U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF N-S-, INC.

DATE: DEC. 1, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, an IT consulting firm, seeks to employ the Beneficiary as a "software quality assurance engineer" under the H-1B nonimmigrant classification. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The Director, Vermont Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

I. ISSUES

The issues before us are whether (1) the proffered position qualifies as a specialty occupation; and (2) the Beneficiary is qualified to serve in a specialty occupation position in accordance with the applicable statutory and regulatory provisions.[1]

II. SPECIALTY OCCUPATION

A. Legal Framework

For an H-1B petition to be granted, the Petitioner must provide sufficient evidence to establish that it will employ the Beneficiary in a specialty occupation position. To meet its burden of proof in this regard, the Petitioner must establish that the employment it is offering to the Beneficiary meets the applicable statutory and regulatory requirements of a specialty occupation.

Section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l), defines the term "specialty occupation" as an occupation that requires:

> (A) theoretical and practical application of a body of highly specialized knowledge, and

[1] We conduct appellate review on a *de novo* basis. *Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542 (AAO 2015); *see also* 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *Dor v. INS*, 891 F.2d 997, 1002 n.9 (2d Cir. 1989).

(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) states, in pertinent part, the following:

> *Specialty occupation* means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must meet one of the following criteria:

(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.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that

must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered 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"). Applying this standard, USCIS regularly approves H-1B petitions for qualified beneficiaries who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the Beneficiary, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

B. The Proffered Position

The Petitioner described the position in its support letter dated March 31, 2014, as follows:

> In general, as a Software Quality Assurance Engineer, the Beneficiary will confer with client management, customers, and staff to define system goals and then create necessary roadmaps, graphs, models, and other materials to document and present the steps necessary to realize system goals. The Beneficiary will specify inputs to be accessed by the system, design the processing steps, and format the output to meet user needs. . . .
>
> . . . .
>
> [The Beneficiary] will work as a Software Quality Assurance Engineer for us on[:]
>
> - Well versed with

- Extensive experience in performing database testing by executing SQL queries
- Strong understanding and experience of QA processes (requirement analysis, test case creation and execution, defects)
- Creates basic to moderately complex test plans using templates and guidelines. Works with more experienced analysts to assist in test strategy development.
- Creates basic test cases and test scripts.
- Documents all phases of the Systems QA process

To summarize:

Job Location:

Job Title: Software Quality Assurance Engineer

Annual Salary: $64000 per year

Initially, the Petitioner stated that the position requires "at least a Bachelor's degree (or its equivalent) in Computer Science or related fields, which the Beneficiary holds." However, in response to the request for evidence (RFE), the Petitioner stated that "at least a bachelor's degree or its equivalent in computer science or engineering or CIS or MIS or some other directly related and specific field of study" is required for the position.

In addition, the Petitioner submitted a copy of an Agreement with the Beneficiary dated March 18, 2014, which included the following language: "Further, irrespective of any client location or project that you may be assigned to . . . ."

The Petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The Petitioner indicated that the proffered position corresponds to the occupational category "COMPUTER OCCUPATIONS, ALL OTHER" with SOC (ONET/OES) code 15-119913-1161, at a Level II (qualified) wage in New Jersey.

In response to the Director's RFE, the Petitioner stated that, "[t]he project to which we intend to assign [the Beneficiary] is for our customer with whom we have an SOW for the enhancement and development of Version 2.0 of their e-Learning portal." The Petitioner further stated in pertinent part:

> [T]he project for the enhancement and development of LMS Version 2.0 for our client is being conducted from our own work location at NJ. The project is expected to extend till at least August 31, 2016. However, it is more than probable that with further enhancements and further modules being added onto this e-Learning portal, by 2016

> the client will be ready for a 'newer version' of LMS and the project will be extended beyond this currently projected end date.

The Statement of Work (SOW) dated January 13, 2014, indicated that the project was estimated to start on March 3, 2014, and end on August 31, 2016. The SOW stated that the location of the work would be at the address of the Petitioner. However, the Petitioner also submitted a letter from Chief Executive Officer of . dated August 25, 2014, which indicated that and the Petitioner are located at the same address, in different suite numbers. The letter from also stated that the Beneficiary would report directly to who is the Petitioner's Human Resource Manager.[2]

On appeal, the Petitioner submits a copy of the Master Services Agreement between itself and pursuant to which the SOW was apparently executed.

C. Analysis

We note that although the Petitioner has titled the proffered position as a software quality assurance engineer, this job title never appeared in the SOW provided and the Beneficiary is not named in the SOW, even though the Petitioner claims that the Beneficiary will work pursuant to the SOW it submitted. Instead, the only job titles listed for the project are Architect, Developers, and QA Testers. The SOW states as follows:

> [The Architect] is for the analysis and design of the enhancements of Self-Service model[.] These services include: analysis, design, configuration, integration, testing, training, and deployment services. . . .
>
> [Developers are] for enhancing the Learning Management features. These services include: analysis, design, configuration, integration, testing, training and deployment of each of the new features.

The SOW does not describe the purpose of the QA Testers.

The Petitioner has not explained how the proffered position of software quality assurance engineer is encompassed within the SOW provided and therefore it has not demonstrated that it has sufficient specialty occupation work available for the Beneficiary to perform. Going on record without

[2] We further note that although the Petitioner stated that it intends to employ the Beneficiary at its offices, its Agreement with the Beneficiary indicated that the Petitioner had not confirmed to which project the Beneficiary would be assigned. In fact, it appears that the Beneficiary may be assigned to more than one client or project. Further, it seems unusual that the Beneficiary would report directly to the Petitioner's human resources manager on a computer-related project, when the Petitioner has 48 employees. It is incumbent upon the Petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the Petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *In Re Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). It therefore is not apparent that the Beneficiary will actually work pursuant to the SOW as the Petitioner has claimed.

We find that the record of proceeding lacks documentation regarding the Petitioner's business activities and the actual work that the Beneficiary will perform to sufficiently substantiate the claim that the Petitioner has H-1B caliber work for the Beneficiary for the period of employment requested in the petition. In other words, the record does not include sufficient work product or other documentary evidence to confirm that the Petitioner has ongoing in-house projects to which the Beneficiary will be assigned.

As discussed, the documentation submitted indicates that the Beneficiary's job title and proposed duties are not supported by the submitted evidence. In addition, the record of proceeding does not contain work orders valid for the requested period of employment for the Beneficiary. While the Petitioner asserts that the Beneficiary will be employed in-house, the Petitioner's work appears to be dependent on contracts with clients. The Petitioner did not submit contracts that list the proffered position or the Beneficiary, or even the proffered position title, and that are valid for the duration of the Beneficiary's requested employment period. Without further information regarding specific projects to which the Beneficiary would be assigned that covers the duration of the period of employment requested, we are not able to ascertain what the Beneficiary would do, where the Beneficiary would work, as well as how this would impact circumstances of her relationship with the Petitioner. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l. Comm'r 1978).[3]

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[3] The agency made clear long ago that speculative employment is not permitted in the H-1B program. A 1998 proposed rule documented this position as follows:

> Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. See section 214(i) of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998). While a petitioner is certainly permitted to change its intent with regard to non-speculative employment, e.g., a change in duties or job location, it must nonetheless document such a

As discussed previously, given the lack of a contract naming the Beneficiary, or even the proffered position title, as well as the documentation, including the Agreement between the Petitioner and Beneficiary, that indicates the Petitioner has not confirmed to which project, if any, the Beneficiary would be assigned, the Petitioner did not provide sufficient evidence regarding the substantive nature of the work to be performed by the Beneficiary, which precludes a finding that the proffered position is a specialty occupation under 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's 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, we will analyze the evidence in the record to determine whether the proffered position as described would qualify as a specialty occupation. To that end and to make our determination as to whether the employment described above qualifies as a specialty occupation, we turn first to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*).

A baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for 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 it addresses.[4] As noted above, the LCA corresponds to the occupational classification "Computer Occupations, All Other"-SOC(ONET/OES) code 15-1799, at a Level II (qualified) wage.

We reviewed the *Handbook* regarding the occupational category "Computer Occupations, All Other." However, the *Handbook* does not provide a detailed narrative account nor does it provide summary data for this occupational category. More specifically, the *Handbook* does not provide the typical duties and responsibilities for "Computer Occupations, All Other." It also does not provide any information regarding the academic and/or professional requirements for these positions. Thus, the *Handbook* does not support the claim that the occupational category here is one for which normally the minimum requirement for entry is a baccalaureate degree (or higher) in a specific specialty, or its equivalent.

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material change in intent through an amended or new petition in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E).

[4] The *Handbook*, which is available in printed form, may also be accessed online at http://www.bls.gov/ooh. The references to the *Handbook* are from the 2014-15 edition available online.

We note that there are occupational categories which are not covered in detail by the *Handbook,* as well as occupations for which the *Handbook* does not provide any information. The *Handbook* states the following about these occupations:

> Although employment for hundreds of occupations are covered in detail in the *Occupational Outlook Handbook,* this page presents summary data on additional occupations for which employment projections are prepared but detailed occupational information is not developed. For each occupation, the Occupational Information Network (O*NET) code, the occupational definition, 2012 employment, the May 2012 median annual wage, the projected employment change and growth rate from 2012 to 2022, and education and training categories are presented.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook,* 2014-15 ed., "Data for Occupations Not Covered in Detail," http://www.bls.gov/ooh/About/Data-for-Occupations-Not-Covered-in-Detail.htm (last visited Nov. 23, 2015).

Thus, the narrative of the *Handbook* indicates that there are many occupations for which only brief summaries are presented and that detailed occupational profiles for these occupations are not developed.[5] The *Handbook* suggests that for at least some of the occupations, little meaningful information could be developed.

Accordingly, in certain instances, the *Handbook* is not determinative. When the *Handbook* does not support the proposition that a proffered position is one that meets the statutory and regulatory provisions of a specialty occupation, it is incumbent upon the Petitioner to provide persuasive evidence that the proffered position more likely than not satisfies the statutory and regulatory provisions, including this or one of the other three criteria, notwithstanding the absence of the *Handb*ook's, support on the issue. In such case, it is the Petitioner's responsibility to provide probative evidence (e.g., documentation from other objection, authoritative sources) that supports a finding that the particular position in question qualifies as a specialty occupation. Whenever more than one authoritative source exists, an adjudicator will consider and weigh all of the evidence presented to determine whether the particular position qualifies as a specialty occupation. Here, the Petitioner did not provide further evidence.

In the instant case, the Petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that normally the minimum requirement for entry is at least a bachelor's degree in a specific specialty, or its equivalent. Thus, the Petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*).

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[5] 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 requirement of a baccalaureate or higher degree in a specific specialty, or its equivalent, is common to the industry in parallel positions among similar organizations

Next, we will review the record regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common for positions that are identifiable as being (1) in the petitioner's industry, (2) parallel to the proffered position, and also (3) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS 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 independent, authoritative source) reports a standard 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.

The Petitioner submitted copies of job advertisements in support of the assertion that the degree requirement is common to its industry in parallel positions among similar organizations. However, upon review of the documents, we find that the Petitioner's reliance on the job announcements is misplaced.

For a petitioner to establish that an organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such evidence, documentation submitted by a petitioner is generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner.

When determining whether the Petitioner and the advertising 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 in the same industry without providing a legitimate basis for such an assertion.

In the Form I-129, the Petitioner states that it is an IT consulting firm with 48 employees, established in The Petitioner designated its business operations under the North American Industry Classification System (NAICS) code 541512, which is described as "Computer Systems Design Services," "planning and designing computer systems that integrate computer hardware, software, and communications technologies."[7]

We will briefly note that, without more, the job postings do not appear to be from organizations similar to the petitioner.[8] More specifically, the advertisements include a position with which "ranks among the ten most valuable technology companies as a leader in design, development and management of secure information infrastructure." The Petitioner also provided advertisements from employers that do not provide sufficient information regarding the employers such as and The Petitioner did not supplement the record of proceeding with additional information or state which aspects or traits it shares with the advertising organizations. Without further information, the advertisements appear to be for organizations that are not similar to the Petitioner.

Further, the Petitioner has not established that the advertisements are for parallel positions. For example, the advertisement from states "5-7 years of Software Quality Engineering experience; aerospace industry preferred." As previously mentioned, the petitioner designated the proffered position on the LCA through the wage level as a Level II (qualified) position relative to others within the occupation. The advertised positions appear to be for more senior positions than the proffered position. Moreover, the Petitioner did not indicate which primary duties of the advertised positions are parallel to the duties of the proffered position.

In addition, some job postings do not indicate that a bachelor's degree in a directly related specific specialty is required. For example, minimum education requirement includes a Bachelor's degree in computer science, math, engineering, business, or related field. 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 such a degree in a specific specialty that is directly related to the specialty occupation claimed in the petition. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title,

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[6] In the Form I-129, the Petitioner indicated that its gross income is $9.1 million. However, the financial statement submitted in response to the RFE indicates that its gross income for 2013 is $1.9 million and its net income is $553,086. The Petitioner did not explain the discrepancy. "[I]t is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence." *Matter of Ho*, 19 I&N Dec. at 591. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* at 591-92.

[7] According to the U.S. Census Bureau, the North American Industry Classification System (NAICS) is used to classify business establishments according to type of economic activity and each establishment is classified to an industry according to the primary business activity taking place there. *See* http://www.census.gov/eos/www/naics/ (last visited Nov. 23, 2015).

[8] Moreover, 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.

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).

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.[9] That is, as the evidence does not establish that similar organizations in the same industry routinely require at least a bachelor's degree in a specific specialty, or its equivalent, for parallel positions, not every deficit of every job posting has been addressed.

The Petitioner has not established that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the Petitioner's industry in positions that are (1) in the Petitioner's industry, (2) parallel to the proffered position, and also (3) located in organizations that are similar to the Petitioner. Thus, for the reasons discussed above, the Petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

The particular position is so complex or unique that it can be performed only by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent

Next, the evidence of record does not satisfy 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 submitted various documents including financial documents and lease. We reviewed the record in its entirety and find that while the documents provide some insight regarding the Petitioner's business operations, the Petitioner has not established that its particular position is so complex or unique that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent.

Further, the Petitioner has not demonstrated how the duties of the proffered position as described in

[9] Even if all of the job postings indicated that a bachelor's degree in a specific specialty, or its equivalent, is common to the industry in parallel positions among similar organizations (which they do not), the Petitioner does not demonstrate what inferences, if any, can be drawn from these 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).

As such, even if the job announcements supported the finding that the position required a bachelor's or higher degree in a specific specialty, or its equivalent (for organizations in the same industry that are similar to the petitioner), it cannot be found that such a limited number of postings that appear to have been consciously selected outweigh the findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not normally require at least a baccalaureate degree in a specific specialty, or its equivalent, for entry into the occupation in the United States.

the record require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty, or its equivalent, is required to perform them. For instance, the Petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties it may believe are so complex and unique. While a few related courses may be beneficial, or even required, in performing certain duties of the position, the Petitioner has not demonstrated how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the proffered position. The description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them.

This is further evidenced by the LCA submitted by the Petitioner in support of the instant petition. Again, the LCA indicates a wage level based upon the occupational classification "Computer Occupations, All Others" at a Level II wage. In accordance with the relevant DOL explanatory information on wage levels, a Level II position is indicative that, relative to other positions falling under the occupational category, the Beneficiary is expected to have a good understanding of the occupation but that she will only perform moderately complex tasks that require limited judgment. Without further evidence, it is not credible that the proffered position is complex or unique as such a position falling under this occupational category would likely be classified at a higher-level, such as a Level III (experienced) or Level IV (fully competent) position, requiring a significantly higher prevailing wage. For example, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."[10] The evidence of record does not establish that this position is significantly different from other positions in the occupational category such that it refutes the *Handbook's* information that a bachelor's degree in a specific specialty is not required for the proffered position.

By way of comparison, a position classified at a Level IV (fully competent) position is designated by the DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems." Thus, the wage level designated by the Petitioner in the LCA for the proffered position is not consistent with claims that the position would entail any particularly complex or unique duties or that the position itself would be so complex or unique as to require the services of a person with at least a bachelor's degree in a specific specialty.[11]

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[10] For additional information regarding wage levels as defined by DOL, see U.S. Dep't of Labor, 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.

[11] The Petitioner's designation of this position as a Level II, qualified-level 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 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

Consequently, the Petitioner has not established that the proffered 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, and has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

The employer normally requires a baccalaureate or higher degree in a specific specialty, or its equivalent, for the position

We turn next to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*), which requires the employer to demonstrate that it normally requires a bachelor's degree in a specific specialty or its equivalent for the position. We usually review the Petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

To satisfy this criterion, the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by the performance requirements of the proffered position. While a petitioner may believe or otherwise assert that a proffered position requires a specific degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's assertion of a particular degree requirement is not necessitated by the actual performance requirements of the proffered position, the position would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

The Petitioner provided a list of its employees which contains their job titles and educational credentials. However, the Petitioner did not provide their job duties and day-to-day responsibilities to establish that the duties and responsibilities for these individuals are the same or are related to the proffered position. It must be noted that the educational level of employees who hold positions that are not the proffered position (or parallel to that position) is not relevant. We further note that the Petitioner did not provide copies of diplomas to substantiate their educational credentials.

As the record of proceeding does not demonstrate that the Petitioner normally requires at least a bachelor's degree in a specific specialty or its equivalent for the proffered position, it does not satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*).

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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 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 in a specific specialty, or its equivalent

The evidence of record does not satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*), which requires the Petitioner to establish that the nature of the proffered position's 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 the specific specialty or its equivalent.

The Petitioner provided information regarding the proffered position and its business operations, including the documentation previously outlined. While the evidence provides some insights into the Petitioner's business activities, the documents do not establish that the nature of the specific duties of the proffered position 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 hereby incorporate our earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a Level II position (out of four assignable wage-levels) relative to others within the occupational category, and hence one not likely distinguishable by relatively specialized and complex duties. Without further evidence, it is not credible that the petitioner's proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a substantially higher prevailing wage. As previously discussed, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems" and requires a significantly higher wage. The petitioner has submitted inadequate probative evidence to satisfy the criterion of the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*).

For all of these reasons, the evidence in the record of proceeding does not establish that the proposed duties meet the specialization and complexity threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)*(4)*.

III. BENEFICIARY'S QUALIFICATIONS

Since the identified basis for denial is dispositive of the Petitioner's appeal, we need not address another ground of ineligibility we observe in the record of proceeding. Nevertheless, we will briefly note and summarize it here with the hope and intention that, if the Petitioner seeks again to employ the Beneficiary or another individual as an H-1B employee in the proffered position, it will submit sufficient independent objective evidence to address and overcome this additional ground in any future filing.

We do not need to examine the issue of the Beneficiary's qualifications, because the Petitioner has not provided sufficient documentation to demonstrate that the position is a specialty occupation. In

other words, the Beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the Petitioner did not submit sufficient evidence regarding the proffered position to determine that it is a specialty occupation and, therefore, the issue of whether it will require a baccalaureate or higher degree, or its equivalent, in a specific specialty also cannot be determined. Therefore, we need not and will not address the Beneficiary's qualifications further.[12] In any event, the Petitioner did not submit sufficient documentation to show that the Beneficiary qualifies to perform services in a specialty occupation in a computer-related field under 8 C.F.R. § 214.2(h)(4)(iii)(C). As such, the petition could not be approved even if eligibility for the benefit sought had been otherwise established.

IV. CONCLUSION AND ORDER

In visa petition proceedings, it is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.[13]

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[12] The credential evaluation found that the Beneficiary possesses the equivalent of a U.S. Bachelor of Science degree in Business Administration with a concentration in Computer Information Systems; however, the concentration in Computer Information Systems was based on the Beneficiary's professional experience and not her academic qualifications. We note that of the numerous courses the Beneficiary took, only five appear to have been computer-based. Aside from the decisive fact that the evidence of record does not establish the evaluation writer, , as competent under 8 C.F.R. § 214.2(h)(4)(iii)(D)(1) to evaluate experience, we find that the content of his evaluation of the Beneficiary's experience would merit limited weight even if were qualified under 8 C.F.R. §214.2(h)(4)(iii)(D)(1). states that he bases his evaluation of the Beneficiary's experience on reference letters from the Beneficiary's former employers, but copies of these letters were not submitted in support of the petition. He then concludes, without analysis, that the work experience was gained through the application of relevant and specialized skills and training by superiors and peers that demonstrate the equivalent of university level training and that "**more than Five years' experience** indicate the course duration equivalent of **More than One year additional, year of Bachelor's-level, academic training/certification in Computer Information Systems.**" [Sic.] As this evaluation does not establish a substantive basis for its conclusion, it would have little probative value even if it were rendered by an official qualified under 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r. 1988).

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), USCIS may determine that the Beneficiary has the equivalent of a degree in business administration with a concentration in computer information systems if she has a combination of education, specialized training, and/or work experience in areas related to this specialty. The evaluation on record is not supported by specific evidence as we do not have copies of the letters from the Beneficiary's former employers to demonstrate that the Beneficiary has relevant experience gained while working with peers, supervisors, and subordinates who have a degree or its equivalent in computer information systems. Finally, the record lacks the required showing of the Beneficiary's expertise in computer information systems. The evidence does not establish that the Beneficiary is qualified to work in the proffered position, which purports to require at least a bachelor's degree or its equivalent in a computer-related field.

[13] As the identified ground of ineligibility is dispositive of the appeal, we will not discuss any additional deficiencies we observe in the record of proceeding.

ORDER: The appeal is dismissed.

Cite as *Matter of N-S-, Inc.*, ID# 15312 (AAO Dec. 1, 2015)