



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

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

MATTER OF CWP-S-

DATE: MAY 4, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a computer business, seeks to temporarily employ the Beneficiary as a “quality assurance analyst” under the H-1B nonimmigrant classification. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The H-1B program allows a U.S. employer to temporarily employ a qualified foreign worker in a position that requires both (a) the theoretical and practical application of a body of highly specialized knowledge and (b) the attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum prerequisite for entry into the position.

The Director, California Service Center, denied the petition. The Director concluded that the evidence of record did not establish that: (1) the proffered position qualifies as a specialty occupation; and (2) the Beneficiary is qualified to serve in a specialty occupation position in accordance with the applicable statutory and regulatory provisions.

The matter is now before us on appeal. On appeal, the Petitioner submits additional evidence and asserts that the Director’s basis for denial of the petition was erroneous and contends that it satisfied all evidentiary requirements.

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

I. LAW

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

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

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

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

8 C.F.R. § 214.2(h)(4)(iii)(A). U.S. Citizenship and Immigration Services (USCIS) has consistently interpreted the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proposed position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing “a degree requirement in a specific specialty” as “one that relates directly to the duties and responsibilities of a particular position”); *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000).

II. PROFFERED POSITION

In the initial letter of support, the Petitioner provided the following description of the job duties for its quality assurance (QA) analyst position:

- Develop and execute software test plans in order to identify software problems and their causes
- Provide technical assistance to the team in terms of understanding the business requirements
- Responsible for test environment and data setup
- Creation of system integrating test strategy and test plans for data warehouse applications
- Define test methods and create test plans for new or updated software projects
- Review product design documentation
- Recommend design improvements or corrections to engineers throughout the development process
- Execute test plans and create test reports to describe program evaluation, testing, and correction

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- Formulate and design software systems, using scientific analysis and mathematical models to predict and measure outcome and consequences of design
- Design and assist in building test automation architecture

According to the Petitioner, the position requires a minimum of a bachelor's degree or the equivalent in computer science or a related field.

III. ANALYSIS

Upon review of the record in its totality and for the reasons set out below, we determine that the Petitioner has not demonstrated that the proffered position satisfies any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, qualifies as a specialty occupation.¹ Specifically, the record does not establish that the job duties require an educational background, or its equivalent, commensurate with a specialty occupation.²

A. First Criterion

We turn first to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which requires that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position.³ To inform this inquiry, we recognize the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁴

¹ In the initial petition, the Petitioner provided inconsistent information as to the Beneficiary's work site. In response to the RFE, the Petitioner stated that the Beneficiary would be working off-site at [REDACTED] facility. The Petitioner continued by stating that the Beneficiary's assignment will not be limited to one particular client and/or project, and that it would reassign the Beneficiary to a different client or project depending upon its business needs. The H-1B classification, however, is not intended for companies to engage in speculative employment and hire foreign workers to meet possible workforce needs arising from potential business needs, customers, or contracts. Further, a petition that requires services to be performed in more than one location must include an itinerary with the dates and locations of the services, which was not provided in the instant case. 8 C.F.R. § 214.2(h)(2)(i)(B). Moreover, assuming, *arguendo*, that the Petitioner would be the Beneficiary's employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii), the Petitioner's statements call into question whether it would maintain such an employer-employee relationship for the duration of the period requested. However, as the Petitioner has not established that the proffered position qualifies as a specialty occupation, we need not further address these issues at this time.

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

³ Although some aspects of the regulatory criteria may overlap, we will address each of the criteria individually.

⁴ All of our references are to the 2016-2017 edition of the *Handbook*, available at <http://www.bls.gov/ooh/>. We do not, however, maintain that the *Handbook* is the exclusive source of relevant information. That is, the occupational category designated by the Petitioner is considered as an aspect in establishing the general tasks and responsibilities of a proffered position, and USCIS regularly reviews the *Handbook* on the duties and educational requirements of the wide variety of occupations that it addresses. To satisfy the first criterion, however, the burden of proof remains on the Petitioner to submit sufficient evidence to support a finding that its particular position would normally have a minimum, specialty degree requirement, or its equivalent, for entry.

On the labor condition application (LCA) submitted in support of the H-1B petition, the Petitioner designated the proffered position under the occupational category “Computer Occupations, All Other” corresponding to the Standard Occupational Classification code 15-1199 at a Level II wage.⁵

Although the *Handbook* covers the employment details for hundreds of occupations, there are additional occupations for which detailed occupational information is not developed. The *Handbook* suggests that for at least some of the occupations, little meaningful information could be developed.⁶ The occupational category “Computer Occupations, All Other” is one of these categories.

When the *Handbook* does not support a petitioner’s assertion that a position meets the statutory and regulatory provisions of a specialty occupation, it is incumbent upon the Petitioner to provide persuasive evidence that the proffered position qualifies, notwithstanding the absence of the *Handbook*’s support on the issue. We will consider and weigh all of the evidence presented.

Here, in response to the Director’s request for evidence (RFE), the Petitioner submitted a printout of the Occupational Information Network (O*NET) OnLine Summary Report for “Software Quality Assurance Engineers and Testers.” Even assuming, *arguendo*, that the printout for this occupation is relevant to the proffered position, it does not support the Petitioner’s assertion that a bachelor’s degree in a specific specialty (or its equivalent) is required for entry. More specifically, the summary report provides general information regarding the occupation, including a Specialized Vocational Preparation (SVP) rating. According to the SVP rating cited in the summary report, this occupation is designated as 7 < 8. An SVP rating of 7 to less than (“<”) 8 indicates that the occupation requires “over 2 years up to and including 4 years” of training. While the SVP rating indicates the total number of years of vocational preparation required for a particular position, it is important to note that it does not describe how those years are to be divided among training, formal education, and experience – and it does not specify the particular type of degree, if any, that a position would require.⁷

⁵ The “Prevailing Wage Determination Policy Guidance” issued by the DOL provides a description of the wage levels. A prevailing wage determination starts with an entry level wage and progresses to a higher wage level after considering the experience, education, and skill requirements of the Petitioner’s job opportunity. We will consider the Petitioner’s classification of the proffered position at a Level II wage (the second lowest of four assignable wage levels) in our analysis of the position. A Level II wage rate is generally appropriate for a position for which the Petitioner expects the Beneficiary to, either through education or experience, have a good understanding of the occupation. This wage rate indicates that the Beneficiary will be expected to moderately complex tasks that require limited exercise of judgment. For additional information, see U.S. Dep’t of Labor, Emp’t & Training Admin., *Prevailing Wage Determination Policy Guidance, Nonagric. Immigration Programs* (rev. Nov. 2009), available at http://flcdatcenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf.

⁶ U.S. Dep’t of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2016-17 ed., “Data for Occupations Not Covered in Detail,” <http://www.bls.gov/ooh/About/Data-for-Occupations-Not-Covered-in-Detail.htm> (last visited Apr. 29, 2016).

⁷ For additional information, see the O*NET Online Help webpage available at <http://www.onetonline.org/help/online/svp>.

Further, the summary report provides the educational requirements of “respondents,” but does not account for 100% of the “respondents.” The respondents’ positions within the occupation are not distinguished by career level (e.g., entry-level, mid-level, senior-level). Additionally, the graph in the summary report does not indicate that the “education level” for the respondents must be in a specific specialty. Thus, the summary report provides general information regarding the occupational category, but it does not corroborate the Petitioner’s claim regarding the minimum educational requirements for these jobs.

In support of the appeal, the Petitioner submits a letter from [REDACTED]. In his letter, [REDACTED] (1) describes the credentials that he asserts qualify him to opine upon the nature of the proffered position; (2) lists the duties proposed for the Beneficiary; and (3) states that these duties require at least a bachelor’s degree in computer information systems or a related area (or the equivalent). We carefully evaluated [REDACTED] assertions in support of the instant petition but, for the following reasons, determined his letter does not have significant weight in this matter.

First, [REDACTED] expertise, regarding current industry degree requirements for QA analyst positions is not established in the record. His supporting documentation indicates that most of his experience over the past 30 years has been in an academic setting as a faculty member within a university’s school of business. His prior experience was as an engineer (1969-1975), followed by managerial positions (1975-1982), and then as a senior systems analyst (1982-1985).

Moreover, [REDACTED] has not provided sufficient information to establish his expertise on the practices of organizations seeking to hire QA analysts. Without further clarification, it is unclear how his education, training, skills or experience would translate to expertise regarding the current recruiting and hiring practices of an enterprise engaged in “computer software and development” (as designated by the Petitioner in the petition) or similar organizations for QA analysts (or parallel positions).

[REDACTED] states that his assessment is based upon a description provided by the Petitioner of the company and the offered position. While [REDACTED] provides a brief, general description of the Petitioner’s business activities, he does not demonstrate in-depth knowledge of its operations or how the duties of the position would actually be performed in the context of its business enterprise. Further, [REDACTED] not acknowledge that the Beneficiary will be working offsite at an end-client’s facility. Nor does [REDACTED] mention that the Beneficiary’s assignments are not limited to one particular client and/or project.

Moreover, [REDACTED] opinion letter does not cite specific instances in which his past opinions have been accepted or recognized as authoritative on this particular issue. There is no indication that he has conducted any research or studies pertinent to the educational requirements for such positions (or parallel positions) in the Petitioner’s industry for similar organizations, and no indication of recognition by professional organizations that he is an authority on those specific requirements. [REDACTED] states that he has published several journal articles in different areas of information technology and business; however, according to his curriculum vitae his most recent publication was in 1994

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(over 20 years ago) – and his curriculum vitae does not reflect that he has published any works on the academic/experience requirements for QA analysts (or related issues).

Even assuming ██████ possessed expertise on the degree requirements for QA analysts, his opinion letter does not substantiate his conclusions, such that we can conclude that the Petitioner has met its burden of proof. First, ██████ does not reference, cite, or discuss any studies, surveys, industry publications, authoritative publications, or other sources of empirical information which he may have consulted to complete his evaluation. Second, the record does not indicate whether ██████ was aware that, as indicated by the Level II wage on the LCA, the Petitioner considered the proffered position to be for an employee who is expected to perform moderately complex tasks that require limited exercise of judgment. Rather, ██████ states that the Beneficiary will have a great level of responsibility in the company; will serve in a highly skilled leadership role; will independently develop and execute plans and tests; and will directly and indirectly affect the company's operations, revenues and profits, as well as its overall success. The Petitioner has not demonstrated that ██████ possessed the requisite information to adequately assess the nature of the position and appropriately determine parallel positions based upon the job duties and level of responsibilities.

For the reasons discussed, we find that ██████ opinion letter lends little probative value to the matter here. *Matter of Caron Int'l*, 19 I&N Dec. 791, 795 (Comm'r 1988) (The service is not required to accept or may give less weight to an advisory opinion when it is “not in accord with other information or is in any way questionable.”).

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

B. Second Criterion

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

1. First Prong

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

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the

industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As previously discussed, the Petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports a requirement for at least a bachelor's degree in a specific specialty, or its equivalent. Thus, we incorporate by reference the previous discussion on the matter. Also, there are no submissions from the industry's professional association indicating that it has made a degree a minimum entry requirement. Furthermore, the Petitioner did not submit any letters or affidavits from similar firms or individuals in the Petitioner's industry attesting that such firms "routinely employ and recruit only degreed individuals."

In support of this criterion, the Petitioner submitted several postings for jobs with other companies.⁸ The Petitioner's reliance on these postings, however, is misplaced. First, without further information, some of the advertisements appear to be for organizations that are not similar to the Petitioner – and the Petitioner has not provided any evidence to suggest otherwise or explained which aspects or traits (if any) it shares with the advertising organizations.⁹ Second, the record also contains advertisements from companies for which little or no information regarding the hiring employers is provided. Consequently, there is insufficient information regarding these employers' business operations to conduct legitimate comparison to the Petitioner's operations.

Third, contrary to the purpose for which the advertisements were submitted, some job postings do not indicate that at least a bachelor's degree in a specific specialty (or its equivalent) is required.¹⁰ Finally, some of the advertisements do not appear to be for parallel positions. For example, some of these advertised positions appear to be for more senior positions than the proffered position. More importantly, the Petitioner has not sufficiently established that the primary duties and responsibilities of these advertised positions are parallel to the proffered position.

⁸ The Petitioner did not provide any independent evidence of how representative these job advertisements are of the particular advertising employers' recruiting history for the type of jobs advertised. Further, as they are only solicitations for hire, they are not evidence of the employers' actual hiring practices.

⁹ Contrary to the Petitioner's assertion in the appeal brief, we note that for a petitioner to establish that an organization is similar, it must demonstrate that it and the organization share the same general characteristics. Without such evidence, documentation submitted by a petitioner would be outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the Petitioner and the organization share the same general characteristics, such factors may include information regarding the nature or type of organization and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). Moreover, it is not sufficient for a petitioner to claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion.

¹⁰ The degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but one in a specific specialty that is directly related to the duties of the position. Further, requiring a general-purpose bachelor's degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d at 147.

As the documentation does not establish that the Petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary.¹¹

We reviewed the evidence submitted, however, the Petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

2. Second Prong

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

To establish eligibility, the Petitioner must describe the specific duties and responsibilities to be performed by the Beneficiary in the context of its business operations, demonstrate that a legitimate need for an employee exists, and substantiate that it has H-1B caliber work for the Beneficiary for the duration of the employment period requested in the petition. *See Defensor v. Meissner*, 201 F.3d at 387 (A “common sense reading” of the regulations indicates an intention to fully implement the definition of “specialty occupation”); *see generally* 8 C.F.R. § 214.2(h)(4)(i)(A)(1), (iii)(B)(2), and (iv)(A). Here, the record does not communicate: (1) the tasks that the Beneficiary would perform on a day-to-day basis¹²; (2) the complexity, uniqueness and/or specialization of those responsibilities; and (3) the correlation between that work and a need for highly specialized knowledge and a particular level of education in a specific specialty.¹³ *See generally* section 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) and (4). Further, it appears that the Petitioner expects the Beneficiary to perform moderately complex tasks that require limited exercise of judgment (by its selection of a Level II wage on the LCA).

The Petitioner has not sufficiently developed relative complexity or uniqueness as an aspect of the proffered position. Thus, the Petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

¹¹ Further, the Petitioner does not demonstrate what statistically valid inferences, if any, can be drawn from the advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations. *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, there is no indication that the advertisements were randomly selected, thus, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. *See id.* at 195-196 (explaining that “[r]andom selection is the key to [the] process [of probability sampling]” and that “random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error”).

¹² For instance, according to the Petitioner, the Beneficiary's work will not be limited to one client and one project, but rather she may be reassigned to different clients and/or projects during the requested employment period.

¹³ While a few related courses may be beneficial in performing certain duties of the position, the Petitioner has not demonstrated how an established curriculum of courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the proffered position.

C. Third Criterion

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

In the appeal brief, the Petitioner states that it satisfies this criterion because it indicated in the job description that it requires a degree or its equivalent for the position. To merit approval of the petition under this criterion, however, the record must establish that a petitioner's imposition of a degree requirement is not a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. While a petitioner may assert that a proffered position requires a specific degree, that statement alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing the Petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the Petitioner created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty, or its equivalent. *See Defensor v. Meissner*, 201 F.3d at 388. Evidence provided in support of this criterion may include, but is not limited to, documentation regarding the Petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

While the Petitioner states that it employs 840 people, it did not provide the total number of people it has employed to serve in the proffered position. Furthermore, it did not submit any documentation (e.g., copies of diplomas/transcripts, employment records) in support of its statement that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position. Consequently, it cannot be determined how representative the Petitioner's claim is of its normal recruiting and hiring practices for the proffered position. Therefore, it has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

D. Fourth Criterion

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

We reviewed the Petitioner's job description and the information regarding its business operations; however, the evidence does not support the Petitioner's assertion that it satisfied this criterion. Without more, the record lacks sufficiently detailed information to distinguish the level of judgment and understanding necessary to perform the duties as specialized and complex. Further, we incorporate our earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a Level II position (the second lowest of four assignable wage-levels) relative to others within the same occupational category.

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

IV. CONCLUSION

Because the Petitioner has not satisfied one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it has not demonstrated that the proffered position qualifies as a specialty occupation.¹⁴ The burden is on the Petitioner to show eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of CWP-S-*, ID# 16304 (AAO May 4, 2016)

¹⁴ We will not address the Beneficiary's qualifications as a beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation.