a “programmer analyst” under the H-1B nonimmigrant classification for specialty occupations. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The H-1B program allows a U.S. employer to temporarily employ a qualified foreign worker in a position that requires both (a) the theoretical and practical application of a body of highly specialized knowledge and (b) the attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum prerequisite for entry into the position.

The Director of the California Service Center denied the Form I-129, Petition for a Nonimmigrant Worker, concluding that the record did not establish that: (1) the proffered position qualifies as a specialty occupation; and (2) the Petitioner would engage the Beneficiary in an employer-employee relationship.

In its appeal, the Petitioner asserts that the Director erred in denying the petition. Upon *de novo* review, we will dismiss the appeal.

I. PROFFERED POSITION

The Petitioner is a computer consulting company. In the petition, the Petitioner stated that the Beneficiary will serve as a “programmer analyst” assigned to its end-client’s place of business in [REDACTED] Ohio. According to the Petitioner, the path of contractual succession for the Beneficiary’s services is:



In its initial letter of support, the Petitioner described the job duties of the proffered position.¹ Thereafter, in response to the Director's request for evidence (RFE), the Petitioner provided a new job description, along with the approximate percentage of time the Beneficiary will spend on each duty as follows:

Activity	% Time
1. Design and deployment Application Virtualization with any application simulators development experience.	15%
2. Understanding clients systems and tools.	10%
3. Gathering User Requirements and moulding to FDD.	15%
4. Creating TDD from FDD.	15%
5. Developing the application enhancements or new applications using TDD.	15%
6. Creating WIRR and Creating UTP.	15%
7. Performing testing using UTP.	15%

In response to the RFE, the Petitioner also provided letters from each vendor. Both letters described the duties of the proffered position as follows:

1. Assessment of client applications
2. Gathering User Requirements for new functionality
3. Creating design documents for technical deliverables
4. Developing the enhancements or new application components
5. Creating unit test for enhancements
6. Performing testing activities

The end-client did not verify any of the duties or provide information about its expectations with regard to the Beneficiary's responsibilities.²

II. SPECIALTY OCCUPATION

We will first determine whether the record of proceedings establishes that the proffered position qualifies as a specialty occupation.

¹ We observe that the wording of the duties provided by the Petitioner for the proffered position is taken virtually verbatim from the Occupational Information Network (O*NET) OnLine Summary Report's list of tasks associated with the occupational category "Computer Systems Analysts." For additional information, see O*NET OnLine, available at <http://www.onetonline.org/link/summary/15-1121.00> (last visited Oct. 11, 2017).

² In response to the RFE, and again on appeal, the Petitioner (and vendor) specifically state that the end-client refuses to issue a letter and thus one is not available. Although a petitioner may always refuse to submit confidential commercial information if it is deemed too sensitive, a petitioner must also satisfy the burden of proof and runs the risk of a denial. *Cf. Matter of Marques*, 16 I&N Dec. 314 (BIA 1977).

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 at 387.

B. Analysis

For the reasons set out below, we have determined that the proffered position does not qualify as a specialty occupation.³ Specifically, the record (1) does not describe the position’s duties with

³ Although some aspects of the regulatory criteria may overlap, we will address each of the criteria individually.

sufficient detail; and (2) does not establish that the job duties require an educational background, or its equivalent, commensurate with a specialty occupation.⁴

1. Position Description

As recognized in *Defensor*, 201 F.3d at 387-88, it is necessary for the end-client to provide sufficient information regarding the proposed job duties to be performed at its location(s) in order to properly ascertain the minimum educational requirements necessary to perform those duties. In other words, as the employees in that case would provide services to the end-client and not to the petitioning staffing company, the Petitioner-provided job duties and alleged requirements to perform those duties were irrelevant to a specialty occupation determination. *See id.*

Here, the record lacks sufficient substantive documentation from the end-client regarding not only the specific job duties to be performed by the Beneficiary, but also information regarding whatever the client may or may not have specified with regard to the educational credentials of persons to be assigned to its project. The record does not contain sufficient probative documentation on this issue from (or endorsed by) [REDACTED] the company that will actually be utilizing the Beneficiary's services that establishes any particular academic requirements for the proffered position.

The Petitioner, thus, has not established the substantive nature of the work to be performed by the Beneficiary, which precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

Nevertheless, assuming, for the sake of argument, that the proffered duties as described in the record would in fact be the duties to be performed by the Beneficiary, we will analyze them and the evidence of record to determine whether the proffered position as described would qualify as a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A).

2. First Criterion

We turn first to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which requires that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for

⁴ 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.

entry into the particular position. We recognize the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁵

On the labor condition application (LCA)⁶ submitted in support of the H-1B petition, the Petitioner designated the proffered position under the occupational category "Computer Systems Analysts" corresponding to the Standard Occupational Classification (SOC) code 15-1121.⁷ The *Handbook* subchapter entitled "How to Become a Computer Systems Analyst" states, in pertinent part, that a bachelor's degree in a computer or information science field is common, although not always a requirement.⁸ According to the *Handbook*, some firms hire analysts with business or liberal arts degrees.⁹ It continues by stating that many analysts have technical degrees, but such a degree is not always a requirement – and that, in fact, many analysts have liberal arts degrees.¹⁰ The *Handbook* does not specify a degree level (e.g., associate's degree) for these business, technical, and liberal arts degrees.

In support of the petition, the Petitioner references DOL's Occupational Information Network (O*NET) summary report for "Computer Systems Analysts" listed as SOC code 15-1121.00. The summary report provides general information regarding the occupation; however, it does not support the Petitioner's assertion regarding the educational requirements for these positions.

We will first focus on the Specialized Vocational Preparation (SVP) rating. DOL designates the occupation "Computer Systems Analysts" as having an SVP 7 < 8. This indicates that the

⁵ All of our references are to the 2016-2017 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/ooh/>. We do not, however, maintain that the *Handbook* is the exclusive source of relevant information. That is, the occupational category designated by the Petitioner is considered as an aspect in establishing the general tasks and responsibilities of a proffered position, and 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.

⁶ 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, 545-46 (AAO 2015).

⁷ The Petitioner classified the proffered position at a Level II wage. We will consider this selection in our analysis of the position. The "Prevailing Wage Determination Policy Guidance" issued by the DOL provides a description of the wage levels. A Level II wage rate is generally appropriate for positions for which the Petitioner expects the Beneficiary to have attained, either through education or experience, 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://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.*

⁸ Bureau of Labor Statistics, U.S. Dep't of Labor, *Occupational Outlook Handbook*, Computer Systems Analysts (2016-17 ed.).

⁹ *Id.*

¹⁰ *Id.*

occupation requires “over 2 years up to and including 4 years” of training. While the SVP rating provides the total number of years of vocational preparation required for a particular position, it is important to note that it does not describe how those years are to be divided among training, formal education, and experience – and it does not specify the particular type of degree, if any, that a position would require.¹¹

Next we will address DOL’s designation in the summary report of the occupation as a Job Zone Four. Similar to the SVP rating, the summary report does not indicate that any academic credentials for Job Zone Four occupations must be directly related to the duties performed.

Finally, we note that the summary report provides the educational requirements of “respondents,” but does not account for 100% of the “respondents.” The respondents’ positions within the occupation are not distinguished by career level (e.g., entry-level, mid-level, senior-level). Additionally, the graph in the summary report does not indicate that the “education level” for the respondents must be in a specific specialty.

The Petitioner also refers to our unpublished decisions in support of its claim that the proffered position is a specialty occupation. The Petitioner has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decisions. While 8 C.F.R. § 103.3(c) provides that our precedent decisions are binding on all U.S. Citizenship and Immigration Services employees in the administration of the Act, unpublished decisions are not similarly binding.

In the instant matter, the record lacks sufficient evidence to support a finding that the position, as described, is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the Petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

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 casts its gaze upon the common industry practice, while the alternative prong narrows its focus to the Petitioner’s specific position.

¹¹ For additional information, see the O*NET Online Help webpage available at <http://www.onetonline.org/help/online/svp>.

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.

We generally consider the following sources of evidence to determine if there is such a common degree requirement: 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) (considering these “factors” to inform the commonality of a degree requirement)).

As already discussed, the Petitioner has not established that its proffered position is one for which the *Handbook* (or other independent, authoritative source) reports an industry-wide 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. In addition, there are no submissions from the industry’s professional association indicating that it has made a degree a minimum entry requirement.

In support of this criterion, the Petitioner submitted copies of job announcements placed by other employers. However, upon review of the documents, we find that the Petitioner’s reliance on the job announcements is misplaced.

First, we note that the job postings do not appear to involve organizations similar to the Petitioner. For example, the Petitioner is an information technology consulting firm, with 16 employees, whereas: one of the advertisements is for a company with 201-500 employees; a second advertisement is for a company with 51-200 employees providing services to banking, financial, entertainment, and insurance clients; and a third advertisement is for a company with 501-1,000 employees. The Petitioner did not supplement the record of proceedings to establish that these advertising organizations are similar to it.

When determining whether the Petitioner and the organization share the same general characteristics, such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). It is not sufficient for the Petitioner to claim that an organization is similar and conducts business in the same industry without providing a basis for such an assertion.

Second, the advertisements do not appear to be for parallel positions. For instance, all of the postings appear to be for more senior, experienced employment than the proffered position.¹² Moreover, some of the postings do not include sufficient information about the duties and responsibilities for the advertised positions. Thus, it is not possible to determine important aspects of the jobs, such as the day-to-day responsibilities, complexity of the job duties, supervisory duties (if any), independent judgment required or the amount of supervision received. Therefore, the Petitioner has not sufficiently established that the primary duties and responsibilities of the advertised positions are parallel to the proffered position.¹³

As the documentation does not establish that the Petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary.¹⁴ That is, not every deficit of every job posting has been addressed.

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.

We reviewed the Petitioner's statements regarding the proffered position; however, the Petitioner does not assert that it satisfies this prong of the second criterion. Further, the Petitioner has not sufficiently developed relative complexity or uniqueness as an aspect of the proffered position. Thus, the Petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

¹² For example, [REDACTED] requires a degree and 7 to 15 years of experience in application development using specified methodologies.

¹³ Even if all of the job postings indicated that a requirement of a bachelor's degree in a specific specialty is common to the industry in parallel positions among similar organizations (which they do not), the Petitioner has not demonstrated what statistically valid inferences, if any, can be drawn from the advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations. *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. *See id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

¹⁴ The Petitioner did not provide any independent evidence of how representative the job postings are of the particular advertising employers' recruiting history for the type of job advertised. As the advertisements are only solicitations for hire, they are not evidence of the actual hiring practices of these employers.

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.

In support of this criterion, the Petitioner submitted education credentials and evidence of employment for four of its employees; however, the Petitioner did not identify the position titles, job duties, or day-to-day responsibilities for these individuals. The Petitioner also did not submit any information regarding the complexity of the job duties, supervisory duties (if any), independent judgment required or the amount of supervision received. Accordingly, it is unclear whether the duties and responsibilities of these individuals were the same or similar to the proffered position.

The Petitioner also submitted a job advertisement from its website for a programmer analyst position. Notably, the advertisement lists different job duties for a different project than that of the proffered position. Furthermore, as the posting is not dated, it cannot be determined when it was created.¹⁵

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*, 201 F.3d at 387-88. Were we limited solely to reviewing a petitioner's 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.

We conclude that the Petitioner did not provide sufficient documentary evidence to support the assertion that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, directly related to the duties of the position. The Petitioner 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.

¹⁵ Evidence that the Petitioner creates after an RFE is issued will not be considered independent and objective evidence. Necessarily, independent and objective evidence would be evidence that is contemporaneous with the event to be proven and existent at the time of the director's notice.

The Petitioner asserts that the job duties of the proffered position are specialized and complex. We refer to our earlier comments and findings with regard to the implication of the Petitioner's designation of the proffered position in the LCA as a Level II wage, and hence one not likely distinguishable by relatively specialized and complex duties.¹⁶ We have also reviewed the job duties of the proffered position. While the position may require that the Beneficiary possess some skills and technical knowledge in order to perform these duties, the Petitioner has not sufficiently explained how these tasks require the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation. The record does not include sufficient probative evidence that the duties require more than technical proficiency in the field. Thus, 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.

III. EMPLOYER-EMPLOYEE RELATIONSHIP

We will now briefly address the issue of whether or not the Petitioner qualifies as an H-1B employer. As previously discussed, there is insufficient documentation evidencing what exactly the Beneficiary would do for the period of time requested. Given this specific lack of evidence, the Petitioner has not established who has or will have actual control over the Beneficiary's work or duties,¹⁷ or the condition and scope of the Beneficiary's services.¹⁸ In other words, the Petitioner has not established whether it has made a bona fide offer of employment to the Beneficiary based on the evidence of record or that the Petitioner, or any other company which it may represent, will have and maintain an employer-employee relationship with the Beneficiary for the duration of the requested employment period.¹⁹ See 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer"

¹⁶ Nevertheless, a low wage-designation does not preclude a proffered position from classification as a specialty occupation, just as a high wage-designation does not definitively establish such a classification. In certain occupations (e.g., doctors or lawyers), a Level II position would still require a minimum of an advanced 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.

¹⁷ The record contains discrepancies as to who will review the Beneficiary's work. For instance, the first itinerary submitted by the Petitioner listed the Beneficiary's supervisor as someone at the first vendor's company, who also has an e-mail address belonging to the first vendor. However, in its new itinerary submitted in response to the RFE, the Petitioner listed the Beneficiary's supervisor at the client site as someone employed by the second vendor, who also has an e-mail address belonging to the second vendor. In addition, both itineraries state that the Beneficiary will be reporting to [REDACTED] who is located at the petitioning company. However, the Petitioner's organizational chart shows the Beneficiary reporting to [REDACTED] vice president, who then reports to [REDACTED] director.

¹⁸ The agency made clear long ago that speculative employment is not permitted in the H-1B program. See, e.g., 63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998).

¹⁹ We note that the record contains contradicting information in regards to the Beneficiary's actual supervision while located at the client site, the actual duties to be performed by the Beneficiary, and the duration of the project for which

and requiring the Petitioner to engage the Beneficiary to work such that it will have and maintain an employer-employee relationship with respect to the sponsored H-1B nonimmigrant worker). Therefore, the appeal is dismissed for this additional reason.

IV. CONCLUSION

The appeal must be dismissed because the Petitioner did not establish that: (1) the proffered position is a specialty occupation; and (2) it would engage the Beneficiary in an employer-employee relationship.

ORDER: The appeal is dismissed.

Cite as *Matter of G- Inc*, ID# 788996 (AAO Oct. 12, 2017)