



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

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

MATTER OF V-T-, INC.

DATE: OCT. 2, 2015

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a software development and consulting business, seeks to employ the Beneficiary as a programmer analyst and classify her as a nonimmigrant worker in a specialty occupation. *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 Director, California Service Center denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

I. PROCEDURAL BACKGROUND

In the Petition for a Nonimmigrant Worker (Form I-129), the Petitioner describes itself as an advanced software development and consulting business, with 15 employees, established in 2007. It wishes to employ the Beneficiary in what it designates as a programmer analyst position.

The Director denied the petition, concluding that the Petitioner did not establish that the proffered position qualifies as a specialty occupation. On appeal, the Petitioner asserts that the Director's basis for denial was erroneous and contends that it satisfied all evidentiary requirements.

The record of proceeding contains: (1) the Form I-129 and supporting documentation; (2) the Director's request for additional evidence (RFE); (3) the Petitioner's response to the RFE; (4) the Director's letter denying the petition; and (5) the Notice of Appeal or Motion (Form I-290B) and supporting documentation. We reviewed the record in its entirety before issuing our decision.¹

For reasons that will be discussed below, we agree with the Director that the Petitioner has not established eligibility for the benefit sought. Accordingly, the Director's decision will not be disturbed. The appeal will be dismissed.

¹ We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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)(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) 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 foreign nationals 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 foreign national, 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)(6)

Matter of V-T, Inc.

B. The Proffered Position

As noted above, the Petitioner states that it is as an advanced software development and consulting business, established in [REDACTED] with 15 employees. The Petitioner describes itself as “an IT staffing organization with a vision of providing a cost-effective service to our clients. . . Our staffing and consulting solutions support a broad spectrum of solutions serving across all domains, be it contract, permanent, fixed-cost or time-and-materials, on-site or off-site, we have proven experience.” In the letter submitted in support of the instant petition, the Petitioner states that the programmer analyst “will be required to plan analyze, develop, test ad document computer programs using applications, languages, tools and technologies,” and will be responsible for with the following job duties:

1. Modify existing software to correct errors, allow it to adapt to new hardware, or improve its performance. Develop and direct software system testing and validation procedures, programming, and documentation. Confer with systems analysts, engineers, programmers and others to design system and to obtain information on project limitations and capabilities, performance requirements and interfaces.
2. Analyze user needs and software requirements to determine feasibility of design within time and cost constraints.
3. Design, develop and modify software systems, using scientific analysis and mathematical models to predict and measure outcome and consequences of design.
4. Store, retrieve, and manipulate data for analysis of system capabilities and requirements.
5. Coordinate software system installation and monitor equipment functioning to ensure specifications are met.
6. Obtain and evaluate information on factors such as reporting formats required, costs, and security needs to determine hardware configuration.
7. Client interaction
8. Requirements gathering
9. High Level Impact Analysis
10. Architecture and Design
11. Development & Defect fixing
12. Test Planning and Strategy
13. Functional & Performance Testing
14. User Acceptance Testing Support
15. Status Reporting
16. Process compliance activities
17. Documentation

The Petitioner submitted a certified Labor Condition Application (LCA) in support of the instant H-1B. The Petitioner indicates that the proffered position corresponds to the occupational category “Computer Programmers”-SOC (ONET/OES Code) 15-1131, at a Level I (entry-level) wage, the lowest of the four assignable wage-levels.

(b)(6)

Matter of V-T-, Inc.

The Petitioner stated that the proffered position “is a professional level position, and as such, we absolutely require, at a minimum, the functional equivalent of a Bachelor's degree with some exposure in software development, programming and designing.”

The initial submission also included a letter from the Petitioner's claimed end-client, [REDACTED] (end-client letter) describing the project the Beneficiary would be assigned to, stating:

Project Description:

[REDACTED] is a web front end application for data used in medical transcription service for a clinic setting. Voice dictations and completed transcripts are transferred to and from the database server using the special transcription Service application, which is installed on the client's computers. [REDACTED] performs advance file management, manipulations and also records all of the transactions in the database. Besides, it enables receiving the detailed statistic information and generating time and cost reports. Medical transcription work flow engine, reports delivery engine, Automates processes for medical transcription industry, includes payroll, billing, routing, HI7 transmissions, interface with EMR.

The end-client letter also listed the proposed duties for the programmer analyst position, mirroring the duties provided by the Petitioner, with the addition of the duty “User Interface designer.” According to end-the client letter, the position requires a “Bachelor's degree or Equivalent in Computer science, Computer Applications, ANY Engineering, IT, Management Information Systems, or related area of study.”

According to the documents submitted, it appears that the Beneficiary will work on a project for a client, [REDACTED] from the Petitioner's offices located in [REDACTED] IL.

The Director reviewed the submitted position information and issued an RFE, requesting additional information regarding the duties of the proffered position. In response, the Petitioner reiterated the aforementioned duties and added the following breakdown of the percentage of time to be spent on the duties:

Percentage	Job Duties
5%	Gathering and analyzing requirements
10%	Store, retrieve, and manipulate data for analysis of system capabilities and requirements.
5%	Design and develop user interface
25%	Design and develop software testing
25%	Plan test strategy and fix the defects. Document the defects
10%	Perform functional, perform, and user acceptance tests
15%	Client and other team members interaction and process

	compliance
5%	Other similar professional responsibilities as necessary

The Petitioner also amended its educational requirements in the RFE response, stating at different points in the RFE response that the proffered position requires “substantial theoretical knowledge in the field of Computer Science and Management,” that “the position requires the application of technology and principles that can only be gained through the attainment of at least a Bachelor's degree or its equivalent in Computer Science, Computer Applications, Information Technology, Electronics, Engineering, or a directly related field with a considerable amount of experience,” and that “the position as a Programmer Analyst requires at least a Bachelor's Degree in computer science for entry.”

C. Analysis

A baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position

We will now discuss the proffered position in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which requires the Petitioner to demonstrate that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position.

USCIS recognizes the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.² The Petitioner asserts in the LCA that the proffered position falls within the “Computer Programmers” occupational category.

We reviewed the section of the *Handbook* covering the “Computer Programmers” occupational category, including the section entitled “How to Become a Computer Programmer,” which states the following:

Most computer programmers have a bachelor's degree in computer science or a related subject; however, some employers hire workers with an associate's degree. Most programmers specialize in a few programming languages.

Education

Most computer programmers have a bachelor's degree; however, some employers hire workers who have an associate's degree. Most programmers get a degree in computer science or a related subject. Programmers who work in specific fields, such as healthcare or

² All references are to the 2014-2015 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>. The excerpts of the *Handbook* regarding the duties and requirements of the referenced occupational category are hereby incorporated into the record of proceeding.

accounting, may take classes in that field to supplement their degree in computer programming. In addition, employers value experience, which many students gain through internships.

Most programmers learn only a few computer languages while in school. However, a computer science degree gives students the skills needed to learn new computer languages easily. During their classes, students receive hands-on experience writing code, debugging programs, and doing many other tasks that they will perform on the job.

To keep up with changing technology, computer programmers may take continuing education and professional development seminars to learn new programming languages or about upgrades to programming languages they already know.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Computer Programmers, available on the Internet at <http://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm> (last visited Sept. 29, 2015).

The *Handbook* specifically states that an associate's degree is acceptable for entrance into some positions located within the occupational category designated by the Petitioner. However, to demonstrate that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a Petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specific specialty, or its equivalent. USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. Therefore, the *Handbook's* recognition that an associate's degree is sufficient for entry strongly suggests that a bachelor's degree in a specific specialty is not a standard, minimum entry requirement for this occupation. Accordingly, as the *Handbook* indicates that positions located within the "Computer Programmers" occupational category do not normally require at least a bachelor's degree in a specific specialty or its equivalent for entry, it does not support the particular position proffered here as being a specialty occupation.

We further note that while the Petitioner requires a bachelor's degree for the proffered position, it did not indicate in the initial petition that a bachelor's degree in a specific specialty, or the equivalent, is required. 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 degree, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Assocs.*, 19 I&N Dec. 558 (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, while a general-purpose bachelor's degree 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. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at 147.

Even if we accepted the amended requirements provided in the RFE response, they would still not establish that the proffered position requires a bachelor's degree in a specific specialty or its equivalent, as the minimum entry requirement. Specifically, the RFE response was internally inconsistent in regards to what the proffered position actually required and was markedly different from the qualifications stated in the client letter. We cannot determine the true requirements for the position with these inconsistencies present in the record. 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).

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).

*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.

There are no submissions from the industry's professional association indicating that it has made a degree a minimum entry requirement and no submission of letters or affidavits from firms or individuals that attest that such firms routinely employ only individuals with a degree in a specific specialty. The Petitioner did submit letters from some of its clients which were purported to establish that it is common for a programmer analyst position to require a bachelor's degree in a specific specialty among similar organizations within the Petitioner's industry. However, the letters do not support such an assertion. Two of the letters address the contractual relationship between the

(b)(6)

Matter of V-T-, Inc.

Petitioner and its client companies and do not provide insight into the educational requirements imposed by similarly situated firms in the Petitioner's industry. The remaining two letters, both from [REDACTED] state that "due to the sophisticated nature of this project, the services that [an individual] is providing to our organization requires a minimum of a Bachelor's degree in Computer Science, Engineering or a related technical field, plus experience in the technologies involved." Neither letter asserts that [REDACTED] routinely recruits and employs only degreed individuals for the position of programmer analyst. Rather, the letters state that it is the nature of the specific project being completed that necessitates the degree. Furthermore, it is not evident from the letters that the positions being discussed, a Database Administrator and Programmer Analyst on Oracle Applications) are in fact similar to the position here proffered.³

The Petitioner further 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.

In the Form I-129 petition, the Petitioner states that it is an advanced software development and consulting business, established in [REDACTED] with 15 individuals. The Petitioner states that it has annual gross revenue of \$1,084,558 and a net annual income of approximately \$65,000. The Petitioner designated its business operations under the North American Industry Classification System (NAICS) code 541511, which corresponds to "Custom Computer Programming Services."⁴

For the Petitioner to establish that an organization within its industry is also similar to it, 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.

We will briefly note that, without more, the job postings do not appear to be from organizations similar to the Petitioner.⁵ 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

³ For example, the positions discussed in [REDACTED] letters require work experience.³ However, given the wage-level designated by the Petitioner on the certified LCA, which DOL guidance indicates is only appropriate for entry-level positions such as research fellows, workers in training, or interns, it is not clear that the duties of the positions referenced in the [REDACTED] letters parallel those of the one proffered here.

⁴ 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 Sept. 29, 2015).

⁵ 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.

(b)(6)

Matter of V-T-, Inc.

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 operates in the same industry without providing a legitimate basis for such an assertion.

More specifically, the advertisements include, among others, positions with [REDACTED], one of the largest commuter rail system in North America; [REDACTED] a leading provider of IT and management training with a record of providing training to over 2.4 million course participants; [REDACTED] a multi-state power supply company; and [REDACTED] a Fortune 100 business that owns and operates food processing, farm supply, fuel, and retail services throughout the United States. 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 involve parallel positions. For example, the position with [REDACTED] requires “7 to 8 years of related experience.” The posting [REDACTED] requires “10 years' experience” while the posting from [REDACTED] requires “5+ years of experience in software system design, development, and deployment.” As previously discussed, the Petitioner designated the proffered position on the LCA through the wage level as a Level I (entry level) position relative to others within the occupation. As such, the advertised positions appear to involve more senior positions than the proffered position. More importantly, the Petitioner has not sufficiently established that the primary duties and responsibilities of the advertised positions parallel those 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, the postings from an unnamed business located in [REDACTED] IL states that “a baccalaureate degree is required. A degree in computer science or related information systems field preferred.” The posting from [REDACTED] likewise states that a “Bachelor in Engineering or Science, Computer Science is a plus,” but does not indicate that such a degree is required. 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 duties of the specialty occupation claimed in the petition.

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.⁶ That is, as the evidence does not establish that similar organizations in the same industry

⁶ 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

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. 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

We will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the Petitioner shows that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent.

We reviewed the record in its entirety and find that the Petitioner has not provided sufficient documentation to support a claim 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.

This is further evidenced by the LCA submitted by the Petitioner in support of the instant petition. The LCA indicates a wage level at a Level I (entry) wage, which is the lowest of four assignable wage levels.⁷ Without further evidence, the record of proceeding does not indicate that the proffered

the United States.

The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is described as follows:

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

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.

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.⁸ 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.”⁹ 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 or its equivalent is not required for the proffered position.

Upon review, we find that the Petitioner has not sufficiently developed relative complexity or uniqueness as an aspect of the proffered position. 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.

In the RFE response, the Petitioner states that the “job of Programmer Analyst involves highly sophisticated computing needs, it is imperative that the personnel working as a programmer analysts have substantial theoretical knowledge in the field of Computer Science and Management” and asserts that “the duties to be performed by the Beneficiary are complex and unique.” While certain skills or knowledge may be beneficial, or even required, in performing specific duties of the position, the evidence does not demonstrate that these skills and knowledge can only be gained through an established curriculum leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, nor has the Petitioner demonstrated that such a degree 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. The record lacks sufficiently detailed information to distinguish the proffered position as more complex

Thus, in accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the Beneficiary is only required to have a basic understanding of the occupation and carries expectations that the Beneficiary perform routine tasks that require limited, if any, exercise of judgment; that she would be closely supervised; that her work would be closely monitored and reviewed for accuracy; and that she would receive specific instructions on required tasks and expected results. DOL guidance indicates that a Level I designation should be considered for positions in which the employee will serve as a research fellow, worker in training, or an intern.

⁸ The issue here is that the Petitioner's designation of this position as a Level I, entry-level position undermines its claim that the position is particularly complex, specialized, or unique compared to other positions *within the same occupation*. Nevertheless, it is important to note that a Level I wage-designation does not preclude a proffered position from classification as a specialty occupation. In certain occupations (doctors or lawyers, for example), an 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 consideration but is not a substitute for a determination of whether a proffered position meets the requirements of section 214(i)(1) of the Act.

⁹ 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.

or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

The Petitioner claims that the Beneficiary is well qualified for the position. 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 establish that its particular position is so complex or unique that it can only be performed by an individual with at least a bachelor's degree in a specific specialty, or its equivalent. Therefore, the Petitioner 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

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. To this end, we review the Petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position, and any other documentation submitted by a Petitioner in support of this criterion of the regulations.

To merit approval of the petition under 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 performance requirements of the position. While a Petitioner may assert that a proffered position requires a specific degree, that statement 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 Petitioner 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 388. In other words, if a Petitioner's stated degree requirement is only designed to artificially meet the standards for an H-1B visa and/or to underemploy an individual in a position for which he or she is overqualified and if the proffered position does not in fact require such a specialty degree or its equivalent, to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* section 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of 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.

In response to the Director's RFE, the Petitioner provided a list of four individuals that it claims are employed as computer programmer analysts, performing duties similar to the duties of the proffered position. The Petitioner asserts that the educational credentials of these four individuals substantiate the claim that it normally requires a baccalaureate or higher degree in a specific specialty, or its equivalent for the position. However, as noted by the Director, the Petitioner has not submitted any evidence to corroborate these claims. The record does not contain copies of the individuals' educational credentials or specific job descriptions to establish their duties. Moreover the Petitioner has not submitted wage statements or W-2s establishing that these individuals are employed by the Petitioner.

On appeal, the Petitioner contends that it need not submit the corroborating evidence to substantiate its claims, as "USCIS approved the petitions, they have access to all collaborative documents relating to the H-1B employees. Therefore the USCIS has on hand all evidence regarding the positions and the degrees each H-1B employee possesses." If a Petitioner wishes to have the facts of prior decisions considered by USCIS in its adjudication of a petition, the petitioner is permitted to submit copies of such evidence that it either obtained itself and/or received in response to a Freedom of Information Act request filed in accordance with 6 C.F.R. Part 5. Otherwise, "[t]he non-existence or other unavailability of required evidence creates a presumption of ineligibility." 8 C.F.R. § 103.2(b)(2)(i).

Again, the Petitioner in this case did not submit copies of these petitions and their respective approval notices. As the record of proceeding does not contain any evidence of the petitions, there were no underlying facts to be analyzed and, therefore, no prior, substantive determinations could have been made to determine what facts, if any, were analogous to those in this proceeding.

When "any person makes an application for a visa or any other document required for entry, or makes an application for admission, [. . .] the burden of proof shall be upon such person to establish that he is eligible" for such benefit. 8 U.S.C. § 1361; *see also Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972). Furthermore, any suggestion that USCIS must review unpublished decisions and possibly request and review each case file relevant to those decisions, while being impractical and inefficient, would also be a shift in the evidentiary burden in this proceeding from the Petitioner to USCIS, which would be contrary to section 291 of the Act, 8 U.S.C. § 1361. Accordingly, neither the Director nor our office was required to request and/or obtain a copy of the petitions noted by the Petitioner

On appeal, the Petitioner provides an affidavit from its Vice President stating that the Petitioner only employs "candidates who have a degree in Computer Science & Engineering, Computer Information Systems, Management Information Systems, or other I.T. degrees to work in Programmer Analyst

positions. . .”¹⁰ However, the Petitioner submits no documentary evidence backing this assertion, and going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

We have reviewed the record and find no evidence that the Petitioner normally requires a baccalaureate or higher degree in a specific specialty, or its equivalent, for the proffered position. Therefore, the Petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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 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.

Upon review of the record of the proceeding, we note that the Petitioner has not provided probative evidence to satisfy this criterion of the regulations. In the instant case, relative specialization and complexity have not been sufficiently developed by the Petitioner as an aspect of the proffered position. That is, the proposed duties have not been described with sufficient specificity to establish that they are more specialized and complex than positions that are not usually associated with at least a bachelor's degree in a specific specialty, or its equivalent.

We further 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 I position (the lowest of four assignable wage-levels) relative to others within the occupational category. Without more, the position is one not likely distinguishable by relatively specialized and complex duties. That is, without further evidence, the Petitioner has not demonstrated that its proffered position is one with specialized and complex duties 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 substantially higher prevailing wage.¹¹

The Petitioner has submitted insufficient evidence to satisfy this criterion of the regulations. We therefore conclude that the Petitioner did not satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

¹⁰ We note that the stated requirements are inconsistent with those earlier claimed by the Petitioner.

¹¹ 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.

Matter of V-T-, Inc.

For the reasons related in the preceding discussion, the Petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation.

III. 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.¹²

ORDER: The appeal is dismissed.

Cite as *Matter of V-T-, Inc.*, ID# 13948 (AAO Oct. 2, 2015)

¹² Since the identified basis for denial is dispositive of the Petitioner's appeal, we will not address the other grounds of ineligibility we observe in the record of proceeding.