



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

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

MATTER OF C-P-S-, INC.

DATE: OCT. 19, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a pool and recreational services company, seeks to temporarily employ the Beneficiary as a “regional supervisor and trainer, lifeguarding” 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 record did 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 denying the petition. 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

The Petitioner seeks to employ the Beneficiary as a regional supervisor and trainer, lifeguarding. In response to the Director’s request for evidence (RFE), the Petitioner stated the Beneficiary would perform the following duties in the proffered position:

As an instructor/teacher, manage and implement the instruction of all Red Cross Lifeguarding, especially but not limited to new employees:

Duty	Time
develop lesson plans based upon his education/certifications	10%
manage lifeguarding classes both classroom as well as practically in field based upon his education/certifications	10%
rate and grade potential lifeguards and related roles based upon his education/certifications	8%
lecture in regards to lifeguarding and related duties, lecturing to clients and also lifeguarding candidates based upon his education/certifications	12%
recruit potential clients as well as lifeguards and related based upon his education/certifications	5%
communication with lifeguards in order to ensure adherence to guidelines for lifeguards based upon his education/certifications	7%
communication with clients regarding lifeguard duties and guidelines based upon his education/certifications	5%
manage lifeguards in regards to their knowledge and performance based upon his education/certifications	5%
review and master all changes in lifeguarding regulations, protocols,	10%

procedures and guidelines based upon his education/certifications and communicate these changes to clients and lifeguarding staff	
develop company lifeguarding policy memoranda based upon his education/certifications	10%
manage and implement training and supervision of all lifeguards in all proper pool procedure, guarding the pools, cleaning and maintaining the pools based upon his education/certifications	5%
manage and implement the training and supervision of all lifeguards in public relations and hospitality training using his education/certifications	3%
managing and coordinating instruction and training regarding health department regulations and requirements using his education/certifications	10%

According to the Petitioner, the proffered position requires a bachelor's degree in physical education or a related field.

### III. ANALYSIS

Upon review, we have determined that the Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation.<sup>1</sup> Specifically, the record does not establish that the job duties require an educational background, or its equivalent, commensurate with a specialty occupation.<sup>2</sup>

#### 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.

On the labor condition application (LCA),<sup>3</sup> the Petitioner designated the proffered position under the occupational category "Teachers and Instructors, All Other" corresponding to the Standard Occupational Classification code 25-3099.<sup>4</sup> We often look to the U.S. Department of Labor's (DOL)

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

<sup>2</sup> 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.

<sup>3</sup> 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).

<sup>4</sup> 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

*Occupational Outlook Handbook (Handbook)*, which is an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>5</sup> However, there are some occupations for which detailed profiles have not been developed, such as for the occupational category “Teachers and Instructors, All Other.”<sup>6</sup> The *Handbook* suggests that for at least some of the occupations, little meaningful information could be developed. Therefore, 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. Here, 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 casts its gaze upon the common industry practice, while the alternative prong narrows its focus to the Petitioner’s specific position.

### 1. First Prong

To satisfy this first prong of the second criterion, the Petitioner must establish that the “degree requirement” (i.e., a requirement of a bachelor’s or higher degree in a specific specialty, or its equivalent) is common to the industry in parallel positions among similar organizations.

We generally consider the following sources of evidence to determine if there is such a common degree requirement: whether the *Handbook* (or another independent, authoritative source) reports that the industry requires a degree; whether the industry’s professional association has made a degree

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the Beneficiary will be expected to perform routine tasks that require limited, if any, exercise of judgment; (2) that he 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. DOL, Emp’t & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf). A 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.*

<sup>5</sup> 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.

<sup>6</sup> For additional information, see <https://www.bls.gov/ooh/about/data-for-occupations-not-covered-in-detail.htm>.

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)).

The Petitioner has not established that its proffered position is one for which the *Handbook* (or other independent, authoritative sources) 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. Also, there are no submissions from the industry’s professional association indicating that it has made a degree a minimum entry requirement. Furthermore, the Petitioner did not submit any letters or affidavits from similar firms or individuals in the Petitioner’s industry to establish that such firms “routinely employ and recruit only degreed individuals.”

In support of this criterion, the Petitioner provided 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, one is a [REDACTED] organization providing community services for a specific county in New Jersey, one is a city in the United States with multiple recreation centers, and one is a community center providing a variety of community-wide physical fitness programs.

When determining whether the Petitioner and the organizations 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 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, some postings appear to be for more senior, experienced employment than the proffered position.<sup>7</sup> 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), and 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.

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<sup>7</sup> For instance: [REDACTED] requires a degree and three years of experience in teaching and supervising a wide range of aquatic programs for all age groups and skill levels; [REDACTED] requires a degree and three years of aquatic experience; and [REDACTED] requires a degree and two years of experience in supervising a community rich in lifeguarding and “ [REDACTED] ”

Third, some of the postings do not indicate that at least a bachelor's degree in a directly related specific specialty (or its equivalent) is required.<sup>8</sup> The job postings suggest, at best, that a bachelor's degree is sometimes required for these positions<sup>9</sup>, but a bachelor's degree in a *specific specialty* (or its equivalent) is not.<sup>10</sup>

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.<sup>11</sup> That is, not every deficit of every job posting has been addressed.

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).

## 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.

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).

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<sup>8</sup> As discussed, the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but a bachelor's degree in a specific specialty that is directly related to the duties of the position. See section 214(i)(1)(b) of the Act and 8 C.F.R. § 214.2(h)(4)(ii).

<sup>9</sup> The [REDACTED] advertisement is for a "pool deck supervisor" position; the [REDACTED] advertisement is for a "recreation supervisor – aquatics" position; and the [REDACTED] advertisement is for an "aquatics supervisor" position.

<sup>10</sup> It must be noted that 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").

<sup>11</sup> 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.

### 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 Petitioner was established in 1977 (38 years before the petition was filed). In the initial filing, the Petitioner stated that it has 100 employees, but it did not report the number of employees who currently or in the past were employed as a regional supervisor and trainer for lifeguarding. While the Petitioner submitted documentation regarding several individuals, it is important to note that none of them have the job title "regional supervisor and trainer, lifeguarding."<sup>12</sup> Further, none of the duties listed on the resumes for these other positions are the same or similar to those of the proffered position. 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 are the same or similar to the proffered position. Furthermore, although the Petitioner stated, in response to the RFE, that "all previous holders of [the Beneficiary's] role possessed the equivalent to a Bachelor's degree in Physical Education or a related field," the resumes indicate that one employee possessed a bachelor's degree in mathematics and secondary education, another employee possessed a bachelor's degree in fine arts with a master's degree of arts in transition special education, and a third employee possessed a bachelor's degree in biology.

Moreover, the Petitioner submitted an LCA, H-1B approval, and resume for a "director, swimming and lesson safety." However, the resume lists employment with the Petitioner as a "swim lesson program coordinator and pool manager" from 2009 to the present, and the listed duties for this position are also not the same or similar to those of the proffered position. Therefore, the evidence provided appears to be irrelevant to the instant matter.

The Petitioner also submitted a job advertisement for a "lifeguard liaison officer" position, listing a single responsibility: "require[d] to communicate with lifeguards to ensure adherence to state as well as internal guidelines for lifeguards in course of their duties." The advertisement indicates that the position requires a bachelor's degree in physical education or a related field and two years of experience. However, given that this job advertisement is for a different position with a different level of responsibility and duties, we cannot conclude that the Petitioner normally requires a bachelor's degree in a specific specialty, or its equivalent for the proffered 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.

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<sup>12</sup> The Petitioner submitted a resume for [REDACTED] indicating that she was employed by the Petitioner as a "pool manager" from 2004 to 2006 and as a "lifeguard instructor and safety director" from 2006 to 2010; a resume for [REDACTED] indicating that he was employed by the Petitioner as a "lifeguarding-first aid/CPR-AED instructor" from 2006 to the present; and a resume for [REDACTED] which does not list any employment with the Petitioner. None of the duties listed on the resumes are the same or similar to those of the proffered position.

*See Defensor v. Meissner*, 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.

The record, therefore, does not establish that the Petitioner normally requires at least a bachelor's degree in a specific specialty, or its equivalent, directly related to the duties of 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.

While the Petitioner provided a more detailed job description in response to the RFE, the description 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 reiterate 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 I (the lowest of four assignable wage-levels). Without further evidence, the Petitioner has not established that its proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level requiring a significantly higher prevailing wage.

The Petitioner has not demonstrated in the record that its proffered position is one with duties sufficiently specialized and complex to satisfy the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

#### IV. PREVIOUSLY APPROVED PETITION

On appeal, the Petitioner states that the U.S. Citizenship and Immigration Services (USCIS) had previously approved an H-1B petition on behalf of the Beneficiary. Prior approvals do not preclude USCIS from denying an extension of the original visa based on a reassessment of eligibility for the benefit sought. *See Tex. A&M Univ. v. Upchurch*, 99 F. App'x. 556 (5th Cir. 2004).

We are not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 597 (Comm'r 1988); *see also Sussex Eng'g, Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987). Furthermore, we are not bound to follow a contradictory decision of a service center. *La. Philharmonic Orchestra v. INS*, No. 98-2855, 2000 WL 282785, at \*2 (E.D. La. 2000).



*Matter of C-P-S-, Inc.*

## V. CONCLUSION

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.

**ORDER:** The appeal is dismissed.

Cite as *Matter of C-P-S-, Inc.*, ID# 821866 (AAO Oct. 19, 2017)