



**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 “senior software 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: (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. In its appeal, the Petitioner asserts that the Director’s conclusions are 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.

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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 company which engages in “Technology Integration Services for applications and hardware” located in ██████████ California. The Petitioner seeks to employ the Beneficiary as a “senior software engineer” from October 1, 2015, to July 18, 2018, at a salary of \$65,000 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 15-1132, “Software Developers, Applications,” from the Occupational Information Network

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(O*NET). The LCA further states that the proffered position is a Level II 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 out of the worksite of its "direct-client," whose office is located in [REDACTED] Michigan. The Petitioner listed the duties of the proffered position as follows (verbatim):

- Develops software solutions by studying information needs; conferring with users; studying systems flow, data usage, and work processes; investigating problem areas; following the software development lifecycle.
- Determines operational feasibility by evaluating analysis, problem definition, requirements, solution development, and proposed solutions.
- Documents and demonstrates solutions by developing documentation, flowcharts, layouts, diagrams, charts, code comments and clear code.
- Prepares and installs solutions by determining and designing system specifications, standards, and programming.
- Improves operations by conducting systems analysis; recommending changes in policies and procedures.
- Updates job knowledge by studying state-of-the-art development tools, programming techniques, and computing equipment; participating in educational opportunities; reading professional publications; maintaining personal networks; participating in professional organizations.
- Provides information by collecting, analyzing, and summarizing development and service issues.
- Accomplishes engineering and organization mission by completing related results as needed.
- Supports and develops software engineers by providing advice, coaching and educational opportunities.

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:

	Tasks	Difficulty Level	% Time to be Spent
1.	Develops information systems by studying operations; designing, developing, and installing software solutions; supports and develops software team. Develops software solutions by studying information needs; conferring with users; studying systems flow, data usage, and work processes; investigating problem areas; following the software development lifecycle.	5	25%
2.	Determines operational feasibility by evaluating analysis, problem		

	definition, requirements, solution development, and proposed solutions. Documents and demonstrates solutions by developing documentation, flowcharts, layouts, diagrams, charts, code comments and clear code.	4	10%
3.	Prepares and installs solutions by determining and designing system specifications, standards, and programming. Improves operations by conducting systems analysis; recommending changes in policies and procedures.	4	15%
4.	Updates job knowledge by studying state-of-the-art development tools, programming techniques, and computing equipment; participating in educational opportunities; reading professional publications; maintaining personal networks; participating in professional organizations.	4	10%
5.	Preparing and installing solutions by determining and designing system specifications, standards. Protects operations by keeping information confidential.	4	20%
6.	Provides information by collecting, analyzing, and summarizing development and service issues.	3	5%
7.	Keeping abreast with state-of-the-art development tools, programming techniques, and computing equipment.	4	5%
8.	Supports and develops software engineers by providing advice, coaching and educational opportunities. Accomplishes engineering and organization mission by completing related results as needed.	3	5%
9.	Supporting junior software engineers	5	5%
Notes on Difficulty Level			
1	Novice		
2	Some Exposure		
3	Familiarity with Computers		
4	Bachelor's		
5	Master's		

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

¹ The Petitioner submitted an "amended" Employment Agreement in response to the Director's RFE which had noted

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[The Beneficiary] will be responsible for Core Development of the Credit Engine in the project [REDACTED]. It includes development of both web layer and business Layer for the credit module using JSP's, EJB's, DAO's, JMS and Struts Framework and deployment of the application on WebLogic. Production and QA support for the developed components including bug fixing and enhancements. Creating clustered Weblogic domains and deploying all the modules of the application and integrating all the modules. Deploying and integrating every release in Onsite environments. Written ant scripts for creating clustered domains and deploying all the modules. Automating the process of build and deployment using ant and also involved in the development of Automatic Path Process for [REDACTED] using Java and Ant.

The Petitioner also submitted a letter from the claimed end-client stating that the Beneficiary will work at its business premises in Michigan as a Senior Software 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 end-client letter further states 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.

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," without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Assocs.*, 19 I&N Dec. 558, 560 (Comm'r 1988).

To prove that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. 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

several impermissible provisions relating to the LCA in the original Employment Agreement. Both Employment Agreements contained the same description of duties.

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 387-388 (the petitioner-provided job duties and alleged requirements to perform those duties are irrelevant to a specialty occupation determination).

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.

Moreover, it also cannot be found that the proffered position qualifies as 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 “Database design, Application design and development, Unit testing, Bug fixing, deployment and support.” No further details about these job duties or the “Database” or “Application” upon which the Beneficiary will work were provided in the Assigned Personnel Form.⁵

The end-client letter, as well as the Petitioner’s letters, describe the proffered duties in vague and duplicative terms. For example, the Petitioner’s RFE response indicated that the Beneficiary will spend 15% of his time performing duties including “[p]repares and installs solutions by determining and designing system specifications, standards, and programming.” The Petitioner then stated that the Beneficiary will spend another 20% of his time performing the nearly identical duties of “[p]reparing and installing solutions by determining and designing system specifications, standards.” The Petitioner also listed a separate set of job duties involving “designing, developing, and installing software solutions” which account for another 25% of the Beneficiary’s time. The Petitioner further indicated that the Beneficiary will spend separate percentages of time to perform the duty of remaining updated with “state-of-the-art development tools, programming techniques, and

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.

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 We note that the Assigned Personnel Form lists the duration of the Beneficiary’s assignment as ending on October 12, 2018. In contrast, the Petitioner requested a validity period ending on July 22, 2018. The Petitioner did not request the maximum of three years, which would have ended on September 30, 2018.

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computing equipment.” The Petitioner has not adequately distinguished each of the stated job duties from one another, even though they account for separate percentages of time.

“[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.

Notably, the evidence of record does not contain any detailed explanation of the [REDACTED] project mentioned in the end-client letter, such as the nature, complexity, and length of this particular project. Equally, if not more, significant is that the Petitioner’s Employment Agreements both indicate that the Beneficiary will be assigned to a different project for a different end-client. More specifically, the Employment Agreements state that the Beneficiary “will be responsible for Core Development of the Credit Engine in the project [REDACTED] and that he will also be “involved in the development of Automatic Patch Process for [REDACTED]. These agreements also state 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].” The Petitioner has not resolved these apparent inconsistencies regarding what project(s) upon which the Beneficiary will work, and for whom. Again, it is incumbent upon the Petitioner to resolve the 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.

There are other vague statements by the Petitioner and the end-client which also lead us to question the Beneficiary’s actual job duties and work location. For instance, the Assigned Personnel Form lists the Beneficiary’s “Primary work location” as the end-client’s Michigan premises. The use of the word “Primary” denotes that the Beneficiary may also be assigned to perform work at other, unspecified locations. We also note the Petitioner’s statements in its cover letter that “[t]he petitioner 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” which are “sourced through third party companies.”⁶ 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.

⁶ The Petitioner states that it has a direct contractual relationship with the end-client, thus indicating that there are no third-party or vendor companies involved.

There are also inconsistencies with the wage level and the proffered duties which further prevent us from understanding the true nature of the proffered position. For example, despite the proffered title of "Senior Software Engineer," the Petitioner designated the proffered position as a Level II position. In designating the proffered position at a Level II wage rate, the Petitioner has indicated that the proffered position is a comparatively lower position relative to others within the occupation.⁷ That is, in accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the Beneficiary will only perform moderately complex tasks that require limited 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 II position is inconsistent with this purportedly senior-level position, whose job duties include "[supporting] and [developing] software engineers by providing advice, coaching and educational opportunities" and "[s]upporting junior software engineers."

Finally, the Petitioner indicated that some of the proffered 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.⁸ Nor has the Petitioner claimed that positions located within the "Software Developers, Applications" 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 "Software Developers, Applications" occupational classification.⁹ Again, we observe that the Petitioner designated the proffered position as a Level II position, which indicates that it is a comparatively lower-level position relative to others within the occupation. These inconsistencies further undermine the credibility of the position descriptions, as well as the Petitioner's overall credibility.

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.

⁷ The Petitioner's designation of this position as a Level II position undermines its claim that the position is a senior position compared to other positions within the same occupation. Nevertheless, a Level II 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 or Level II 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.

⁸ The Petitioner also does not claim that the Beneficiary possesses a master's degree or its equivalent. It is therefore unclear how the Beneficiary would be qualified to perform the proposed duties of the proffered position according to the Petitioner's own standards.

⁹ The Petitioner indicates that the job duty of "[s]upports and develops software engineers by providing advice, coaching and educational opportunities" is a Difficulty Level 3, requiring "Familiarity with Computers." This leads us to question whether the Petitioner requires at least a bachelor's degree for its other software engineers.

§ 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.

II. BENEFICIARY QUALIFICATIONS

The Director also found that the Beneficiary is not qualified to perform the duties of the proffered position. However, a beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the proffered position does not qualify as a specialty occupation. Therefore, we need not and will not address the Beneficiary's qualifications further.

III. CONCLUSION AND ORDER

The Petitioner has not established that the proffered position, more likely than not, qualifies as a specialty occupation. The petition, therefore, may not be approved. 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# 16748 (AAO May 31, 2016)