



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

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

MATTER OF N-, INC.

DATE: MAY 31, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a computer company, seeks to temporarily employ the Beneficiary as an “applications systems engineer” 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 evidence of record is insufficient to establish that the proffered position qualifies as a specialty occupation.

The matter is now before us on appeal. In its appeal, the Petitioner asserts that the Director’s conclusion is erroneous.

Upon *de novo* review, the appeal will be dismissed.

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.

We note that, as recognized by the court in *Defensor*, 201 F.3d at 387-88, where the work is to be performed for entities other than the petitioner, evidence of the client companies’ job requirements is critical. See *Defensor v. Meissner*, 201 F.3d at 387-88. The court held that the former Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary’s services. *Id.* Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work.

B. The Proffered Position

On the Form I-129, Petition for a Nonimmigrant Worker, the Petitioner described itself as a 22-employee software services company. The Petitioner seeks to employ the Beneficiary as an “applications systems engineer” from October 1, 2015, to July 22, 2018, at a salary of \$62,000 per year. The Petitioner indicated that the Beneficiary will work off-site in Michigan.

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).

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The LCA further states that the proffered position is a Level I, entry-level, position. The LCA lists the sole place of employment as the Michigan address.

In its cover letter, the Petitioner stated that the Beneficiary “will be designated to primarily work at [the Petitioner’s] End-Client’s business premises located [in] [REDACTED] MI [REDACTED]. This assignment is based on [the Petitioner’s] direct contract with [the End-Client].” The Petitioner then described the proffered position as follows (verbatim):

[The Beneficiary] will be responsible for analyzing users’ needs and overseeing development of framework for network analytics and enterprise business applications. His duties will include identifying departmental needs and making suggestions regarding technical direction; Designing and implementing system security and data assurance; Designing and developing software and testing software applications and systems; Developing different types of software, including computer games, business applications, operating systems, network control systems, and middleware; and Creating proposal documents, framing requirements and feasibility studies.

In response to the Director’s request for evidence (RFE), the Petitioner elaborated upon the duties of the proffered position, as well as the time spent on each duty, as follows (verbatim):

| | Tasks | Difficulty Level | % Time to be Spent |
|----|---|-------------------------|---------------------------|
| 1. | Lead and synchronize teams of information systems professionals in the maturity of software and integrated information systems, process control software and additional embedded software control systems. Provide guidance and leadership to new engineers | 4 | 30% |
| 2. | Evaluate, troubleshoot, document, upgrade and build up maintenance procedures for operating systems, communications environments and software | 4 | 30% |
| 3. | Frequently work together with customer and functional colleagues in addition to management | 4 | 10% |
| 4. | Examine and select methods and procedures used for obtaining solutions. Research, appraise and create technical information to design | 4 | 10% |
| 5. | Develop and test automated systems, Develop data, procedure and network models to optimize structural design and to assess the performance and consistency of designs | 3 | 10% |

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| | | | |
|----------------------------------|---|---|-----|
| 6. | Plan, design and organize the progress, installation, integration and function of computer-based systems. Follow the corporation regulations for application implementation | 4 | 10% |
| Notes on Difficulty Level | | | |
| 1 | Novice | | |
| 2 | Some Exposure | | |
| 3 | Familiarity with Computers | | |
| 4 | Bachelor's | | |
| 5 | Master's | | |

The Petitioner stated that the proffered position requires a bachelor's degree in computer science, electronics engineering, computer information systems, or a related field, plus a minimum of two to four years of related experience.

In support of the petition, the Petitioner submitted two Employment Agreements with the Beneficiary which provide the following description of duties (verbatim):¹

[The Beneficiary] will be responsible for Engineering, design, and evaluation of new and current production applications systems and supporting infrastructure, Operational planning, design and implementation for new and updated programs, inclusive of effectively utilizing tier partners, Systems analysis and support for Internet-based solutions, Provide extensive troubleshooting and technical expertise in identifying issues that impact service delivery, Provide comprehensive troubleshooting and recommend fixes for application issues, including batch jobs, data store, application functionality and presentation layers, Provide design requirements, feedback and guidance to software development teams for operational best practices, Analysis, stability and support of a specific subset Expedia productions systems, Operational support as application SME for 24x7 systems, including on call rotation duties, Utilizing your enterprise technical expertise to drive the improvements of production systems, Utilizing your support expertise to set and improve existing standards for system administration, such as process builds, monitoring, reporting and documentation.

The Petitioner also submitted a letter from the claimed end-client stating that the Beneficiary will work at its business premises in Michigan as an applications systems engineer "for the project entitled [REDACTED] The end-client letter lists job duties similar to those listed in the Petitioner's cover letter and RFE response. The same end-client letter stated that the company has "never recruited for [the proffered] position for less than a Bachelor's degree in the following fields

¹ The Petitioner submitted an "amended" Employment Agreement in response to the Director's RFE which had noted several impermissible provisions relating to the LCA in the original Employment Agreement. Both Employment Agreements contain the same description of duties.

Computer Science, Computer Applications, Information Technology, Mathematics, Business or a closely related field [*sic*],” along with at least two to three years of related experience.

C. Analysis

As a preliminary matter, the end-client’s assertion that a bachelor’s degree in “Business” is a sufficient minimum requirement for entry into the proffered position is inadequate to establish that the proposed position qualifies as a specialty occupation.² 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,” 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. 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 business degree 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 at 147.³ Without more, a degree requirement in “Business,” alone, indicates that the proffered position is not in fact a specialty occupation.

² While the Petitioner’s list of acceptable degrees does not contain a degree in business, the Petitioner has not explained why its requirements differ from the end-client’s requirements. Regardless, to the extent that the Petitioner’s descriptions differ from those provided by the end-client, we defer to the end-client’s descriptions. *See Defensor v. Meissner*, 201 F.3d at 387-88 (the petitioner-provided job duties and alleged requirements to perform those duties are irrelevant to a specialty occupation determination).

³ 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.

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Moreover, it also cannot be found that the proffered position qualifies a specialty occupation because the Petitioner has not credibly and sufficiently demonstrated the substantive nature of the proffered position.⁴

The evidence of record contains generalized, broad descriptions of the work to be performed by the Beneficiary. For instance, the "Assigned Personnel Form" signed by the Petitioner and the end-client simply describes the "Services to be performed" as "Design, Coding and unit testing core components and client customization of the product." No further details about these job duties or what "product" the Beneficiary will work on were provided in the Assigned Personnel Form. In fact, the Assigned Personnel Form contains discrepancies such as listing the Beneficiary's service fee as "705\$/hr" (for 40-45 hours of work per week for three years) and his end-date as October 12, 2018.⁵ We thus question whether this document constitutes an accurate, legally binding contract between the Petitioner and the end-client for the Beneficiary's services, as claimed.⁶

"[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. "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." *Id.* at 591.

The end-client letter also describes the proffered duties in broad terms, such as "[l]ead and synchronize teams of information systems professionals in the maturity of software and integrated information systems, process control software and additional embedded software control systems" and "[f]requently work together with customer and functional colleagues in addition to management." There is no further explanation of what specific tasks the Beneficiary will perform (i.e., what is meant by the vague phrases "[l]ead and synchronize teams" and "[f]requently work together"), and how these duties specifically relate to the [REDACTED] project. Notably, the evidence of record does not contain a detailed explanation of the [REDACTED] project, such as the nature, complexity, and length of this particular project.

⁴ The California Secretary of State website indicates that the Petitioner's corporate status has been suspended. That is, the Petitioner's powers, rights and privileges, including the right to use its corporate name in California, were suspended. See attached print-outs. The Petitioner's corporate status raises questions regarding whether the Petitioner's offer of employment to the Beneficiary is *bona fide*.

⁵ The prevailing wage rate for the proffered position is \$52,603 per year, or \$25.29 per hour. Although the Assignment Personnel Form does not list the Beneficiary's total compensation, it is evident that it cannot be \$705 per hour. Furthermore, the Petitioner requested a validity period ending on July 22, 2018. The Petitioner did not request the maximum three years, which would have ended on September 30, 2018.

⁶ This document also states that the Beneficiary's "Primary work Location is [REDACTED] Michigan." As will be discussed *infra*, the use of the word "Primarily" is problematic and denotes that the Beneficiary may also be assigned to perform work other than at the stated premises.

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Furthermore, the job descriptions provided by the end-client differ from some of the job descriptions provided by the Petitioner.⁷ For example, in its cover letter, the Petitioner described the proffered duties as including “[d]eveloping different types of software, including computer games.” The Petitioner has neither explained how the job duty of developing computer games is consistent with other job duties as described by the end-client, nor how this job duty specifically relates to the [REDACTED] project.

As another example, the Petitioner’s Employment Agreements with the Beneficiary list the job duty of “[a]nalysis, stability and support of a specific subset [REDACTED] productions systems [sic].” The Petitioner has not explained how this job duty involving a subset of [REDACTED] productions systems” is related to the [REDACTED] project. We note that the Petitioner’s Employment Agreements do not state the Beneficiary’s full name, thus leading us to further question the documents’ overall credibility.

The Petitioner states that the Beneficiary will serve as a subject matter expert or “SME” for certain systems. The Petitioner and the end-client both list duties for the Beneficiary indicating that he will oversee other computer professionals, such as “[l]ead and synchronize teams of information systems professionals” and “[p]rovide guidance and leadership to new engineers.” In contrast, the Petitioner designated the proffered position as a Level I (entry) position.⁸ In designating the proffered position at a Level I wage rate, the Petitioner has indicated that the proffered position is a comparatively low, entry-level position relative to others within the occupation.⁹ That is, in accordance with the

⁷ While petitioner-provided job duties are generally outside the scope of consideration for establishing whether the position qualifies as a specialty occupation, we are considering the Petitioner’s descriptions of the duties here for the purpose of highlighting the inconsistencies in the evidence of record. See *Defensor v. Meissner*, 201 F.3d at 387-88 (stating that the petitioner-provided job duties and alleged requirements to perform those duties were irrelevant to a specialty occupation determination where the nurses in that case would provide services to the end-client hospitals and not to the petitioning staffing company).

⁸ 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.

⁹ The Petitioner’s designation of this position as a Level I, entry-level position undermines its claim that the position is a higher-level position 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

relevant DOL explanatory information on wage levels, this wage rate indicates that the Beneficiary is only required to have a basic understanding of the occupation and will perform routine tasks that require limited, if any, exercise of judgment. 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. The Petitioner's designation of the proffered position as a Level I, entry-level position is inconsistent with the stated job duties, and further precludes us from understanding the substantive nature of the proffered position.

Finally, we note the vague statements by the Petitioner and the end-client regarding the Beneficiary's "primary" work duties and location. For instance, the Assigned Personnel Form lists the Beneficiary's "Primary work location" as the end-client's Michigan premises. The Petitioner states in its cover letter that the Beneficiary "will be designated to primarily work at [the Petitioner's] End-Client's business premises." However, the use of the words "primary" or "primarily" denotes that the Beneficiary may also be assigned to perform work at other, unspecified locations, and that he may be assigned to perform job duties other than those disclosed in the petition. The Petitioner's Employment Agreements with the Beneficiary contain other similar provisions indicating that the Beneficiary may be assigned to perform undisclosed work, such as that the Beneficiary's "duties shall be rendered at [Petitioner's] business premises or at such other places as the [Petitioner] may require" and that he "shall also perform such other duties in the ordinary course of business as performed by other persons in similar such positions, as well as such other reasonable duties as may be assigned from time to time by the [Petitioner]." When considered as a whole, the evidence of record lacks a sufficient, detailed explanation of all the work the Beneficiary will be assigned to perform during the entire validity period requested, including the location(s) of such work and the specific job duties to be performed.

For all of the above reasons, we find the evidence of record insufficient to demonstrate the substantive nature of the proffered position and its constituent duties. Consequently, we are precluded from 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.

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.

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Accordingly, as the evidence does not satisfy 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. The appeal will be dismissed and the petition denied for this reason.

II. CONCLUSION

The Petitioner has not established that the proffered position, more likely than not, qualifies as a specialty occupation. 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 N-, Inc.*, ID# 16767 (AAO May 31, 2016)