



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

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

MATTER OF T-S-ITG- LLC

DATE: OCT. 31, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, an information technology (IT) consulting services firm, seeks to employ the Beneficiary as a “software engineer” under the H-1B nonimmigrant classification for specialty occupations. *See* section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 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 evidence of record did not establish that the proffered position qualifies as a specialty occupation position, or that the Petitioner would have an employer-employee relationship with the Beneficiary.

On appeal, the Petitioner submits additional evidence and asserts that the Director erred denying the petition. Upon *de novo* review, we will dismiss the appeal.

I. SPECIALTY OCCUPATION

We will first address whether the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions.

A. 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).

B. Proffered Position

The Petitioner stated that the proffered position is a software engineer position.¹ In addition, the Petitioner stated that the Beneficiary would be assigned to its end-client’s place of business in [REDACTED] Montana, and that the Beneficiary would be working on a project identified as “[REDACTED]”.

In response to the Director’s request for evidence (RFE), the Petitioner submitted a letter from the end-client, which included the Beneficiary’s job duties in the proffered position as follows (verbatim):²

The Beneficiary will spend 60% of her time on the following Job Duties on Module 2, Module 3, Module 4, Module 6, Module 7 and Module 9:

- Develop test specifications for testing reader connectivity and configuration

¹ Throughout the record of proceedings, the Petitioner also references the proffered position as “software quality assurance engineer.”

² The end-client mistakenly and repeatedly references the Beneficiary in the feminine pronoun case in its letter. The record provides no explanation for this inconsistency. Thus, we must question the accuracy of the letter and whether the information provided is correctly attributed to this particular Beneficiary and position.

- Develop simulation data for passive tags for [REDACTED] use cases
- Develop diagnostics utilities to generate EPC codes and UCC codes and control serialized data
- Develop user interface tests using C# and .NET and document error codes and debug procedures.
- Create test documentation and black box test scenarios.
- Work with project delivery team to develop project acceptance criteria for client deployments.
- Write clear, complete, concise bug reports using appropriate details, call stacks, screenshots, and repro steps.
- Identify, review, and incorporate changes in web application, database and the documentation.
- Perform testing in multiple domains like functional, performance, stress and usability.
- Regress bug fixes and implement new test cases as needed.
- Proactively review test pass results and investigate the failures

The Beneficiary will spend 40% of her time on the following Job Duties on Module 2, Module 3, Module 4, Module 6, Module 7 and Module 9:

- Review and publish test cases on requirements gathering sessions.
- Execute successful model to enhance bandwidth and testing cycles.
- Record, assess and approve Tracking system issues, suggested ownership, priority and issues.
- Oversee defects to progress on time and stick to defect tracking standards.
- Manage QA environment on build and release management.
- Offer accurate status on defect information and metrics.
- Communicate at all levels, handle multiple projects and work on business critical solutions.
- Enhance testing capabilities guided by standard best practices, policies and procedures.
- Mentor QU analysts testing activities on test plan and test case development.
- Coordinate with business analysts and development teams to assess requirements and engage in project review and status meetings.
- Setup and manage communications between development teams.

The end-client letter also states that the position requires a bachelor's degree in computer science/applications, engineering, or another information technology related field of study.

Moreover, the Petitioner provided the same job description as the end-client and stated that the position requires "at least a Bachelor's degree or equivalent in Computer Science, Computer Information Systems, Computer Applications, Information Technology, Engineering (any), Math, Business, Commerce or other related technical field."

C. Analysis

For the reasons set out below, we have determined that the Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation.³ Specifically, the record does not establish that the job duties require an educational background, or its equivalent, commensurate with a specialty occupation.⁴

1. Requirements for the Position

As a preliminary matter, we find that the Petitioner has provided inconsistent statements regarding the minimum requirements for the proffered position. The table below summarizes the variances in the educational requirements.

Record of Proceedings	Minimum Requirements
Petitioner's Initial Letter of Support	Bachelor's degree in computer science, computer information systems, computer applications, information technology, engineering (any), math, business, commerce, or other related technical field
Petitioner's Job Posting	Master's degree in computer science, engineering, information technology, mathematics, physics, or a related field and six months experience
End-Client's Letter	Bachelor's degree in computer science/applications, engineering, or another information technology related field
Letter from [REDACTED]	Bachelor's degree in computer science, computer information systems, or a closely related field

The Petitioner did not provide an explanation for the variances in the requirements.

2. Bachelor's in Business

Furthermore, the Petitioner stated that a bachelor's degree in business is sufficient for the proffered position. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. There must be a close correlation between the required specialized studies and the position; thus, the mere requirement of a general degree, such as business, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Assocs.*, 19 I&N Dec. 558, 560 (Comm'r 1988) ("The mere requirement of a college degree for the sake of general education, or to obtain what an employer perceives to be a higher caliber employee, also does not establish eligibility."). Thus,

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

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.

while a general-purpose bachelor's degree in business may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *Royal Siam Corp.*, 484 F.3d at 147.⁵

3. Bachelor's Degree in Disparate Fields

Moreover, the Petitioner stated that a degree in one of several disparate fields (e.g., computer science, computer information systems, computer applications, information technology, engineering (any), math, business, commerce) is sufficient for the position. In general, provided the specialties are closely related, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty (or its equivalent)" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same.

A minimum entry requirement of degrees in disparate fields, however, would not meet the statutory requirement that the degree be "in *the* specific specialty (or its equivalent)," unless the Petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties.⁶ Section 214(i)(1)(B) of the Act (emphasis added). The Petitioner has not made this showing.

Nevertheless, we will analyze the evidence of record to determine whether the proffered position as described qualifies as a specialty occupation pursuant to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

4. 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 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.⁷

⁵ A general degree requirement does not necessarily preclude a proffered position from qualifying as a specialty occupation. For example, an entry requirement of a bachelor's or higher degree in business administration with a concentration in a specific field, or a bachelor's or higher degree in business administration combined with relevant education, training, or experience may, in certain instances, qualify the proffered position as a specialty occupation. In either case, it must be demonstrated that the entry requirement is equivalent to a bachelor's or higher degree in a specific specialty that is directly related to the proffered position.

⁶ While the statutory "the" and the regulatory "a" both denote a singular "specialty," we do not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. See section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). This also includes even seemingly disparate specialties providing, again, the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

⁷ All of our references are to the 2016-17 edition of the *Handbook*, which may be accessed at the Internet site

On the labor condition application (LCA)⁸ submitted in support of the H-1B petition, the Petitioner designated the proffered position under the occupational category “Computer Occupations, All Other,” corresponding to the Standard Occupational Classification code 15-1131 at a Level I wage.⁹

We note that there are occupational categories which are not covered in detail by the *Handbook*.¹⁰ The *Handbook* suggests that for at least some of the occupations, little meaningful information could be developed. When the *Handbook* does not support the proposition that a proffered position is a specialty occupation, it is the Petitioner’s responsibility to provide probative evidence (e.g., documentation from other objective, authoritative sources) that indicates whether the particular position in question qualifies as a specialty occupation. We will consider and weigh all of the evidence presented.

In response to the Director’s RFE, the Petitioner submitted a position evaluation from [REDACTED], an associate professor at [REDACTED] which stated that the position of software engineer is clearly a specialty occupation, and requires a bachelor’s degree in computer science, computer information systems, or a closely related field. We carefully evaluated [REDACTED] assertions but, for the following reasons, determined his opinions lent little probative value.

First, [REDACTED] does not reference, cite, or discuss any studies, surveys, industry publications, authoritative publications, or other sources of empirical information which he may have consulted to complete his evaluation. Second, [REDACTED] does not discuss the duties of

<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.

⁸ 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).

⁹ A Level I wage rate is generally appropriate for positions for which the Petitioner expects the Beneficiary to have a basic understanding of the occupation. This wage rate indicates: (1) that the Beneficiary will be expected to perform routine tasks that require limited, if any, exercise of judgment; (2) that he will be closely supervised and his work closely monitored and reviewed for accuracy; and (3) that he will receive specific instructions on required tasks and expected results. U.S. Dep’t of Labor, Emp’t & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://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.*

¹⁰ We note that occupational categories for which the *Handbook* only includes summary data includes a range of occupations, including for example, postmasters and mail superintendents; agents and business managers of artists, performers, and athletes; farm and home management advisors; audio-visual and multimedia collections specialists; clergy; merchandise displayers and window trimmers; radio operators; first-line supervisors of police and detectives; crossing guards; travel guides; agricultural inspectors, as well as others.

the proffered position in any substantive detail. To the contrary, he simply listed the tasks in bullet-point fashion without discussion. Third, the record does not indicate whether [REDACTED] was aware that, as indicated by the Level I wage on the LCA, the Petitioner considered the proffered position to be an entry-level position for a beginning employee who has only a basic understanding of the occupation. In other words, the Petitioner has not demonstrated that [REDACTED] possessed the requisite information to adequately assess the nature of the position. As such, we find that [REDACTED] opinion letter lends little probative value. *Matter of Caron Int'l*, 19 I&N Dec. 791, 795 (Comm'r 1988) (The service is not required to accept or may give less weight to an advisory opinion when it is “not in accord with other information or is in any way questionable.”). For efficiency’s sake, we hereby incorporate the above discussion regarding the letter into our analysis of each criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, the Petitioner submits a copy of the Occupational Information Network’s (O*NET) summary report for the occupational category “Software Quality Assurance Engineers and Testers,” and claims that this subcategory under the heading of “Computer Occupations, All Others” is the most relevant occupational category for the proffered position. The summary report provides general information regarding the occupation; however, it does not support the Petitioner’s assertion regarding the educational requirements for the occupation.

Under the subsection entitled “Education,” O*NET states that “[m]ost of these occupations require a four-year bachelor’s degree, but some do not.” Moreover, O*NET does not state that a degree must be in a *specific specialty*. Furthermore, the Specialized Vocational Preparation (SVP) rating cited within O*NET’s Job Zone designates this occupation as 7 < 8. That SVP rating indicates the occupation requires “over 2 years up to and including 4 years” of training. Further, while the SVP rating indicates 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

The Petitioner also asserts that “70% of the respondents require a bachelor’s degree.” The summary report, however, 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.

In the instant matter, the Petitioner has not provided sufficient 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).

5. Second Criterion

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

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.

a. First Prong

To satisfy the 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 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.

On appeal, the Petitioner submits copies of job announcements placed by the Petitioner as well as 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 Petitioner did not establish that the advertising organizations are similar to the Petitioner. For example, the advertisements provide little or no information regarding the hiring employers. 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). Upon review, some of the employers for which the job postings are submitted include an international media company, a telecommunications company, and a Content Delivery Network services company, entities that cannot be considered to be within the same industry as the Petitioner. 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.

Moreover, not every posting requires a minimum of a bachelor's degree in a specific specialty for entry into the occupation of software engineer. For example, the posting by [REDACTED] will accept a general-purpose bachelor's degree in business administration plus experience.

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.¹² That is, not every deficit of every job posting has been addressed.¹³

The Petitioner also submits excerpts from the websites of [REDACTED] and [REDACTED] which summarize these schools' degree programs in Management Information System (MIS). The Petitioner concludes that graduates of similar programs with a bachelor's degree in MIS routinely are employed in the position of software quality assurance engineers and testers/quality assurance specialists. These articles, however, demonstrate simply that a degree in MIS can qualify an individual to perform duties related to those of the proffered position as well as numerous other occupations; however, they do not establish that the occupation of software engineer usually mandates a bachelor's degree in a specific specialty, or its equivalent, within the Petitioner's industry.

The Petitioner also submits excerpts from the websites of [REDACTED] the [REDACTED] and the [REDACTED] which demonstrate that degrees in mathematics can qualify individuals for jobs in the information technology sector. Again, while a degree in mathematics may be a legitimate prerequisite for entry into the position of software engineer, or the information technology field in general, the issue here is whether 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 established such a requirement.

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).

¹² 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.

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").

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 described the proffered position and its business operations. In its letter of support, the Petitioner asserted that the job duties for the proffered position require “conceptual, theoretical, and analytical knowledge” associated with a bachelor's degree. However, the Petitioner designated the proffered position as an entry-level position within the occupational category (by selecting a Level I wage).¹⁴ This designation, when read in combination with the Petitioner and the end-client's job descriptions, further suggests that the particular position is not so complex or unique that the duties can only be performed an individual with bachelor's degree or higher in a specific specialty, or its equivalent. While related courses may be beneficial in performing certain duties of the position, the Petitioner has not demonstrated how an established curriculum of courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the proffered position.

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

6. 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.

¹⁴ The Petitioner's designation of this position as a Level I, entry-level position undermines its claim that the position is particularly complex, unique, and specialized compared to other positions *within the same occupation*. Nevertheless, a Level I wage-designation does not preclude a proffered position from classification as a specialty occupation, just as a Level IV wage-designation does not definitively establish such a classification. In certain occupations (e.g., doctors or lawyers), a Level I, entry-level position would still require a minimum of a bachelor's degree in a specific specialty, or its equivalent, for entry. Similarly, however, a Level IV wage-designation would not reflect that an occupation qualifies as a specialty occupation if that higher-level position does not have an entry requirement of at least a bachelor's degree in a specific specialty, or its equivalent. That is, a position's wage level designation may be a relevant factor but is not itself conclusive evidence that a proffered position meets the requirements of section 214(i)(1) of the Act.

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.

The Petitioner claims that it routinely hires specialty-degreed individuals for the position of software engineer. The Petitioner provided copies of the foreign degrees and transcripts of two individuals, along with copies of their paystubs.¹⁵ However, the Petitioner did not submit sufficient information regarding the duties and positions of these employees. For example, there is no evidence establishing the position titles they held or the duties they performed during their employment with the Petitioner. Notably, one of the employees is compensated \$72,800 per year, which is significantly higher than the salary offered to the Beneficiary. Thus, this strongly suggests that this individual is employed in a different or more senior position than the proffered position. The Petitioner did not provide an explanation for the variance in the wages.

In addition, the Petitioner provided a copy of its own advertisement for the position of software engineer. The advertisement states that the position requires a master's degree in computer science, engineering, information technology, mathematics, physics, or a related field, and six months experience. Given the advertised position requires a master's degree and six months of experience, it appears that the advertised position is for a more senior position than that of the proffered position. Again, the Petitioner has designated the proffered position as a Level I, entry-level position that only requires a basic understanding of the occupation, which is in contrast to the position advertised that is for a more senior position. As such, we cannot determine that the proffered position is the same or similar to the advertised position such that we can conclude that the Petitioner normally requires a bachelor's degree in a specific specialty, or its equivalent for this position.

Without more, the Petitioner has not provided sufficient evidence to establish 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. Therefore, the Petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

7. 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

¹⁵ The Petitioner did not provide academic credential evaluations to establish that these foreign degrees are equivalent to a U.S. bachelor's degree in a specific specialty.

usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent.

In the instant case, relative specialization and complexity have not been sufficiently developed by the Petitioner as an aspect of the proffered position. The Petitioner does not establish how the generally described duties elevate the proffered position to a specialty occupation. We again refer to our comments regarding the implications of the Petitioner's designation of the proffered position at a Level I wage level.

Upon review of the totality of the record, the Petitioner has not established that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. For the reasons discussed above, the evidence of record does not satisfy the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

II. EMPLOYER-EMPLOYEE RELATIONSHIP

Finally, we will briefly address the issue of whether or not the Petitioner will have a valid employer-employee relationship with the Beneficiary. As previously noted, the Petitioner claimed that the Beneficiary will work for the end-client in Montana. Further, the Petitioner stated that the [REDACTED] and the letter from the end-client support this contention.

Although the Petitioner submitted evidence such as the [REDACTED] and the end-client letter, along with the 51-page project document, the Petitioner did not sufficiently establish the nature and scope of the Beneficiary's employment from the end client. Although the submission of the SOW is noted, this document merely provides a one-sentence overview of the Beneficiary's proposed assignment, along with his hourly rate of compensation pursuant to the [REDACTED]. Further, the letter from the end-client does not identify the Beneficiary's supervisor or the manner in which his work will be monitored and supervised. Therefore, the key element in this matter, which is who exercises control over the Beneficiary, has not been substantiated.

On appeal and throughout these proceedings, the Petitioner contends that the Beneficiary is the Petitioner's employee and that the Petitioner controls the Beneficiary's salary and conditions of employment. However, the claimed work location of the Beneficiary is in Montana, but the Petitioner's offices are located in New Hampshire. Given the significant distance between the end-client's location and the Petitioner's offices, it is unclear, absent additional evidence, how the Petitioner intends to supervise and control the Beneficiary's work. Although the Petitioner's submission of a sample performance review is noted, it contains no specific details pertinent to the Beneficiary's assignment with the end-client, and further indicates that performance appraisals are conducted "every 6 months," thereby suggesting that daily, onsite supervision is not exercised at the client location by the Petitioner or its employees.

While social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are still relevant factors in determining who will control the Beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the Beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the Beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the Beneficiary's employer. Without full disclosure of all of the relevant factors, we are unable to find that the requisite employer-employee relationship will exist between the Petitioner and the Beneficiary.

The evidence, therefore, is insufficient to establish that the Petitioner qualifies as a United States employer, as defined by 8 C.F.R. § 214.2(h)(4)(ii).

III. CONCLUSION

Here, the Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation or that it will have the requisite employer-employee relationship with the Beneficiary.

ORDER: The appeal is dismissed.

Cite as *Matter of T-S-ITG- LLC*, ID# 749805 (AAO Oct. 31, 2017)