



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

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

MATTER OF MSI-, INC.

DATE: JAN. 14, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a distributor and importer of natural stone, seeks to temporarily employ the Beneficiary as a “Programmer Analyst” 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, California Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

**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.<sup>1</sup>

**II. SPECIALTY OCCUPATION**

**A. Legal Framework**

For an H-1B petition to be granted, the Petitioner must provide sufficient evidence to establish that it will employ the Beneficiary in a specialty occupation position. To meet its burden of proof in this regard, the Petitioner must establish that the employment it is offering to the Beneficiary meets the applicable statutory and regulatory requirements.

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

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<sup>1</sup> We conduct appellate review on a *de novo* basis. *Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542 (AAO 2015); *see also* 5 U.S.C. § 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”); *Dor v. INS*, 891 F.2d 997, 1002 n.9 (2d Cir. 1989).

- (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 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 387. To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing “a degree requirement in a specific specialty” as “one that relates directly to the duties and responsibilities of a particular position”). Applying this standard, USCIS regularly approves H-1B petitions for qualified foreign nationals who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position’s title. The specific duties of the proffered position, combined with the nature of the petitioning entity’s business operations, are factors to be considered. USCIS must examine the ultimate employment of the foreign national, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer’s self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

#### B. The Proffered Position

The Petitioner seeks to employ the Beneficiary as a full-time “Programmer Analyst” at an annual salary of \$63,000. In a letter of support, dated April 1, 2015, submitted with the petition, the Petitioner stated that the proffered position requires “an individual who has achieved the educational level of at least a Bachelor’s degree in Computer Science, Management Information Systems, Electrical Engineer[ing], or in a related field.”

The labor condition application (LCA) submitted to support the visa petition states that the proffered position corresponds to Standard Occupational Classification (SOC) code and occupation title 15-1121, “Computer Systems Analysts,” from the Occupational Information Network (O\*NET). The LCA further states that the proffered position is a Level I, entry-level, position.

In a letter, dated June 8, 2015, submitted in response to the Director’s request for evidence (RFE), the Petitioner listed the duties of the proffered position, along with the percentages of time spent on each duty, as follows:

- Gathers business requirements and develops conceptual design and technical design for [the Petitioner]. Analyze, design, develop, test, implement, modify, and maintain client and web-based software applications, reports, interfaces, and databases; 15%

- Design, implement, and support software solutions; 7%
- Write software, support existing software, domain and network issues, help employees with their computer issues (hands on code development) to meet key business objectives; 8%
- Analyze user needs to determine software that will best serve those needs and develop/design computer system using that software while working with IT Director to understand the business process and problem statements for operational improvements; 10%
- Streamline database in MS SQL Server 7.0 & Oracle 8i; 6%
- Create SQL queries and update client information and products in the database by reviewing computer system capabilities, work flow and scheduling limitations to determine if requested program or program change is possible within existing system[;] 10%
- Implement procedures/functions to ensure database consistency, integrity & security as well as provide alternative solutions and recommends solution that best meets the need of the business; 7%
- Develop data entry forms using VB.net and front-end and recommends, schedules and performs software improvements and updates and Crystal Reports 4.5 to generate reports of schedule and stock status; 7%
- Design & update web pages with ASP.net and recognizes, identifies and documents potential areas where existing business processes require change, or where new processes need to be developed, and makes recommendations in these areas; 10%
- Develop and maintain complex systems including: control of the inventory and financial/cost analysis in which transactions are automatically processed through the full system of records; 8%
- Review proposals, gather facts, analyze data, and prepare a project synopsis which compares alternatives in terms of cost, time, availability of equipment and personnel while translating user requirements into overall solution architecture for complex technical solutions. 12%

The Petitioner summarized the above duties of the Beneficiary as “to maintain our existing IT systems, assist our employees and clients in navigating the systems, and create new systems and software as needed.” The Petitioner provided a list and description of its existing in-house IT systems. Further, the Petitioner stated that the Beneficiary “will be employed full-time performing specialized and complex job duties which require at least a bachelor’s degree in the specific specialty of Business Administration to be successfully performed.”

### C. Analysis

As a preliminary matter, we find that the Petitioner has provided inconsistent information regarding the requirements for the proffered position. For instance, the Petitioner stated in its response to the RFE that the proffered position requires “at least a bachelor’s degree in the specific specialty of Business

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Administration to be successfully performed.”<sup>2</sup> However, the Petitioner has also stated that the proffered position requires “an individual who has achieved the educational level of at least a Bachelor’s degree in Computer Science, Management Information Systems, Electrical Engineer[ing], or in a related field.” The Petitioner has not provided an explanation for its varying requirements. “[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.

If it is the Petitioner’s claim that a bachelor’s degree in Business Administration is a sufficient minimum requirement for entry into the proffered position, this claim is insufficient 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.<sup>3</sup> *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. As discussed *supra*, 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

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<sup>2</sup> The Petitioner’s statement that it requires at least a bachelor’s degree in Business Administration is consistent with the vacancy announcement by [REDACTED] submitted in support of the petition, in which the minimum entry requirement was a “BS in Computer Science or Business Administration.” In addition, as will be discussed in more detail *infra*, two of the Petitioner’s IT employees have master’s degrees in Business Administration.

<sup>3</sup> 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 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”).

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specialty occupation. *Royal Siam Corp. v. Chertoff*, 484 F.3d at 147.<sup>4</sup>

Second, we find that the proffered position, as described, do not adequately establish the depth, complexity, level of specialization, or substantive aspects of the duties for which the Beneficiary would be responsible. Rather, the duties of the proffered position are described in relatively generalized and abstract terms that do not relate substantial details. For example, the Petitioner has not provided additional details regarding the Beneficiary's specific role in the duties to "[a]nalyze, design, develop, test, implement, modify, and maintain client and web-based software applications, reports, interfaces, and databases." Similarly, the Petitioner has not adequately described the specific tasks to be performed in the duty of "[r]eview proposals, gather facts, analyze data, and prepare a project synopsis," or even the nature of the proposals and projects involved. This type of generalized description may be appropriate when defining the range of duties that may be performed within an occupational category, but it does not adequately convey the substantive work that the Beneficiary would perform within the Petitioner's operations.

Notably, the Petitioner listed several duties involving the design and development of new software applications and systems. The Petitioner specifically stated that the Beneficiary would "create new systems and software as needed." However, the Petitioner has not explained what new systems and software, if any, the Beneficiary would be creating.

Moreover, while the Petitioner has described the existing IT systems currently utilized by the company in general, the Petitioner has not described in sufficient detail the actual work the Beneficiary would perform with respect to each of these existing systems. We acknowledge the Petitioner's statements that a programmer analyst on its IT team must have a "complete understanding" and "thorough working knowledge" of Security Portal, ██████████ MAS500 and ERP Related Software, Data Interchange, and other internal systems.<sup>5</sup> However, merely asserting that the Beneficiary is required to understand these internal systems, without more, is insufficient to establish the nature of her work with respect to these systems.

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<sup>4</sup> 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.*

<sup>5</sup> With respect to ██████████ the Petitioner stated that "[e]very developer needs to familiarize themselves with the architecture and design of this system in order to make secured applications for [the Petitioner]." The position here, however, is not a developer position, but a programmer analyst position.

Without a more meaningful job description, the record lacks evidence sufficiently concrete and informative to demonstrate that the proffered position requires a specialty occupation's level of knowledge in a specific specialty. The tasks as described do not sufficiently communicate (1) the actual work that the Beneficiary will 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. For this reason alone, we find the evidence of record insufficient to establish that the proffered position qualifies as a specialty occupation.

Nevertheless, we will analyze the duties and the evidence of record to determine whether the proffered position as described would qualify as a specialty occupation. To that end and to make our determination as to whether the employment described above qualifies as a specialty occupation, we turn first to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

*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'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.<sup>6</sup> The LCA corresponds to the SOC(ONET/OES) code and title 15-1121, Computer Systems Analysts, at a Level I (entry) wage.

The *Handbook* subchapter "How to Become a Computer Systems Analyst" states the following:

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.

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<sup>6</sup> All of the references are to the 2016-17 edition of the *Handbook*, which is available at <http://www.bls.gov/OCO/>. The excerpts of the *Handbook* regarding the duties and requirements of the referenced occupational category are hereby incorporated into the record of proceeding.

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.

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.

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. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2016-17 ed., "Computer Systems Analysts," <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-4> (last visited Jan. 13, 2016).

A review of the *Handbook* does not indicate that, simply by virtue of its occupational classification, a computer systems analyst position qualifies as a specialty occupation. More specifically, the information on the educational requirements in the subchapter cited above indicates, at most, that a bachelor's or higher degree in a computer or information science field may be a common preference, but not a standard occupational, entry requirement. *See id.* In fact, this chapter states that a bachelor's degree in a computer or information science field is "not always a requirement," and that some computer systems analysts may only have liberal arts degrees and programming or technical experience. *See id.*

In response to the RFE and again on appeal, the Petitioner cited to a Memorandum from Terry Way, Director of Nebraska Service Center, *Guidance Memorandum on HIB Computer Related Positions* (Dec. 22, 2000).<sup>7</sup>

We find that the Petitioner's reliance on this memorandum is misplaced as the memorandum is not relevant to this proceeding. By its very terms, the memorandum was issued by the then Director of the Nebraska Service Center (NSC) as an attempt to "clarify" an aspect of NSC adjudications; and, framed as it was, as a memorandum to NSC adjudication officers, it was addressed exclusively to NSC personnel within that Director's chain of command. As such, it has no force and effect upon the present matter before us on appeal.

It is also noted that the legacy memorandum cited by the Petitioner does not bear a "P" designation. According to the Adjudicator's Field Manual (AFM) § 3.4, "correspondence is advisory in nature, intended only to convey the author's point of view . . . ." AFM § 3.4 goes on to note that examples of correspondence include letters, memoranda not bearing the "P" designation, unpublished AAO

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<sup>7</sup> A copy of the memorandum was not provided for the record.

decisions, USCIS and DHS General Counsel Opinions, etc.<sup>8</sup> Regardless, the NSC no longer adjudicates H-1B petitions and, therefore, the memorandum is not followed by any USCIS officers even as a matter of internal, service center guidance.

Even if we were bound by this memorandum either as a management directive or as a matter of law, it was issued more than a decade ago, during what the NSC Director perceived as a period of “transition” for certain-computer related occupations. In addition, this memorandum referred to now outdated versions of the *Handbook* (the latest of those being the 2000-01 edition), and also relied partly on a perceived line of relatively early unpublished (and unspecified) decisions in the area of computer-related occupations, which did not address the computer-related occupations as they have evolved since those decisions were issued more than a decade ago. In any event, the memorandum reminds adjudicators that a specialty occupation eligibility determination is not based on the proffered position’s job title but instead on the actual duties to be performed. For all of the reasons articulated above, the memorandum is not helpful to this discussion regarding the job duties of the Petitioner’s proffered position and whether the Petitioner has satisfied its burden of establishing that this particular position qualifies as a specialty occupation.

In the instant case, the Petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or another reliable and authoritative source, indicates that there is a standard, minimum entry requirement of at least a bachelor’s degree in a specific specialty, or its equivalent. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding do not indicate that the position is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the record does not satisfy the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

*The requirement of a baccalaureate or higher degree in a specific specialty,  
or its equivalent, is common to the industry in parallel  
positions among similar organizations*

Next, we will review the record regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor’s or higher degree in a specific specialty, or its equivalent, is common for positions that are identifiable as being (1) in the Petitioner’s industry, (2) parallel to the proffered position, and also (3) located in organizations that are similar to the Petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry’s professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms “routinely employ

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<sup>8</sup> While 8 C.F.R. § 103.3(c) provides that our precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

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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 discussed, the Petitioner has not established that its proffered position is one for which the *Handbook*, or another independent, authoritative source, reports a standard industry-wide requirement for at least a bachelor’s degree in a specific specialty, or its equivalent. We incorporate by reference the previous discussion on the matter. Also, there are no submissions from the industry’s professional association(s) indicating that it has made a degree a minimum entry requirement.

We will next address the job advertisements submitted by the Petitioner. Upon review of the documents, we find that the Petitioner’s reliance on the job advertisements is misplaced.

First, with the exception of the job advertisement from [REDACTED] none of the submitted advertisements involve positions parallel to the proffered position. The position being offered here is designated as a Level I wage level, which indicates that the proffered position is a comparatively low, entry-level position relative to others within the occupation.<sup>9</sup> In contrast, the advertisements from [REDACTED] (requiring 4-6 years of related experience), [REDACTED] (requiring 5+ years of related experience), an unidentified company in the automobile industry (requiring 7+ years of related experience), and [REDACTED] (requiring 8-10 years of related experience) all require several years of related experience, and thus, are not for beginning-level positions.

Furthermore, the evidence of record is insufficient to demonstrate that the advertising employers are in the same industry as the Petitioner. On appeal, the Petitioner “concedes this fact,” stating that it is “one of the only firms in the distribution and import of natural stone that employs the use of sophisticated IT systems to run their operation.” The Petitioner thus requests us to consider its industry as not in the natural stone industry, but in the distribution and logistics industry. However, the Petitioner has not cited to any legal authority to support such a broad interpretation of the term

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<sup>9</sup> 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.

See U.S. Dep’t of Labor, Emp’t & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

“the industry” found in the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). While we acknowledge that distribution and logistics are aspects of the Petitioner’s *operations*, we cannot find that the Petitioner can reasonably be classified as in distribution and logistics *industry*.<sup>10</sup> As such, these postings are outside the scope of consideration for this criterion, which encompasses only organizations that are similar to and in the Petitioner’s industry.<sup>11</sup>

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 evidence of record shows that the Petitioner’s 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.

Here, the evidence of record does not sufficiently demonstrate relative complexity or uniqueness as aspects of the proffered position. As we previously discussed, the Petitioner has not adequately established the depth, complexity, level of specialization, or other substantive aspects of the duties for which the Beneficiary would be responsible. That is, the duties of the proffered position are too broadly described that they do not sufficiently communicate (1) the actual work that the Beneficiary will 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 Petitioner highlights the complexity and uniqueness of its business operations, stating that its “complex and sophisticated global organization . . . in turn justifies the Petitioner’s need for a degreed, professional Programmer Analyst.” In support, the Petitioner submits news articles praising its “most sophisticated” and “advanced” IT system and capabilities. However, the focus of the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) is on the particular position being proffered here, which was not specifically addressed in these articles. The Petitioner has not described in sufficient detail the nature of the work the Beneficiary would perform with respect to the Petitioner’s IT system. Without knowing her specific tasks and role, we cannot find, based upon the nature of the Petitioner’s IT system alone, that the particular position is so complex or unique that

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<sup>10</sup> The Petitioner provided a North American Industry Classification System (NAICS) Code of “423320, Brick, Stone, and Related Construction Material Merchant Wholesalers.” U.S. Dep’t of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, “423320, Brick, Stone, and Related Construction Material Merchant Wholesalers,” <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited Jan. 13, 2016).

<sup>11</sup> As these vacancy announcements are outside the scope of consideration for this criterion, 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.

it can be performed only by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent.

It is unclear how the proffered position, as described, necessitates the theoretical and practical application of a body of highly specialized knowledge such that a person who has attained a bachelor's or higher degree in a specific specialty or its equivalent is required to perform them. The evidence of record does not demonstrate how the duties described require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty, or its equivalent, is required to perform them. 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 of the proffered position. For instance, while the Petitioner stated that a programmer analyst must have a "complete understanding" and "thorough working knowledge" of its internal systems, the Petitioner has not explained what specific course(s) of study would provide the necessary knowledge and understanding of these systems. As another illustration, the Petitioner stated that a programmer analyst "must be able to quickly adapt to [its] Inventory & Warehouse Automation procedures as well as [its] RFID infrastructure." Again, it is not clear what course(s) of study would provide the necessary knowledge of the Petitioner's "Inventory & Warehouse Automation procedures" and "RFID infrastructure."

It is also important to consider that the Petitioner has designated the proffered position as a Level I position on the LCA. The position's Level I designation indicates that it is an entry-level position for an employee who has only a basic understanding of the occupation, and performs routine tasks that require limited (if any) exercise of judgment and are closely supervised and monitored. See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance, Nonagric. Immigration Programs* (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf). The position's Level I, entry-level, wage rate is contrary to a position that requires the performance of complex or unique duties.<sup>12</sup>

The evidence of record therefore does not satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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<sup>12</sup> The Petitioner's designation of this position as a Level I, entry-level position undermines its claim that the position is particularly complex or unique 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.

*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.

The record of proceeding does not contain sufficient evidence demonstrating the Petitioner's employment history for the proffered position. First, the Petitioner has not indicated whether it has previously recruited and hired for the same "Programmer Analyst" position being offered here. According to the Petitioner's organizational chart, the Petitioner currently does not have a "Programmer Analyst" position, and there is no evidence in the record regarding any other individuals the Petitioner may have employed in the same position. If this is the Petitioner's first time hiring for the position, it is unclear how an employer that has never recruited and hired for the position would be able to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a demonstration that it normally requires at least a bachelor's degree in a specific specialty or its equivalent for the position.

With respect to the educational credentials of the Petitioner's other IT employees, the Petitioner has not demonstrated the relevance or significance of this information to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). The criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) involves an employer's normal employment practices for the particular position being proffered here. The Petitioner has not established that the other IT positions depicted on the chart, such as the IT Manager, Hardware Technician, and Software Programmer III, are the same or sufficiently similar to the proffered position such that they could be considered under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).<sup>13</sup>

Even if we could consider the educational credentials of the Petitioner's other IT employees, the Petitioner has not established the statistical significance of this information. In particular, the Petitioner stated in its RFE response that its IT team is "comprised of over 35 individuals," and the organizational chart depicts 25 different IT employees.<sup>14</sup> Out of these 25-35 employees, the Petitioner has only listed and documented the educational credentials of seven of them. The Petitioner has not demonstrated what statistically valid inferences, if any, regarding the Petitioner's normal employment practices can be drawn from the educational credentials of seven employees –

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<sup>13</sup> While we do not simply rely on a position's title, the Petitioner has not provided any information regarding the specific duties of these other IT positions in order for us to compare them with the proffered position based on anything but the job titles.

<sup>14</sup> The Petitioner has not submitted an explanation, corroborated by objective evidence, resolving this inconsistency. "[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.

two of whom have not been shown to have U.S. bachelor's degrees in a specific specialty, or its equivalent.<sup>15</sup> See generally *Earl Babbie, The Practice of Social Research* 186-228 (7th ed. 1995).

While the Petitioner explained that “[c]ertain employees refused to provide their confidential information,” the Petitioner has not explained why it could not have provided such evidence about its own employees and the company’s educational requirements for these positions. Moreover, we note that a claim that information is “confidential” does not provide a blanket excuse for a petitioner not providing documentation if that documentation is material to the requested benefit.<sup>16</sup> Although a petitioner may always refuse to submit confidential commercial information if it is deemed too sensitive, the Petitioner must also satisfy the burden of proof and runs the risk of a denial. Cf. *Matter of Marques*, 16 I&N Dec. 314 (BIA 1977) (holding the “respondent had every right to assert his claim under the Fifth Amendment[; however], in so doing he runs the risk that he may fail to carry his burden of persuasion with respect to his application.”).

Thus, despite the Petitioner’s statement that “all of its programmer analysts and professional IT staff have Master’s or baccalaureate degrees in Computer Science, Electronics Engineering, Information Technology, or MIS,” the Petitioner has not submitted sufficient evidence to corroborate this statement. “[G]oing on record without supporting documentary evidence is 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)).

As the record of proceeding does not demonstrate that the Petitioner normally requires at least a bachelor’s degree in a specific specialty or its equivalent for the proffered position, the Petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).<sup>17</sup>

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<sup>15</sup> Two of these seven individuals possessed master’s degrees in Business Administration and foreign bachelor’s degrees in a computer-related field. However, the Petitioner did not submit evidence establishing that their foreign bachelor’s degrees are equivalent to U.S. bachelor’s degrees in a specific field. As such, we cannot consider these individuals to possess at least a U.S. bachelor’s degree in a specific specialty, or its equivalent. As we stated earlier, the Petitioner’s acceptance of a degree with a generalized title, such as Business Administration, without further specification, does not establish the position as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d at 147; cf. *Matter of Michael Hertz Assocs.*, 19 I&N Dec. at 560.

<sup>16</sup> Both the Freedom of Information Act and the Trade Secrets Act provide for the protection of a petitioner’s confidential business information when it is submitted to USCIS. See 5 U.S.C. § 552(b)(4), 18 U.S.C. § 1905. Additionally, the petitioner may request pre-disclosure notification pursuant to Executive Order No. 12,600, “Predislosure Notification Procedures for Confidential Commercial Information.” Exec. Order No. 12,600, 52 Fed. Reg. 23,781 (June 23, 1987).

<sup>17</sup> We also note that while a petitioner may believe or otherwise assert that a proffered position requires a degree in a specific specialty, that opinion 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 employer 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 387. In other words, if a petitioner’s degree requirement is only symbolic and the proffered position does not in fact require such a specialty degree, or its equivalent, to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. See section 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term “specialty occupation”).

*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*

Finally, the Petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. Again, relative specialization and complexity have not been sufficiently developed by the Petitioner as an aspect of the proffered position. In other words, the proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than other computer systems analyst positions that do not require at least a bachelor's degree in a specific specialty, or its equivalent. We hereby incorporate our earlier discussions about the Petitioner's overly broad job descriptions, and the position's Level I (entry-level) designation, which are contrary to any claim that the proffered position is particularly complex or specialized.

Although the Petitioner asserts that the nature of the specific duties is specialized and complex, the record lacks sufficient evidence to support this claim. Thus, the Petitioner has submitted inadequate probative evidence to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

### III. CONCLUSION

The evidence of record is insufficient to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions.

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.

**ORDER:** The appeal is dismissed.

Cite as *Matter of MSI-, Inc.*, ID# 15475 (AAO Jan. 14, 2016)