



**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 a “software test 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 23-employee “Technology Integration Services for applications and hardware” company. The Petitioner seeks to employ the Beneficiary as a “software test engineer” from October 1, 2015, to July 19, 2018. 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 15-1131, “Computer Programmers,” from the Occupational Information Network (O*NET). The

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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 work at the business premises of its "direct-client," located in [REDACTED] Michigan. The Petitioner provided a description of the proffered position, and subsequently provided the same description in response to the Director's request for evidence (RFE) with new percentages of time, as follows (verbatim):

	Tasks	Difficulty Level	% Time to be Spent
1.	Go through the software requirements and get clarifications on one's doubts (learn using my video on Requirement Analysis). Become familiar with the software under test and any other software related to it	5	25%
2.	Understand the master test plan and/or the project plan. Create or assist in creating own test plan	4	10%
3.	Generate test cases based on the requirements and other documents. Procure or create test data required for testing. Set up the required test beds (hardware, software and network). Create or assist in creating assigned test automation	4	15%
4.	Test software releases by executing assigned tests (manual and/or automated).	4	10%
5.	Report defects (usually in a defect database) to the stakeholders. Create test logs. Report test results to the stakeholders. Reply to returned bug reports (for example, when a bug report is returned as not reproducible)	4	20%
6.	Re-test resolved defects, Update test cases based on the discovered defects. Update test automation based on the updated test cases	3	5%
7.	Provide inputs to the team in order to improve the test process, Log own time in the project management software or time tracking system	4	5%
8.	Report work progress and any problems faced to the Test-Lead or Project Manager as required. (If applicable) Support the team with testing tasks as required	3	5%
9.	Keep himself/herself up-to-date on the overview of the development		

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	technology, the popular testing tools (e.g. automated testing tools and test management systems) and the overview of the business domain	5	5%
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 relevant experience.

In support of the petition, the Petitioner submitted two "Assigned Personnel Forms" which describe the "Services to be performed" as "design and development of the automation."¹ The Petitioner also submitted two Employment Agreements with the Beneficiary which provide the following description of duties (verbatim):²

[The Beneficiary] will be responsible for in identifying the business flow of trades,Involved in preparation of Test Strategy and Release planning and role of Scrum master as part of agile track and worked closed with teams in multiple locations Responsible for the execution of Test cases Involved in Functionality, Integration, System, Regression Testing Created Web Services test Framework and process in place for all the SOAP based and RESTful web services.Created FitNesse suites for daily Smoke tests Automated web services testing using the tool SOAP SOANRAutomated the test execution by integrating SOAP SONAR with Quality center.

In addition, the Petitioner submitted a letter from the claimed end-client stating that the Beneficiary will work at its business premises in Michigan as a "Software Test 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 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.

¹ The two Assigned Personnel Forms contain the same description of duties.

² 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.

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.³ 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 147.⁴ Without more, a degree requirement in "Business," alone, indicates that the proffered position is not in fact a specialty occupation.

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.⁵

³ 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).

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

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

Id.

⁵ 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.

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The evidence of record contains generalized, broad descriptions of the work to be performed by the Beneficiary. For instance, the Assigned Personnel Forms signed by the Petitioner and the end-client simply describe the “Services to be performed” as “design and development of the automation.” No further details about these job duties, such as what “automation” system(s) the Beneficiary will work on or with, were provided in the Assigned Personnel Forms. We note that that the Petitioner submitted two different versions of this document, even though both forms were purportedly executed on the same day. One of the Assigned Personnel Forms lists the Beneficiary’s start and end dates as October 1, 2015, to October 12, 2018, while the other one lists the dates of October 12, 2015, to October 11, 2018, even though the Petitioner is requesting a validity period ending on July 19, 2018.⁶ We thus question whether these documents constitute an accurate, legally binding contract between the Petitioner and the end-client for the Beneficiary’s services, as claimed.⁷

“[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 contains substantially the same job duties as those found in the Petitioner’s cover letter and RFE response. However, these job duties are described in broad and duplicative terms that are not specifically explained within the context of the [REDACTED] project. In fact, neither the end-client letter, nor other evidence of record, provides a detailed explanation of the [REDACTED] project, such as the nature, complexity, and length of this particular project.

Notably, the majority of the proffered duties found in the Petitioner’s Employment Agreements with the Beneficiary appear to have been copied directly from the Beneficiary’s resume.⁸ More specifically, they mirror the Beneficiary’s past and current work experience for the “High Income – Trading Systems” project for a different end-client, which appears to be an investment company. We thus question the credibility of these Employment Agreements, i.e., whether they constitute an accurate, legally binding contract between the Petitioner and the Beneficiary. We must also question the credibility of the job descriptions found therein, and of the Petitioner overall. Again, it incumbent upon the Petitioner to resolve inconsistencies in the record, and doubt cast on any aspect of the Petitioner’s proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591-92.

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*.

⁶ The Petitioner did not request the maximum three years, which would have ended on September 30, 2018.

⁷ These documents also state 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.

⁸ The fact that the job duties found in the Employment Agreements are described in the past tense indicates that, more likely than not, they were copied from the Beneficiary’s resume, and not the other way around.

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Assuming *arguendo* that these job duties were not copied from the Beneficiary's resume and/or are otherwise relevant to the proffered position, we still find them insufficient to convey the substantive nature of the work to be performed. These job duties are overly broad and not specifically explained within the context of the [REDACTED] project. To illustrate, the Employment Agreements state that the Beneficiary "will be responsible for in [*sic*] identifying the business flow of trades" and "worked closed with teams in multiple locations." The Petitioner has not further explain what is meant by the term "business flow of trades," what "teams" or "multiple locations" will be involved, and how these job duties all relate to the [REDACTED] project, which the Petitioner has indicated will only take place at the end-client's office in Michigan. The Employment Agreements also contain references to "SOAP based and RESTful web services" and "SOAP SONAR with Quality center," for example, but do not provide further explanation of what these services or systems are, and what "Quality center" is involved.

With regard to the first and ninth set of duties listed in the RFE response, the Petitioner indicated that these duties are a "Difficulty Level" 5, which requires a master's degree. However, the Petitioner has never claimed that the proffered position requires a master's degree. Nor has the Petitioner claimed that positions located within the "Computer Programmers" occupational classification normally require a master's degree. Rather, the Petitioner repeatedly states that a bachelor's degree is the normal minimum requirement for this as well as other positions within the "Computer Programmers" occupational classification. We observe that the Petitioner designated the proffered position as a Level I (entry) position, which indicates that the proffered position is a comparatively low, entry-level position relative to others within the occupation.⁹ The Petitioner's designation of this position as a Level I, entry-level position further undermines the Petitioner's characterizations of the proffered position.¹⁰

⁹ 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.

¹⁰ The Petitioner's designation of this position as a Level I, entry-level position undermines any claim that the position is particularly difficult, particularly as 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

Finally, we note the vague statements by the Petitioner and the end-client regarding the Beneficiary's work duties and location. The Assigned Personnel Forms list the Beneficiary's "Primary work location" as the end-client's Michigan premises. However, the use of the word "primary" 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 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]." Furthermore, the Petitioner states in its cover letter that it has "enough resources and financial strength to continue paying the beneficiary even without specific project/s" and that "[i]f required, the petitioner can place the beneficiary in place of any one of those contractor positions."¹¹ 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.

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.

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.

¹¹ Speculative employment is not permitted in the H-1B program. USCIS regulations require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the Petitioner or Beneficiary becomes eligible under a new set of facts. *See* 8 C.F.R. § 103.2(b)(1); *see also* *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978).

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# 16794 (AAO May 31, 2016)