



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

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

MATTER OF 2233P-R-, LLC

DATE: FEB. 26, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a company providing consumer lending, Internet deferred deposit, and credit services, seeks to employ the Beneficiary as a “chief operating officer” under the H-1B nonimmigrant classification for specialty occupations. See Immigration and Nationality Act (the Act) § 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, California Service Center, denied the petition. The Director concluded that the Petitioner had not established that the job offered here qualifies as a specialty occupation.

The matter is now before us on appeal. In its appeal, the Petitioner asserts that the proffered position is a specialty occupation.¹ Upon *de novo* review, we will dismiss the appeal.

¹ The Petitioner checked box “b” in Part 3, item 1 of the Form I-290B, Notice of Appeal or Motion, indicating that it would provide a brief and/or additional evidence to us within 30 calendar days of filing the appeal. The Petitioner submitted a brief statement with the Form I-290B, which states:

As allowed for, we will file our brief and/or additional evidence to the AAO within 30 calendar days of filing this appeal. As will be discussed further in our brief, it is our contention that USCIS erroneously concluded that the position offered to the beneficiary does not qualify as a specialty occupation. We will show in the brief and supporting documentation that the specific duties to the Chief Operating Officer at our Company and in our industry, are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

However, as of the date of this decision, the Petitioner did not submit a brief and/or additional evidence; therefore, the record is deemed complete as currently constituted.

I. 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.

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.

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 its support letter dated January 20, 2015, the Petitioner indicated that the Beneficiary will perform the following duties, in pertinent part, as a chief operating officer (COO) (with percentages added):

Manage secured and unsecured personal loan portfolios and develop other consumer line credit product and new personal loan product business [50 percent]

Train, coach, and manage employees in all Company's policies and procedures with connection of all categories of loan business operation [20 percent]

Develop the strategic partner relationship with third party service providers and enhance Company's business market value [30 percent]

The Petitioner did not state its own minimum requirements for the position in its support letter. However, the Petitioner cited to the U.S. Department of Labor's *Occupational Outlook Handbook* to state that "[t]op [e]xecutive is a position that requires an entry level of education of Bachelor's degree or higher" and "[m]any top executives have a bachelor's or master's degree in business administration or in an area related to their field of work."

In response to the Director's request for additional evidence (RFE), the Petitioner elaborated on its duties as follows, in pertinent part, in a letter dated May 20, 2015 (with percentages added):

- a. Review, implement and coordinate all of the Company's short-term lending activities including: improving sales department efficiency, loan processing accuracy, customer service and collections activities. [30 percent of the time]
- b. Conduct statistical analytics to help achieve profitability in the loan portfolio, on topics including consumer lead purchasing, loan conversions and loan performance. [30 percent of the time]
- c. Implement marketing projects in various channels such as email, direct mail, SEO, PPC, etc. [10 percent]
- d. Continually monitor, improve and fine tune key operating metrics and financial performance. [10 percent]
- e. Advise and develop company strategy for future growth and profitability. [10 percent]
- f. Participate in funding raising for additional funds for the lending portfolio. [10 percent]

Regarding the minimum requirements, the Petitioner stated that the proffered duties are so:

[c]omplex and specialized in the loan and finance industry that knowledge required to perform those specific executive direction, supervision and strategy policy making duties is usually associated with the attainment of an advanced degree in the MBA degree. We also confirmed the above requirements with our executive recruiter (who specializes in the short-term lending field) and he indicated that it was common and that we would and should hire someone with an MBA or similar experience to oversee the intricate tasks of this position.

However, the Petitioner also stated that “most of our executive officers possess a minimum Bachelor or higher degree” and that “various similar loan processing companies with comparable size to our Company requires that their COO and other executive officers possess [a] Bachelor or higher degree.”

C. Analysis

On appeal, the Petitioner asserts that the Director erred in concluding that the proffered did not qualify as a specialty occupation. We reviewed the record in its totality and determined that the record contains 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. Inconsistencies Regarding the Petitioner’s Business

In the Form I-129, Petition for a Nonimmigrant Worker, the Petitioner indicated that it was established in 2011, and has 55 employees. In response to the RFE, the Petitioner asserted that “[u]nder [the Beneficiary]’s direction, the [Petitioner] has the following five Departments to coordinate the daily business [with] each other: Accounting, Operations, Product Management/Compliance, Analytics, Marketing and Information Technology.”

However, the evidence in the record does not support its claims. For example, the Petitioner submitted an organization chart, but it lists only 11 employees. Further, the chart does not include the five departments that the Petitioner claimed that the Beneficiary would direct. Notably, the organization chart is titled “Executive Staff,” and lists positions such as chief executive officer/ chief legal officer, senior vice president of operations, chief financial officer...etc., implying that the

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.

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organization chart only lists executive positions. However, it also lists accounting clerk and junior web applications developer position, which are not executive positions. Further, the Petitioner did not submit additional organization chart or explain why the organization chart lists only 11 employees when it indicated that it has 55 employees.

The Petitioner provided the Form 1065, U.S. Return of Partnership Income, from 2013. The return indicates that the Petitioner paid only \$288,945 for salaries and wages, which does not appear to be sufficient to pay the wages for 55 employees or even 11 employees, most of whom are listed as executives.

The Petitioner also submitted Form W-2, Wage and Tax Statements, from 2013. While there are 32 wage and tax statements, most of the employees appear to have been either temporary or part-time as majority of the statements report wages of less than \$10,000, some less than \$1,000.

We find that it is reasonable to assume that the size of an employer's business has or could have an impact on the claimed duties of a particular position. See *EG Enters., Inc. v. Dep't of Homeland Sec.*, 467 F. Supp. 2d 728 (E.D. Mich. 2006). The size of a petitioner may be considered as a component of the nature of the petitioner's business, as the size impacts upon the actual duties of a particular position. In this matter, the job description provided identifies typical management duties, yet the record lacks sufficient evidence to demonstrate that the duties as described will actually be performed by the Beneficiary or that the Petitioner's organization actually has the need for an individual to perform such duties.

Further, the Petitioner's 2013 partnership income return indicated a loss of \$366,093. We also note that in the Form I-129, which was submitted on January 30, 2015, the Petitioner indicated that its net annual income is "\$3,213,477" suggesting that it had a loss of approximately \$3.2 million in 2014. It therefore appears that the Petitioner's revenues are decreasing, which contradicts its statement in its support letter, that "[w]e have experienced healthy financial growth since our inception." Further, the Petitioner's financial losses also call into question the Petitioner's ability to pay the Beneficiary the proffered wage of \$180,000 per year plus annual bonus, which according to the employment contract is \$50,000 per year. "[I]t is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence." *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* at 591-92. Here, the Petitioner did not provide sufficient evidence to address its inconsistencies.

2. Inconsistencies Regarding the Proffered Position

We also note that the record of proceedings in this case contains conflicting information regarding the proffered position. For example, the Petitioner stated in its May 20, 2015, letter that "[t]he [proffered] position was vacant prior to [the Beneficiary] joining the company. . . . The closest equivalent in the company is [REDACTED] who is the CEO and CLO of the Company and who has a Bachelor's Degree in Finance, a Juris Doctorate and an LL.M. in Banking and Financial Law."

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However, the record contains a contract effective November 26, 2014, to May 25, 2015, signed by [REDACTED] on the Petitioner's behalf with the position title of "Chief Operating Officer."³ Since the Petitioner already appears to have employed another COO at the time the petition was filed on January 30, 2015, it is not clear whether the Beneficiary actually would work as a COO.

Based on the conflicting evidence as described above, we find the evidence of record insufficient to establish that the Beneficiary will be employed to exclusively perform work as a COO, as claimed. Thus, we find that the evidence of record is insufficient to establish the substantive nature of the work to be performed by the Beneficiary.

3. Inconsistencies Preclude a Finding that the Proffered Position is a Specialty Occupation

Because of the discrepancies discussed above, we cannot determine the nature and scope of the Beneficiary's employment. The record lacks evidence sufficiently concrete and informative to demonstrate that the proffered position qualifies as a specialty occupation. Therefore, we cannot determine that description of the proffered position communicates: (1) the actual work that the Beneficiary would perform; (2) the complexity, uniqueness and/or specialization of the tasks; and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty.

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.

4. The Petitioner's Educational Requirement

The Petitioner also provided inconsistent information regarding the degree required for the proffered position. The Petitioner indicated that the proffered position requires at least a bachelor's degree without stating a specific specialty but also stated that a bachelor or higher degree in business administration is required.

³ In the Petitioner's letter dated May 20, 2015, submitted in response to the RFE, the Petitioner refers to [REDACTED] as the Senior Vice President of Operations.

We note that the Petitioner's educational requirement for the proffered position is inadequate to establish that the proposed position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. 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 establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Assocs.*, 19 I&N Dec. 558, 560 (Comm'r 1988).

To prove that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. 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).⁴

Again, the Petitioner in this matter claims that the duties of the proffered position can be performed by an individual with only a general-purpose bachelor's degree, i.e., a bachelor's or higher degree in business administration. Without more, this assertion alone indicates that the proffered position is not in fact a specialty occupation. The Director's decision must therefore be affirmed and the appeal dismissed on this basis alone.⁵

⁴ Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

The courts and the agency consistently have stated that, although a general-purpose bachelor's degree, such as a business administration degree, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify the granting of a petition for an H-1B specialty occupation visa. *See, e.g., Tapis Int'l v. INS*, 94 F.Supp.2d 172, 175-76 (D. Mass. 2000); *Shanti*, 36 F. Supp. 2d at 1164-66; *cf. Matter of Michael Hertz Assocs.*, 19 I&N Dec. 558, 560 ([Comm'r] 1988) (providing frequently cited analysis in connection with a conceptually similar provision). This is as it should be: otherwise, an employer could ensure the granting of a specialty occupation visa petition by the simple expedient of creating a generic (and essentially artificial) degree requirement.

Id.

⁵ A general degree requirement does not necessarily preclude a proffered position from qualifying as a specialty occupation. For example, an entry requirement of a bachelor's or higher degree in business administration with a concentration in a specific field, or a bachelor's or higher degree in business administration combined with relevant education, training, and/or experience may, in certain instances, qualify the proffered position as a specialty occupation. In either case, it must be demonstrated that the entry requirement is equivalent to a bachelor's or higher degree in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at 147.

It is also important to note that a position may not qualify as a specialty occupation based solely on either a preference for certain qualifications for the position or the claimed requirements of a petitioner. *See Defensor v. Meissner*, 201 F.3d

II. 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 2233P-R-, LLC*, ID# 15630 (AAO Feb. 26, 2016)

384, 387 (5th Cir. 2000). Instead, the record must establish that the performance of the duties of the proffered position requires both the theoretical and practical application of a body of highly specialized knowledge and the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent, as the minimum for entry into the occupation. *See* section 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").