



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

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

MATTER OF T-P-C-, LLC

DATE: AUG. 24, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a general contractor and real property management company, seeks to temporarily employ the Beneficiary as a “cost estimator/financial specialist.” *See* Immigration and Nationality Act (the Act) section 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The H-1B program allows a U.S. employer to temporarily employ a qualified foreign worker in a position that requires both (a) the theoretical and practical application of a body of highly specialized knowledge and (b) the attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum prerequisite for entry into the position.

The Director, Vermont Service Center, denied the petition. The Director concluded that the evidence of record did not establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions.

The matter is now before us on appeal. On appeal, the Petitioner asserts that the Director’s denial of the petition was arbitrary and capricious, and that the proffered position is of the same nature and complexity as other general contractors or construction companies’ cost estimators.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term “specialty occupation” as an occupation that requires:

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

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

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

8 C.F.R. § 214.2(h)(4)(iii)(A). U.S. Citizenship and Immigration Services (USCIS) has consistently interpreted 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 proposed position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing “a degree requirement in a specific specialty” as “one that relates directly to the duties and responsibilities of a particular position”); *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000).

II. PROFFERED POSITION

In support of the petition, the Petitioner explained that it is in the business of real property investment and development, and provided a description of the job duties of the proffered position. In response to the Director’s request for evidence (RFE), the Petitioner expanded upon the duties of the proffered position, as follows:

1. Assist the Company in preparing construction contractor bidding. In performing this job duty, the Cost Estimator/Financial Specialist will calculate costing of the construction projects including general contracting and sub-contracting. Review cost data involved including labor, materials, construction permit applications from the Cities, prepare itemized cost analysis and reports as reference and basis for the Management’s construction project planning and project management; prepare the bidding packages. To competently perform this job duty, the incumbent will apply knowledge and training in Accounting; Finance; Financial Management. These knowledge and skills are normally gained through a formal college degree program in accounting or finance
2. Study, analyze construction project financing issues; study Bank lending requirements and assist in compiling cost estimation and profit analysis for obtaining construction loans. In performing this job duty, the incumbent will study Bank lending requirements, standards, Government assisted community development

housing loans; analyze ratio of capital funding for the projects and the Bank's loan guidelines on such property development projects. Prepare for submission of property project research reports as part of construction loan applications

To competently perform this job duty, the incumbent will apply knowledge and skills in Financial Management; Managerial Accounting; and Federal Taxation. Such are normally learned through a formal college degree program in Accounting or Finance.

3. Assist in the Company's financial management. In performing this job duty, the incumbent will review, prepare financial reporting for the Company's property sales and leasing operation; summarize and compile monthly financial data spreadsheets for reporting revenue, profit or loss; outstanding loan, property tax payments and filing

The petitioner estimates that approximately 35% of the beneficiary's work times will be spent on job duty Item #1, *above*; 35% on job duty Item 2, *above*; 20% on Item 3, *above*; and 10% on miscellaneous other administrative duties.

According to the Petitioner, the duties of the position are complex and can only be performed by an individual with at least a bachelor's degree in accounting or finance.

III. ANALYSIS

Upon review of the record in its totality and for the reasons set out below, we determine that the Petitioner has not demonstrated that the proffered position satisfies any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, qualifies as a specialty occupation. Specifically, the record does not establish that the job duties require an educational background, or its equivalent, commensurate with a specialty occupation.¹

A. First Criterion

We turn first to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position.² To inform this inquiry, we recognize the U.S. Department of Labor's (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.³

¹ The Petitioner submitted documentation to support the H-1B petition, including evidence regarding the proffered position. While we may not discuss every document submitted, we have reviewed and considered each one.

² Although some aspects of the regulatory criteria may overlap, we will address each of the criteria individually.

³ We do not maintain that the *Handbook* is the exclusive source of relevant information. That is, the occupational category designated by the Petitioner is considered as an aspect in establishing the general tasks and responsibilities of a proffered position, and USCIS regularly reviews the *Handbook* on the duties and educational requirements of the wide variety of occupations that it addresses. To satisfy the first criterion, however, the burden of proof remains on the

On the labor condition application (LCA) submitted in support of the H-1B petition, the Petitioner designated the proffered position under the occupational category “Cost Estimators” corresponding to the Standard Occupational Classification code 13-1051 at a Level I wage.⁴

The 2016-2017 edition of the *Handbook* subchapter entitled “How to Become a Cost Estimator” states in pertinent part: “A bachelor’s degree is generally required to become a cost estimator, although some highly experienced construction workers may qualify without a bachelor’s degree.”⁵ It further states: “Construction cost estimators typically need a bachelor’s degree in an industry-related field, such as construction management, building science, or engineering.”⁶

The 2014-2015 edition of the same *Handbook* subchapter – upon which the Petitioner relies and submitted a copy of for the record – restates the same two passages cited above (for the 2016-2017 edition). In addition, the 2014-2015 edition of the *Handbook* states specifically for construction cost estimators that “[s]ome employers accept candidates with backgrounds in business-related disciplines such as accounting, finance, and business.”

Upon review, we find that the *Handbook* does not support the assertion that a bachelor’s degree in a specific specialty, or its equivalent, is required for entry into this occupation. While the *Handbook* reports that a bachelor’s degree is generally required, some workers may qualify for entry into the occupation without such a degree. Moreover, the *Handbook* does not indicate that a degree in a *specific specialty*, or its equivalent, is necessary to become a cost estimator. Rather, for construction cost estimators, the *Handbook* indicates that degrees in “industry-related fields” as well as “business-related disciplines such as accounting, finance, and business” are acceptable for entry. Notably, the Petitioner does not state a requirement of a degree in an “industry-related field” such as construction management, building science, or engineering; instead, the Petitioner’s stated minimum requirement of a degree in accounting or finance falls under the broad category of what the *Handbook* characterizes as “business-related disciplines.”

Petitioner to submit sufficient evidence to support a finding that its particular position would normally have a minimum, specialty degree requirement, or its equivalent, for entry.

⁴ We will consider the Petitioner’s classification of the proffered position at a Level I wage (the lowest of four assignable wage levels) in our analysis of the position. The “Prevailing Wage Determination Policy Guidance” issued by the DOL provides a description of the wage levels. A Level I wage rate is generally appropriate for positions for which the Petitioner expects the Beneficiary to have a basic understanding of the occupation. This wage rate indicates: (1) that the Beneficiary will be expected to perform routine tasks that require limited, if any, exercise of judgment; (2) that she will be closely supervised and her work closely monitored and reviewed for accuracy; and (3) that she will receive specific instructions on required tasks and expected results. U.S. Dep’t of Labor, Emp’t & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://flcdcenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf. A prevailing wage determination starts with an entry level wage and progresses to a higher wage level after considering the experience, education, and skill requirements of the Petitioner’s job opportunity. *Id.* A Level I wage should be considered for research fellows, workers in training, or internships. *Id.*

⁵ U.S. Dep’t of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2016-17 ed., “Cost Estimators,” <http://www.bls.gov/OOH/business-and-financial/cost-estimators.htm> (last visited Aug. 23, 2016).

⁶ *Id.*

The Petitioner has not provided documentation from a probative source to substantiate its assertion regarding the minimum requirement for entry into its particular position. Thus, the Petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

B. Second Criterion

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

1. First Prong

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

In determining whether there is such a common degree requirement, factors often considered by 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 another authoritative source, reports a requirement for at least a bachelor’s degree in a specific specialty, or its equivalent. Thus, we incorporate by reference the previous discussion on the matter. Also, there are no submissions from the industry’s professional association indicating that it has made a degree a minimum entry requirement. Furthermore, the Petitioner did not submit any letters or affidavits from similar firms or individuals in the Petitioner’s industry attesting that such firms “routinely employ and recruit only degreed individuals.”

In support of its assertion that the degree requirement is common to the Petitioner’s industry in parallel positions among similar organizations, the Petitioner submitted copies of job vacancy announcements in response to the Director’s RFE. Upon review of the documentation, 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 both parallel to the proffered position and located in organizations that are similar to the Petitioner.

Contrary to the purpose for which the advertisements were submitted, some of the postings do not establish that at least a bachelor's degree in a specific specialty, or its equivalent, is required for the positions.⁷ For example, many of the submitted advertisements indicate that a bachelor's degree in a variety of disparate fields is acceptable. One posting will accept an individual with a degree in "Civil Engineering, Construction Management, or Business Administration," whereas another posting seeks candidates that possess a bachelor's degree in "Engineering, Math, Economics, Statistics, Science, or Operations Research." A third posting solicits candidates with a bachelor's degree in "Accounting, Business, Financial Management, Computer Science, Information Systems Management, Business (MBA), National Security Strategy, and/or Engineering."

The degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but such a degree in a *specific specialty* that is directly related to the specialty occupation claimed in the petition.⁸ See *Royal Siam Corp. v. Chertoff*, 484 F.3d at 147. Moreover, some of the submitted advertisements indicate that a bachelor's degree in business or business administration is acceptable. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not support the assertion that a position is a specialty occupation. Cf. *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

Moreover, many of the advertisements do not appear to be for parallel positions. For instance, one advertisement requires a minimum of five years of experience "in a heavy manufacturing industry which includes welding," and another requires "10+ years of experience providing cost estimating and analysis support to US Federal Govt. customer[s]." As previously discussed, the Petitioner designated the proffered position on the LCA (through the wage level) as a Level I, entry-level position. Furthermore, some of the positions do not appear to have similar duties to the proffered

⁷ It must be noted that even if all of the job postings indicated that a requirement of a bachelor's degree in a specific specialty is common to the industry in parallel positions among similar organizations (which they do not), the Petitioner has not demonstrated what statistically valid inferences, if any, can be drawn from the advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. See *id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

⁸ In general, provided the specialties are closely related, e.g., math and statistics, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty (or its equivalent)" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in disparate fields, such as construction management and computer science, would not meet the statutory requirement that the degree be "in *the* specific specialty (or its equivalent)," unless the Petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added). The Petitioner has not done so here.

position. For these postings, the Petitioner has not sufficiently established that the primary duties and responsibilities of the advertised positions are parallel to the proffered position.

Finally, the postings contain little or no information regarding the employers. Consequently, the record is devoid of sufficient information regarding the advertising organizations to conduct a legitimate comparison of the organizations to the petitioner. The Petitioner did not supplement the record of proceedings to establish that the advertising organizations are similar to it. That is, the Petitioner has not provided any information regarding which aspects or traits (if any) it shares with the advertising organizations.

The evidence does not establish that at least a bachelor's degree in a specific specialty, or its equivalent, is common to the industry in parallel positions to the proffered position, among similar organizations to the Petitioner.⁹ Thus, the Petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

2. Second Prong

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

We reviewed the Petitioner's statements regarding the proffered position; however, the Petitioner has not sufficiently developed relative complexity or uniqueness as an aspect of the position. The Petitioner states that it is "a general contractor, which is a construction management company for real property development projects." In support of its assertion, it submitted a portfolio of its construction and real property development projects, noting that the Beneficiary's role as cost estimator/financial specialist will require her to compute the costs of the general contractor's work, as well as that of its subcontractors. The Petitioner submitted copies of the typical work product of a cost estimator in the context of its business operations, which includes examples of contracts and monthly financial reporting, as well as a copy of lending guidelines for a typical government housing loan. The Petitioner asserts that this documentary evidence demonstrates that the Beneficiary, in preparing construction contract bidding, obtaining construction loans, and assisting in the company's financial management, requires her to apply knowledge and skills gained from a course of study in accounting and finance.

While the Petitioner repeatedly asserts that the duties of the proffered position are "complex," these claimed aspects of the proffered position have not been sufficiently corroborated in the record. The general descriptions of the proffered duties do not identify any tasks that are so complex or unique

⁹ We reviewed all of the advertisements submitted in response to the RFE. 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.

that only a specifically degreed individual could perform them. The duties the Petitioner ascribed to the proffered position indicate a need for some knowledge in finance or accounting, but do not establish any particular level of formal, postsecondary education leading to a bachelor's or higher degree in a specific specialty (or its equivalent) as minimally necessary to attain such knowledge.

Further, the LCA submitted by the Petitioner indicates that the proffered position is a Level I (entry) wage, which, as noted above, is the lowest of four assignable wage levels. Without additional evidence, the record of proceedings does not indicate that the proffered position is so complex or unique, as such a position would likely be classified at a higher-level, which requires a significantly higher prevailing wage.¹⁰ Thus, the Petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

C. Third Criterion

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position.

The Petitioner does not assert that it currently or previously employed any individuals in the proffered position, and has not provided evidence in support of this criterion. Therefore, it has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

D. Fourth Criterion

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent.

We reviewed the Petitioner's description of the job duties and the information regarding its business operations. However, the Petitioner does not assert and the evidence does not support a finding that it has satisfied this criterion. For instance, the Petitioner did not submit a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the tasks. While a few related courses may be beneficial in performing certain duties of the position, the Petitioner has not demonstrated how an established curriculum of such courses is required. The evidence in the record does not refute the *Handbook's* information to the effect that an experienced construction worker without a degree, or individuals with degrees in a wide variety of fields, could perform the duties of this occupation. Without more, the record lacks sufficiently detailed information to distinguish the level of judgment and understanding necessary to perform the duties as specialized and complex.

¹⁰ For more information, 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://flcdcenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf.

Further, we 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 same occupational category.¹¹

The Petitioner claims that the Beneficiary is well qualified for the position, and references her qualifications. However, the test to establish a position as a specialty occupation is not the education or experience of a proposed beneficiary, but whether the position itself requires at least a bachelor's degree in a specific specialty, or its equivalent. The Petitioner has not demonstrated in the record that its proffered position is one with duties sufficiently specialized and complex to satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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

IV. PREVAILING WAGE

The record of proceedings also lacks probative evidence demonstrating that the Petitioner will offer a wage equal to or greater than that required by law. Section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A), states that the Petitioner must offer wages that are at least “the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question” or “the prevailing wage level for the occupational classification in the area of employment, whichever is greater.”

Here, the prevailing wage for the proffered position is \$690.00 per week, which is annualized at \$35,880.00 per year for full-time employment. The Petitioner attested on the Form I-129, Petition for a Nonimmigrant Worker, and LCA, however, that it would only pay the Beneficiary \$603.75 per week for working full-time for the Petitioner. This salary, when annualized, only amounts to \$31,395.00 per year. Therefore, the Petitioner has not offered a wage that is equal to or greater than the prevailing wage, and the petition cannot be approved for this additional reason.

¹¹ As discussed earlier, this designation indicates that the proffered position is a low-level, entry position relative to others within the “Cost Estimators” occupational category. Thus, the Petitioner’s designation of this position as a Level I, entry-level position undermines a claim that the position is particularly complex compared to other positions *within the same occupation*. Nevertheless, a Level I wage-designation does not preclude a proffered position from classification as a specialty occupation, just as a Level IV wage-designation does not definitively establish such a classification. In certain occupations (e.g., doctors or lawyers), a Level I, entry-level position would still require a minimum of a bachelor’s degree in a specific specialty, or its equivalent, for entry. Similarly, however, a Level IV wage-designation would not reflect that an occupation qualifies as a specialty occupation if that higher-level position does not have an entry requirement of at least a bachelor’s degree in a specific specialty, or its equivalent. That is, a position’s wage level designation may be a relevant factor but is not itself conclusive evidence that a proffered position meets the requirements of section 214(i)(1) of the Act.

V. CONCLUSION

The Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation, and that it has offered a wage that is equal to or greater than that required by law.¹²

We may deny an application or petition that does not comply with the technical requirements of the law even if the Director does not identify all of the grounds for denial in the initial decision. *See Spencer Enters., Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001).

Moreover, when we deny a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that we abused our discretion with respect to all of the enumerated grounds. *See Spencer Enters., Inc. v. United States*, 229 F. Supp. 2d at 1037; *see also BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1183 (D.C. Cir. 2003) (“When an agency offers multiple grounds for a decision, we will affirm the agency so long as any one of the grounds is valid, unless it is demonstrated that the agency would not have acted on that basis if the alternative grounds were unavailable.”).

The petition will therefore be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. The burden is on the Petitioner to show 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 T-P-C-, LLC*, ID# 17748 (AAO Aug. 24, 2016)

¹² We will not address the Beneficiary’s qualifications as a beneficiary’s credentials to perform a particular job are relevant only when the job is found to be a specialty occupation.