



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

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

MATTER OF U-S-, INC

DATE: SEPT. 14, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

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

The Director of the California Service Center denied the petition, concluding that the Petitioner did not establish that the Beneficiary is qualified to serve in a specialty occupation position in accordance with the applicable statutory and regulatory provisions.

In its appeal, the Petitioner submits additional evidence and asserts that the Beneficiary is qualified to serve in a specialty occupation position.

We conduct *de novo* review on appeal, but a threshold matter must be resolved before we may address the merits of the Director's decision and the Petitioner's appeal. Specifically, a beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As will be discussed, the record does not establish that the proffered position requires a baccalaureate or higher degree in a specific specialty, or its equivalent. Furthermore, the record does not establish whether the Petitioner qualifies as an H-1B employer. Accordingly, the matter will be remanded to the Director for further review of the record and a new decision.

I. SPECIALTY OCCUPATION

The Petitioner claims that the proffered position qualifies as a specialty occupation. For the reasons discussed below, we do not agree.

A. Legal Framework

Section 214(i)(1) of the Act, defines the term “specialty occupation” as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

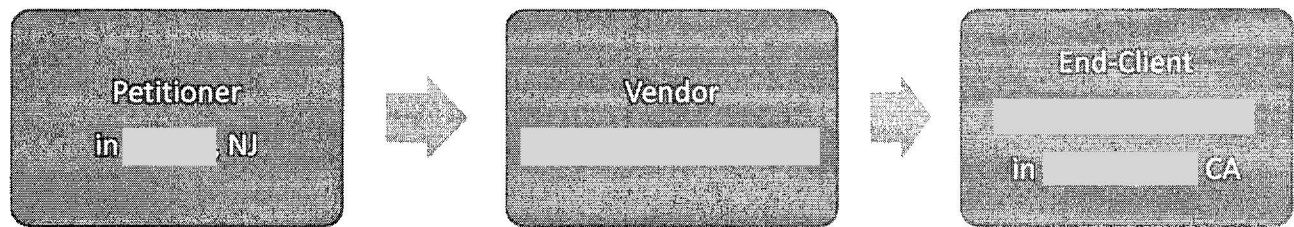
The regulation at 8 C.F.R. § 214.2(h)(4)(ii) largely restates this statutory definition, but adds a non-exhaustive list of fields of endeavor. In addition, the regulations provide that the proffered position must meet one of the following criteria to qualify as a specialty occupation:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

8 C.F.R. § 214.2(h)(4)(iii)(A). We have consistently interpreted the term “degree” to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proposed position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing “a degree requirement in a specific specialty” as “one that relates directly to the duties and responsibilities of a particular position”); *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000).

B. Proffered Position

The Petitioner stated that the Beneficiary will serve as an “ERP analyst” at an end-client’s facility. It provided the following information about its contractual relationship:



The end-client provided the following job duties for the position:

- Analysis of AS-IS Business processes
 - Interact with Business Process Owners for gather requirements
 - Identification of new enhancements
 - Recordation of SAP Business Processes
 - Prepare AS-IS V/s TO-BE document
- Sales & Distribution, POS DM & Pricing and Promotions modules
 - Configuration of SAP ERP Software
 - Preparing/modifying design document as per the TO-BE document
 - Configuration of the system as per the Design document
 - Transport the configuration changes to quality environment for testing
- Data Analysis, Data migration and Validation
 - Provide Document Templates to collect the Master data
 - Prepare the data migration programs
 - Migrate/upload the required data
- Unit and Integration Testing of the product
 - Prepare Unit test Scripts
 - Conduct Unit testing
 - Prepare Integration test Scripts
 - Conduct Integration testing
 - User acceptance test in quality
- Preparation of Functional specifications for custom developments
 - Prepare Functional Specification Document then review it by Business Process Owner
 - Prepare test data/ cases against Custom developments
 - Provide Functional Specification Document and test data to Technical team for develop

- Training & SupportPrepare Training Manuals
- Maintain the issue log and Support the day-to-day Production issuesCoordinate with Offshore team

C. Analysis

The Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation.¹ Specifically, the record does not establish that the job duties require an educational background, or its equivalent, commensurate with a specialty occupation.²

1. Variances in the Record of Proceedings

As a preliminary matter, the Petitioner has provided inconsistent information regarding the position. The Form I-129 stated the Beneficiary will serve as an ERP analyst. However, on the labor condition application (LCA), the Petitioner reported the job title as systems analyst. The Petitioner submitted an itinerary of services indicating that the Beneficiary will work as a senior software engineer.³ Moreover, the Petitioner's claimed salary for the Beneficiary varies by almost \$20,000 within the record. No explanation for these variances was provided by the Petitioner.

Furthermore, the record contains inconsistent information regarding the minimum requirement for the proffered position. For example:

Party	Education Required	Experience Required
Petitioner	Bachelor's degree in computer science/applications, engineering, computer/management information systems or a related field	None stated
Vendor	Bachelor's degree in computers, science, or engineering	At least seven years of experience in information technology
End-client	Bachelor's degree in engineering	None stated

The Petitioner also did not explain the variances in the requirements, and we are unable to reconcile these statements.

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

² 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.

³ In addition, the itinerary states that the Beneficiary will provide his services to a company that is not the end-client.

2. First Criterion

We now turn to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position. To inform this inquiry, we recognize the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook* (*Handbook*) as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁴

The Petitioner designated the position under the occupation "Computer Systems Analysts" on the LCA,⁵ at a level II wage rate.⁶ The *Handbook's* subchapter entitled "How to Become a Computer Systems Analyst" states, in pertinent part: "A bachelor's degree in a computer or information science field is common, although not always a requirement. Some firms hire analysts with business or liberal arts degrees who have skills in information technology or computer programming."⁷ The *Handbook* also states: "Although many computer systems analysts have technical degrees, such a degree is not always a requirement. Many analysts have liberal arts degrees and have gained programming or technical expertise elsewhere."⁸

The *Handbook* does not support the assertion that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for these positions. As cited above, the *Handbook* begins by stating that a bachelor's degree in a computer-related field is "not always a requirement."⁹ The *Handbook* continues by stating that there is a wide range of degrees that are acceptable for positions in this occupation, including general-purpose degrees in business and liberal arts.¹⁰ Also according to the *Handbook*, many computer systems analysts have liberal arts degrees

⁴ 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.

⁵ 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).

⁶ 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. DOL's wage-level guidance specifies that a Level II designation is reserved for positions involving only moderately complex tasks requiring 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.*

⁷ Bureau of Labor Statistics, U.S. Dep't of Labor, *Occupational Outlook Handbook*, Computer Systems Analysts (2016-17 ed.).

⁸ *Id.*

⁹ *Id.*

¹⁰ As discussed above, we interpret the term "degree" to mean a degree *in a specific specialty* that is directly related to

and have gained programming or technical expertise elsewhere. It further reports that many analysts have technical degrees. But we observe that the *Handbook* does not specify the amount of programming or technical expertise required, or the degree level for these technical degrees (e.g., associate's degrees). Thus, the *Handbook* does not support the claim that the occupational category of "Computer Systems Analysts" is one for which normally the minimum requirement for entry is a baccalaureate degree (or higher) in a specific specialty, or its equivalent.

In the instant matter, 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).

3. Second Criterion

The second criterion presents two alternative prongs: "The degree requirement is common to the industry in parallel positions among similar organizations *or, in the alternative*, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree[.]" 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) (emphasis added). The first prong contemplates the common industry practice, while the alternative prong narrows its focus to the Petitioner's specific position.

a. First Prong

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

In determining whether there is such a common degree requirement, factors often considered by us include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As previously discussed, the Petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports a requirement for at least a bachelor's degree in a specific specialty, or its equivalent. Thus, we incorporate by reference the previous discussion on the matter. 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

the proposed position. Since there must be a close correlation between the required specialized studies and the position, the acceptance of general and wide-ranging degrees (such as business and liberal arts degrees) strongly suggests that a computer systems analyst position is not categorically a specialty occupation. See *Royal Siam Corp.*, 484 F.3d at 147. Cf. *Matter of Michael Hertz Assocs.*, 19 I&N Dec. 558, 560 (Comm'r 1988).

any letters or affidavits from similar firms or individuals in the Petitioner's industry attesting that such firms "routinely employ and recruit only degreed individuals." Nor is there any other evidence relevant to this prong. Thus, based upon a complete review of the record of proceedings, we find that 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.

The vendor and the end-client assert that the job duties of the proffered position are complex requiring at least a bachelor's degree. However, the Petitioner has designated the proffered position as a Level II position on the LCA.¹¹ This designation, when read in combination with the evidence presented and the *Handbook's* account of the requirements for this occupation, suggests that the particular position is not so complex or unique that the duties can only be performed by an individual with bachelor's degree or higher in a specific specialty, or its equivalent.¹²

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

¹¹ The Petitioner's designation of this position as a Level II position undermines its claim that the position is particularly complex, specialized, or unique compared to other positions *within the same occupation*. Nevertheless, a Level II 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 low level 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.

¹² The evidence of record does not establish that this position is significantly different from other positions within the occupational category such that it refutes the *Handbook's* information to the effect that some courses are advantageous to obtaining such a position, but not specifying that a bachelor's degree or higher in a specific specialty (or its equivalent) is required.

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.

Upon review of the record, we find that the Petitioner did not submit information regarding employees who currently or previously held the position. The record 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).

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.

We find that the Petitioner has not sufficiently developed relative specialization and complexity as an aspect of the proffered position. The proposed duties have not been described with enough detail to show that they are more specialized and complex than other computer systems analyst positions that are not usually associated with at least a bachelor's degree in a specific specialty, or its equivalent. The Petitioner does not establish how the generally described duties elevate the proffered position to a specialty occupation. We also incorporate our earlier discussion and analysis regarding the duties of the proffered position, and the designation of the position in the LCA as a Level II position, and not as the higher Level III (referring to "special skills or knowledge") or Level IV (referring to "complex or unusual problems") wage levels. For the reasons discussed above, the evidence of record does not meet 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Because the Petitioner has not satisfied one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it has not demonstrated that the proffered position qualifies as a specialty occupation.

IV. EMPLOYER-EMPLOYEE RELATIONSHIP

Although not addressed by the Director, the evidence does not establish whether the Petitioner qualifies as an H-1B employer. The United States Supreme Court determined that where federal law fails to clearly define the term "employee," courts should conclude that the term was "intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992) (quoting *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). The Supreme Court stated:

"In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by

which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party."

Id.; see also *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 445 (2003) (quoting *Darden*, 503 U.S. at 323). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 258 (1968)).

As such, 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. The record of proceedings lacks sufficient documentation evidencing exactly what the Beneficiary would do for the period of time requested.

V. CONCLUSION

Based on the foregoing discussion, the evidence of record as presently constituted does not establish eligibility for the benefit sought. Accordingly, we will remand this matter to the Director for further action and entry of a new decision. The Director may request any additional evidence considered pertinent to the new determination.

ORDER: The decision of the Director is withdrawn. The matter is remanded for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Cite as *Matter of U-S-, Inc*, ID# 739199 (AAO Sept. 14, 2017)