U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF N-E-S-, LLC

DATE: SEPT. 10, 2015

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, an information technology services firm, seeks to employ the Beneficiary as a computer systems analyst and to classify him as a nonimmigrant worker in a specialty occupation. *See* Immigration and Nationality Act (the Act) § 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.

The Director denied the petition, finding the evidence insufficient to establish that (1) the proffered position qualifies as a specialty occupation; and (2) the Petitioner will have an employer-employee relationship with the Beneficiary. On appeal, the Petitioner states that the Director's basis for denial was erroneous and contends that it satisfied all evidentiary requirements.

The record of proceeding before us contains: (1) the Form I-129 and the supporting documentation; (2) the service center's request for additional evidence (RFE); (3) the Petitioner's response to the RFE; (4) the service center's notice of intent to deny (NOID); (5) the Petitioner's response to the NOID; (6) the Director's denial letter; and (7) the Form I-290B, Notice of Appeal or Motion, and the Petitioner's submissions on appeal. We reviewed the record in its entirety before issuing our decision.[1]

I. THE PROFFERED POSITION

In the Labor Condition Application (LCA) submitted to support the visa petition, the Petitioner indicated that the proffered position corresponds to the occupational category "Computer Systems Analysts" with SOC (ONET/OES) code 15-1121, at a Level I (entry level) wage.

In an employment offer letter dated February 3, 2014, the Petitioner provided the duties of the proffered position as follows:

> Job duties: As a Business Systems Analyst, [the Beneficiary] will be required to plan, design, develop, test, implement, and support custom proprietary software

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

> applications['] research, design, implement, document, and test system software in accordance with the firm's development process. [The Beneficiary] will provide technical support to project team members; contribute to company's intellectual property development; evaluate user requests for new or modified programs; consult with user to identify current operating procedures to clarify program objectives; formulate plans outlining steps required to develop programs, using structured analysis and design; prepare flowcharts and diagrams to illustrate sequence of steps, program must follow and to describe logical operations involved; write documentation to describe program development, logic, coding and corrections, oversee installation of hardware and software, monitor performance of program after implementation; conduct user training, perform periodic system updates, interact with users for future enhancements; and resolve software application problems.

In the letter of support dated March 31, 2014, the Petitioner stated that it offers cutting edge database administration (DBA) expertise encompassing a "complete range of DBA solutions, including onsite DBA support and Remote DBA support . . . ." The Petitioner also stated that the Beneficiary will perform the following duties:

- Interact with management to determine system requirements;
- Analyze software requirements to determine design feasibility;
- Evaluate interface between hardware & software and performance requirements of overall system;
- Design software system, using design tools to predict outcome;
- Develop software systems programming, including documentation and testing procedures;
- Advise concerning maintenance of system; [and]
- Coordinate installation of software system.

The Petitioner further stated that the educational requirements for the position is a Bachelor's degree or its equivalent in Engineering, Computer Science, Computer Information Systems, Business with a specialization in Information Systems, or a closely related field. The Petitioner also indicated that the Beneficiary will be working as at its office location at California

II. SPECIALTY OCCUPATION

We will first address the specialty occupation basis of denial. The issue is whether the evidence of record establishes that the Petitioner will employ the Beneficiary in a specialty occupation position.

A. Legal Framework

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

(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 aliens 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 alien, 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. 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 that 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 (DOL)'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 *Handbook*'s section titled "How to Become a Computer Systems Analyst" states:

> A bachelor's degree in a computer or information science field is common, although not always a requirement. Some firms hire analysts with business or liberal arts degrees who have skills in information technology or computer programming.
>
> **Education**
>
> Most computer systems analysts have a bachelor's degree in a computer-related field. Because these analysts also are heavily involved in the business side of a company, it may be helpful to take business courses or major in management information systems.
>
> Some employers prefer applicants who have a master's degree in business administration (MBA) with a concentration in information systems. For more technically complex jobs, a master's degree in computer science may be more appropriate.
>
> Although many computer systems analysts have technical degrees, such a degree is not always a requirement. Many analysts have liberal arts degrees and have gained programming or technical expertise elsewhere.
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> Many systems analysts continue to take classes throughout their careers so that they can learn about new and innovative technologies and keep their skills competitive. Technological advances come so rapidly in the computer field that continual study is necessary to remain competitive.
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> Systems analysts must understand the business field they are working in. For example, a hospital may want an analyst with a background or coursework in health management, and an analyst working for a bank may need to understand finance.

U.S. Department of Labor (DOL), Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Computer Systems Analyst, available on the Internet at http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm (last viewed September 8, 2015).

The *Handbook* does not indicate that a bachelor's or higher degree in a specific specialty, or its equivalent, is not normally the minimum requirement for entry into the particular position. Rather, the occupation accommodates a wide spectrum of educational credentials. While the *Handbook* reports that a bachelor's degree in a computer or information science field is common, it also states

[2] 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.

that it is not always a requirement. The *Handbook* reports that some firms hire analysts with business or liberal arts degrees who have skills in information technology or computer programming. The *Handbook* continues by stating that many computer systems analysts have technical degrees (it does not specify the level of such degrees, i.e., associate's, baccalaureate, master's), but the *Handbook* does not report that it is normally the minimum requirement for entry. According to the *Handbook*, many analysts have liberal arts degrees and have gained programming or technical expertise elsewhere.

On appeal, the Petitioner states that the job description and other documentation provided as well as the section regarding Computer Systems Analysts in Occupational Information Network(O*NET) On-line Summary Report is sufficient to demonstrate that the proffered position is a specialty occupation.[3] Contrary to the Petitioner's claim, we find that O*NET does not state a requirement for a bachelor's degree for Computer Systems Analysts. Rather, it assigns "Computer Systems Analysts" a Job Zone Four rating, which groups them among occupations of which "most," but not all, "require a four-year bachelor's degree." Further, O*NET does not indicate that four-year bachelor's degrees required by Job Zone Four occupations must be in a specific specialty closely related to the requirements of that occupation. As was noted previously, we interpret 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. Therefore, O*NET information is not probative of the proffered position being a specialty occupation.

As the evidence of record does not indicate that this petition's particular position is one that normally requires at least a bachelor's degree in a specific specialty, or its equivalent, 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 find that the Petitioner has not satisfied 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.

Again, 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 at 1165 (quoting *Hird/Blaker Corp. v. Sava,* 712 F. Supp. at 1102).

[3] See http://www.onetonline.org/link/summary/15-1121.00 (last visited September 8, 2015).

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

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.

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

The Petitioner stated that it is an information technology services business established in 2005 with 16 employees. The Petitioner further stated that it had $1.7 million in gross income and $200,000 in net income. The Petitioner designated its business operations under the North American Industry Classification System (NAICS) code 541519, which corresponds to "Other Computer Related Services."[4] The U.S. Department of Commerce, Census Bureau website describes this NAICS code by stating the following:

> This U.S. industry comprises establishments primarily engaged in providing computer related services (except custom programming, systems integration design, and facilities management services). Establishments providing computer disaster recovery services or software installation services are included in this industry.

U.S. Dep't of Commerce, U.S Census Bureau, 2012 NAICS Definition, 541519 – Other Computer Related Services, on the Internet http://www.census.gov/econ/isp/sampler.php?naicscode=44619&naicslevel=5# (last visited September 8, 2015).

For the petitioner to establish that an organization is similar, it must demonstrate that it shares 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 organization share the same general characteristics, such factors may include information regarding the nature or

[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 September 8, 2015).

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). Notably, 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.

Upon review of the documentation, the Petitioner did not 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.

For instance, the advertisements include a major supplier of weather information and geospatial intelligence; an engineering services business; and , a business in government and military industry. Without further information, these advertisements appear to be for organizations that are not similar to the Petitioner. While the advertisements also include and International, which describe their industry as computer/IT services, the Petitioner did not supplement the record to establish that the advertising organizations are similar to it. The Petitioner also submitted a confidential posting and also a posting from neither of which provides information regarding the employers. Consequently, the record does not contain sufficient information regarding the employers to conduct a legitimate comparison of the organizations to the Petitioner.

Moreover, some of the advertisements do not appear to be for parallel positions. More specifically, requires a B.S. degree in computer science, computer engineering, business or communications plus five years of experience. Similarly, requires a bachelor's degree in related field or equivalent experience, without defining what a related field or equivalent experience means. Moreover, the Petitioner has not sufficiently established which primary duties of the advertised positions are parallel to the duties of the proffered position.

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. That is, not every deficit of every job posting has been addressed. 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.[5]

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[5] Although the size of the relevant study population is unknown, the Petitioner does not demonstrate what statistically valid inferences, if any, can be drawn from these advertisements with regard to determining the common educational requirements for entry into parallel positions in similar companies. See generally Earl Babbie, The Practice of Social Research 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. See id. at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error.")

As such, even if the job announcements supported the finding that the position of computer systems analysts for companies that are similar to the Petitioner requires a bachelor's or higher degree in a specific specialty, or its equivalent,

On appeal, the Petitioner refers to an article titled *Careers in the Growing Field of Information Technology Services*, published by U.S. Bureau of Labor Statistics to assert that "this industry requires technical workers who have at least a Bachelor's degree. We note that this article describes computer systems analysts generally, along with other IT-related positions, including software developers, computer programmers, and computer support specialists. The petitioner indicates that according to the article "[c] omputer support specialist is the only computer occupation that does not typically require a bachelor's degree for entry." However, we find that the article also states "[a]lthough employers may prefer a degree for more technical support positions, many help desk and call center positions only require an associate's degree or some postsecondary classes..." We further note that the article includes a table, that lists computer systems analyst positions as typically requiring a bachelor's degree for entry, but nowhere does the article state that a bachelor's degree in a specific specialty or its equivalent is required.

As explained previously, we interpret the supplemental degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) as requiring a degree in a specific specialty that is directly related to the proposed position. USCIS has consistently stated that, although 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 139, 147 (1st Cir. 2007).

Therefore, 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.

As discussed previously, the evidence of record does not develop relative complexity or uniqueness as an aspect of the position. In fact, the Petitioner's statement in response to the NOID that the Beneficiary would serve in a secondary role to a more senior employee, "similar to how an Attorney

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it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not require at least a baccalaureate degree in a specific specialty, or its equivalent, for entry into the occupation in the United States.

represents clients in on the record and in Court but may have paralegals and other administrative staff that draft documents, file pleadings and do things behind the scenes to assist the Attorney in providing service to a client..." indicates that the proffered duties are routine and do not entail complexity or uniqueness. The Petitioner further indicated that the Beneficiary's "work is subject to review by the Primary role to ensure compliance with client requirements and project scop[e]."

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.[6] Without further evidence, the record of proceeding does not indicate 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.[7] 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."[8] The evidence of record does not establish that

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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.flcdatacenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf.

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 he would be closely supervised; that his work would be closely monitored and reviewed for accuracy; and that he 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.

[7] 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.

[8] 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.flcdatacenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf.

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. 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. The record lacks sufficiently detailed information to distinguish the proffered position as more complex 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 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* § 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. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. 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.

The record has not established a prior history of hiring for the proffered position only persons with at least a bachelor's degree *in a specific specialty*. Although the Petitioner stated that it only hires people who have a bachelor's degree in a specific specialty to work in the proffered position, no evidence regarding these other employees or petitioner's advertisements for this or any similar positions was provided. As such, the Petitioner has not asserted that it has a history of recruiting and hiring only persons with at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position. Additionally, 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 sufficient evidence to satisfy this criterion of the regulations. In the instant case, relative specialization and complexity have not been credibly 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.[9]

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*).

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. EMPLOYER-EMPLOYEE ISSUE

Since our decision on the specialty occupation basis is dispositive of the Petitioner's appeal, we need not address the additional ground upon which the Director denied the appeal, namely, the Director's conclusion that the Petitioner had not established the employer-employee relationship with the Beneficiary that is necessary for standing to file an H-1B petition as a "United States employer" as defined at 8 C.F.R. § 214.2(h)(4)(ii).

In our consideration of the specialty occupation issue we assumed for the sake of adjudication that the Petitioner intended to employ the Beneficiary exclusively in-house as described in the record. However, we find that there are inconsistencies in the record that undermine the Petitioner's claims regarding the nature of its business and the proffered position, and whether, in fact, the Petitioner has sufficient work for the duration of the employment. Specifically, as noted that in the offer letter dated February 3, 2014, the Petitioner indicated that the Beneficiary will "plan, design, develop, test, implement and support custom proprietary software applications" and "contribute to company's intellectual property development." However, the Petitioner did not submit sufficient regarding its proprietary software applications or intellectual property development. Further, the Statement of Work that describes the Beneficiary's role and service requirements and an information booklet that indicates that the Petitioner provides remote or in-house database administration services to its clients both contain sections that appear to be verbatim from other Internet sources. Moreover, the record of proceeding contains a lease agreement to establish availability of work space for the

[9] 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.

Beneficiary; however, the lease is valid only until April 30, 2015 and so does not cover the entire employment period.

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 does not appear to develop its own software and its work appears to be dependent on contracts with clients. The Petitioner submitted a few existing contracts; however, none of the contracts are valid for the duration of the Beneficiary's requested employment period. The Petitioner asserts that the Beneficiary will only serve in a secondary-role and therefore is not named in the contracts. However, 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 his 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. Comm'r 1978).[10]

The above is not meant to be a comprehensive and conclusive analysis of the U.S. employer issue. We reserve the option to provide such an analysis, if needed in the future. It serves, however, to place the Petitioner on notice that it has not submitted sufficient evidence to establish that the Petitioner and the Beneficiary would have the requisite employer-employee relationship.

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

IV. CONCLUSION

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.

ORDER: The appeal is dismissed.

Cite as *Matter of N-E-S-, LLC*, ID# 13279 (AAO Sept. 10, 2015)