



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

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

MATTER OF CEME-1, LLC

DATE: FEB. 23, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a business with wholesale trade agents and brokers, seeks to temporarily employ the Beneficiary as an “industrial designer” under the H-1B nonimmigrant classification. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The Director, Vermont Service Center, denied the petition. The matter is now before us on appeal. Upon *de novo* review, we will dismiss the appeal.¹

I. ISSUE

The issue before us is whether the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions.

II. SPECIALTY OCCUPATION

A. Legal Framework

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.

¹ We follow the preponderance of the evidence standard as specified in *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010).

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. Fed. 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.

(b)(6)

Matter of CEME-1, LLC

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 individuals 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 individual, 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 or an employer’s self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

B. The Proffered Position

In a letter dated February 2, 2015, the Petitioner described the proffered position as follows (verbatim):

As an Industrial Designer for our company, [the Beneficiary] will be responsible for design of machinery for the food industry, principally but not limited to sandwich manufacturing companies, develop, and prepare blueprints on [REDACTED] CAD based on R&D and client specifications in compliance with FDA and USDA regulations. Must design and engineer all mechanical, electrical, electronic, pneumatic and/or hydraulic systems to specification, modify at client request, investigate material characteristics, safety, handling qualities and projected production efficiency. Write operation manuals, preventive maintenance manuals and diagnostic and repair manuals. Provide cost estimates on production materials and manufacturing methods and lead new product planning and development. Supervise parts manufacturers and assembly of the designed machinery to warrant[y] product compliance with specifications, both from government agencies and client company. Requires 40% travel to the machinery manufacturing location to supervise machinery construction and testing, as well as to the client location to supervise

(b)(6)

Matter of CEME-1, LLC

assembly line installment, testing and debugging and employees training on the new machinery operation, cleaning procedures and maintenance, both preventive and repairs. Give phone assistance on the machinery operation and/or diagnostics and repair.

The requirements for this job offer include a bachelor's degree or academic equivalent in Business Information Systems or Industrial Engineering and two years experience in field.

In response to the Director's request for evidence (RFE), the Petitioner provided a more detailed job description as follows (verbatim):

- Research new technologies that can be applicable to our products to keep the up to date
Approximated percentage of time invested in this task 5%
- Design products
Approximated percentage of time invested in this task 20%
 - Contact the client to get their special needs if any that have to be incorporated to the machinery for installation in their production lines.
 - Use [REDACTED] CAD (Computer Aid Design) software to create detailed 3D drawings of the machinery components and construct a 3D model of the machine to ensure clearance between parts are met. This information will be used for the blueprints to make the parts and to make 3D representations that can later be used on CNC (Computer Numerical Control) machinery to produce the parts for the machine.
 - Make sure the design will meet with the requirements to comply with all USDA and FDA regulations.
 - Calculate power requirements as power consumption in Amps/Hour and most adequate voltage and it should work with DC or AC power.
 - Calculate compressed air and or hydraulic fluid use in cubic feet per minute and most adequate pressure to move every cylinder or pneumatic motor
 - Select the appropriate material for each part taking in consideration the use of engineered materials and make analysis of the durability and Cost/Benefit
 - Make the appropriate programs to control the machinery either in a PLC (Programmable Logic Controller) or in a MCU (Microcontroller Unit)
 - Design the electric schematics and select the electronic components according with the required voltage and power consumption

- Select sensors according to their voltage, power consumption and reaction times to ensure they are suitable for the machine being designed.
- Select motor and servomotors as well as other power transmission elements as pulleys, belts, sprockets and chain as well as frequency drives or other motor control devices to obtain the desired speed and torque needed for the operation of the machinery.
- Build prototypes
Approximated percentage of time invested in this task 20%
 - 3D print of parts
 - Find and buy electric parts needed
 - Find, buy and program electronics
 - Outsource manufacture of parts that can be built in house
 - Pot together prototype
 - Run tests
 - Make the necessary changes if needed
- Make costs analysis and select companies for the production of parts and assembly of the machinery
Approximated percentage of time invested in this task 10%
- Supervise construction of the machinery by the selected company
Approximated percentage of time invested in this task 20%
 - Make sure the construction methods will meet with the requirements to comply with all USDA and FDA regulations.
 - Ensure the quality running appropriate tests
- Write machine documentation
Approximated percentage of time invested in this task 5%
 - Operation manuals
 - Preventive maintenance manuals
 - Diagnostic and repair manuals
- Supervise machinery installation at the clients production facility
Approximated percentage of time invested in this task 20%
 - Setup and test machinery
 - Train production personal
 - Train maintenance personal
 - Train sanitation personal

On appeal, the Petitioner submitted another job description for the proffered position, consolidating previous job descriptions.

C. Analysis

On appeal, the Petitioner asserts that the Director erred in concluding that the employment is speculative, and the Petitioner did not establish that specialty occupation work is available for the validity of the requested H-1B employment period. We reviewed the record in its totality and determined that it contains unresolved inconsistencies that undermine the Petitioner's claims regarding the proffered position.² We do not simply rely on a position's title to determine whether a particular job qualifies as a specialty occupation. We consider the specific duties of the proffered position, combined with the nature of the petitioning entity's business operations. *See generally Defensor v. Meissner*, 201 F. 3d 384. Accordingly, the Petitioner did not satisfy its burden to establish by a preponderance of the evidence that the proffered position qualifies as a specialty occupation.

1. Insufficient information regarding the Petitioner's business

We find that the record of proceedings in this case contains insufficient information regarding the Petitioner's business operations.

In this matter, the Petitioner described its business in the Form I-129, Petition for a Nonimmigrant Worker, as "wholesale trade agents [sic] and brokers" with three employees. In the Form I-129 supplement, the Petitioner stated that its business corresponds to the North American Industry Classification System (NAICS) code 722310. The U.S. Department of Commerce, Census Bureau website describes this NAICS code as "food service contractors" who "provide[s] services at institutional, governmental, commercial, or industrial locations of others based on contractual arrangements with these types of organizations for a specified period of time."³

In response to the RFE, the Petitioner stated that it [REDACTED] in several counties here in Florida as well as some counties in Texas and South Carolina." The Petitioner further indicated that it plans to sell "machinery formally used by [the Beneficiary's previous employer] after making some necessary improvements and modifications . . . as well as entirely new machinery designed by [the Petitioner]."

The Petitioner also indicated that "[w]e still haven't sold any machines nor have any contracts but after talking with people at several companies we are optimistic about this new part of our company." However, the Petitioner did not provide evidence such as business plans or potential clients to substantiate its claims. "[G]oing on record without supporting documentary evidence is

² The Petitioner submitted documentation to support the H-1B petition, including evidence regarding the proffered position and the Petitioner's business operations. While we may not discuss every document submitted, we have reviewed and considered each one.

³ According to the U.S. Census Bureau, 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 viewed Feb. 22, 2016).

(b)(6)

Matter of CEME-1, LLC

not sufficient for purposes of meeting the burden of proof in these proceedings.” *In re Soffici*, 22 I&N Dec. 158, 165 (Comm’r 1998) (citing *Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190 (Reg’l Comm’r 1972)).

We note that “[t]he H-1B classification is not intended . . . 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.” Petitioning Requirements for the H Nonimmigrant Classification, 63 Fed. Reg. 30,419, 30,419-20 (proposed June 4, 1998) (to be codified at 8 C.F.R. pt. 214). The Petitioner must establish eligibility at the time of filing the nonimmigrant visa petition and must continue to be eligible for the benefit through adjudication. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the Petitioner or Beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg’l Comm’r 1978).

2. Inconsistencies in the Beneficiary’s job duties

We find that the record of proceedings in this case contains conflicting information regarding the job duties to be performed by the Beneficiary. Specifically, the Petitioner has not submitted sufficient, credible evidence regarding the Beneficiary’s work, which belies whether he will actually perform a significant percentage of the proffered duties.

We note that in a letter dated February 2, 2015, the Petitioner stated that the proffered position “[r]equires 40% travel to the machine manufacturing location to supervise machinery construction and testing, as well as to the client location to supervise assembly line installment, testing and debugging and employees training on the new machinery operation, cleaning procedures and maintenance, both preventive and repairs [sic].” The Petitioner also indicated that “[the Beneficiary] will be responsible for design of machinery . . . based on . . . client specifications.” Further, in a letter dated February 23, 2015, the Petitioner stated that 20 percent of the Beneficiary’s time would be spent on “supervis[ing] machinery installation at the clients[’] production facility.” However, as discussed, the Petitioner indicated that it has not sold any machines or has any contracts.

Moreover, documents in the record appear to contradict the Petitioner’s representation of the proffered position. For example, the Petitioner indicated that the Beneficiary’s duties include building prototypes (20%), but the record contains emails from the Beneficiary requesting quotes in connection with building and production of parts. The Petitioner did not provide sufficient information regarding what is being outsourced and what the Beneficiary is actually building.

The Petitioner also submitted the Beneficiary’s email exchanges with a patent and trademark attorney to file a patent on one of its products, [REDACTED]. In an email dated April 9, 2015, the Beneficiary is identified as “Director of National Accounts.” The Petitioner did not explain how this job title relates to the proffered position as an industrial designer. Further, in an email dated June 1, 2015, in response to a question on whether the Petitioner or the Beneficiary would like to assign the rights of and interest in the invention in the patent application, the Petitioner

(b)(6)

Matter of CEME-1, LLC

provided the name of a different company to where it would assign the rights, specifically, [REDACTED] however, there is no further information about this company and its relation to the Petitioner or the proffered position.

On appeal, the Petitioner submitted copies of the Beneficiary's pay stubs to establish that his salary is "not dependent on prospective clients and/or projects and [the Petitioner] has secured sufficient work for him." However, while the Petitioner may employ the Beneficiary, the Petitioner has not provided sufficient evidence to establish that the Beneficiary will be performing the duties described by the Petitioner and that H-1B caliber work exists for the Beneficiary.

3. Work location

The Petitioner indicated in the labor condition application (LCA) that the Beneficiary would work at [REDACTED] FL [REDACTED].

In the RFE, the Director noted that both the Petitioner's address and the Beneficiary's worksite appear to be residential. In response to the RFE, the Petitioner explained:

The duties performed by [the Beneficiary] for [the Petitioner] do not require an office location and therefore, he perform [sic] his duties from his home. [The Beneficiary performs] his duties with a computer and telephone which has been provided to him by [the Petitioner.]

In the future, [the Beneficiary] will also visit customer's place of business for machinery installation purposes. He will make sure machinery is set up and ready to go for the customer and he will be doing any simple repairs on the machinery as well at the customer's place of business.

While we do not dispute the Petitioner's justification for having the Beneficiary work from home, we note that in the Form I-129, the Petitioner had indicated that the Beneficiary would not work off-site. The Petitioner has not sufficiently explained how the Beneficiary would work at home when 40 percent of his work as outlined in the petition requires him to be at client sites, supervising construction of the machinery and its installation. The Petitioner did not provide further information on how the long the Beneficiary is required to be at client sites.

In sum, we find that the inconsistencies in the record undermine the Petitioner's claims regarding the proffered position and the Petitioner did not submit sufficient information to resolve the discrepancies in the record of proceedings.

4. Inconsistencies in educational requirements

The Petitioner also provided inconsistent information regarding the degree required for the proffered position. For example, the Petitioner initially stated in the support letter dated February 2, 2015, that

the proffered position requires at least a bachelor's degree or the equivalent in business information systems or industrial engineering, plus two years of experience in the field. In response to the RFE dated March 30, 2015, the Petitioner indicated that knowledge required to satisfactorily perform the duties of the proffered position "is generally obtained through formal education at a baccalaureate or higher level in an engineering, physical science, or computer science discipline." Then, in another letter dated February 23, 2015, the Petitioner stated that "[o]nly a person with a bachelorette [sic] degree can be capable of making all the cost benefit studies, material stress and electric and electronic calculations in a satisfactory manner," without indicating that the degree has to be in a *specific specialty*.

Additionally, on appeal, the Petitioner asserted that "clear and probative evidence in the record shows that [the Beneficiary]'s position with [the Petitioner] normally requires a baccalaureate or higher degree, or its equivalent, for entry into the position," without indicating that the degree for the proffered position must be in a specific specialty. Instead, the Petitioner cited to the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* regarding the requirements for industrial designers, stating that industrial designer positions "require a bachelor's degree in design, architecture, or engineering, and the completion of courses including computer-aided design and drafting, industrial materials and processes and manufacturing methods." The Petitioner did not explain or reconcile these inconsistencies, and therefore, we cannot determine what educational requirements the Petitioner requires for the proffered position.

However, assuming *arguendo* that the Petitioner established a minimum requirement for the proffered position of at least a bachelor's degree in various specialties, such as business information systems, industrial engineering, physical sciences, or computer sciences, we note that this requirement, without more, is inadequate to demonstrate that the proposed position qualifies as a specialty occupation. In general, provided the specialties are closely related, e.g., chemistry and biochemistry, 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 two disparate fields, such as philosophy and engineering, 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).

In other words, while the statutory "the" and the regulatory "a" both denote a singular "specialty," we do not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. *See* section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). This also includes even seemingly disparate specialties providing, again, the evidence of record establishes how each

acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

Again, the Petitioner claimed that the duties of the proffered position can be performed by an individual with a bachelor's degree in business information systems, industrial engineering, physical sciences, or computer sciences. The issue here is that it is not readily apparent that these fields of study are closely related or that the field of physical sciences is directly related to the duties and responsibilities of the particular position proffered in this matter.

Here and as indicated above, the Petitioner, who bears the burden of proof in this proceeding, has not established either: (1) that business information systems, industrial engineering, physical sciences, or computer sciences are closely related fields; or (2) that the field of physical sciences is directly related to the duties and responsibilities of the proffered position. Absent this evidence, it cannot be found that the particular position proffered in this matter has a normal minimum entry requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, under the Petitioner's own standards.

As explained above, we interpret 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. We have consistently stated that, although a general-purpose bachelor's degree, such as a degree in business administration, 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. *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).

The Petitioner further notes on appeal that the Beneficiary "holds a Bachelor of Science degree in Computer Science where his general studies included courses in industrial engineering, mathematics, algorithms, system designs, computer science and programming languages, and network and administrative processes. Thus his position normally requires a baccalaureate or higher degree." 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.

5. Conclusion

Based on all of the above reasons, including the conflicting information regarding the proffered duties, work location, and the minimum requirements of the position, we find the evidence of record insufficient to establish that the Beneficiary will be employed to perform the proffered duties as outlined in the petition. Thus, we find that the evidence of record is insufficient to establish the substantive nature of the work to be performed by the Beneficiary.

The inability to establish the substantive nature of the work to be performed by the Beneficiary consequently precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines: (1) the normal

minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4. Accordingly, as the Petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position qualifies as a specialty occupation.

III. BENEFICIARY'S QUALIFICATION

We do not need to examine the issue of the Beneficiary's qualifications because the Petitioner has not provided sufficient evidence to demonstrate that the proffered position is a specialty occupation. A beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation.

As discussed in this decision, the Petitioner did not submit sufficient evidence regarding the proffered position to determine whether it will require a baccalaureate or higher degree in a specific specialty or its equivalent. Absent this determination, it also cannot be determined whether the Beneficiary possesses that degree, or its equivalent. Therefore, we need not and will not address the Beneficiary's qualifications further, except to note that, the record contains two academic equivalency evaluations, but the evaluations rely on the same documents to make two different conclusions. Specifically, the evaluation dated December 11, 2007, states that the Beneficiary has "Title of Licentiate in Administrative Computer Science" and concludes that he has the U.S. equivalent of a Bachelor of Science degree in Business Information Systems. In another evaluation dated May 31, 2011, the evaluator relies on the same degree and academic transcript to conclude that the Beneficiary has the U.S. equivalent of a Bachelor of Science degree in Computer Science. Therefore, we find that the conclusions from the academic equivalency evaluations are not sufficiently substantiated. As such, since evidence was not presented that the Beneficiary has at least a U.S. bachelor's degree in any specific specialty, or its equivalent, the petition could not be approved even if eligibility for the benefit sought had been otherwise established.

IV. CONCLUSION AND ORDER

In visa petition proceedings, it is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013) (citing *Matter of Brantigan*, 11 I&N Dec. 493, 495 (BIA 1966)). Here, that burden has not been met.⁴

⁴ As the identified grounds of ineligibility are dispositive of the appeal, we will not address additional deficiencies we have identified on appeal.

Matter of CEME-1, LLC

ORDER: The appeal is dismissed.

Cite as *Matter of CEME-1, LLC*, ID# 15194 (AAO Feb. 23, 2016)