



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

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

MATTER OF D-R-, INC.

DATE: OCT. 11, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a company engaged in software application development, seeks to temporarily employ the Beneficiary as a “computer programmer analyst” under the H-1B nonimmigrant classification for specialty occupations. *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 of the California Service Center denied the petition, concluding that the evidence of record does not establish that the proffered position qualifies as a specialty occupation.

On appeal, the Petitioner submits additional evidence and asserts that the Director erred in the decision.

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

## 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) 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). We construe the term “degree” 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).

#### B. Proffered Position

The Petitioner states that the Beneficiary will perform the services of a computer programmer analyst. The record’s labor condition application (LCA)<sup>1</sup> was certified for a position falling within the Standard Occupation Classification (SOC) code and category 15-1131, “Computer Programmers.”

In the response to the request for evidence (RFE), the Petitioner described the Beneficiary’s duties as follows:

<ul style="list-style-type: none"><li>• Develop custom-based modules of the [redacted] and [redacted] system<ul style="list-style-type: none"><li>a. Create BRDs (Business Requirement Documents) by interacting with project stakeholders, including C-level management and directors, to elicit business and functional requirements</li><li>b. Function as a subject matter expert for application design, feature, optimization, availability, scalability, user experience, visualization</li></ul></li></ul>	<b>30%</b>
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<sup>1</sup> The Petitioner is required to submit a certified LCA to demonstrate that it will pay an H-1B worker the higher of either the prevailing wage for the occupational classification in the “area of employment” or the actual wage paid by the employer to other employees with similar experience and qualifications who are performing the same services. See *Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542, 545-546 (AAO 2015).

<p>and data integrity</p> <ul style="list-style-type: none"> <li>c. Develop functional specification designs including definition of functional requirements and business scenarios</li> <li>d. Drive the effective transition of requirements to delivery and development, ensuring a clear and complete understanding of the requirements for a successful delivery to end customer</li> </ul>	
<ul style="list-style-type: none"> <li>• <u>Participate and lead quality management reviews including designs, prototypes and other stages of project to ensure requirements are fulfilled</u> <ul style="list-style-type: none"> <li>a. Engage with project team leads to gather assets, best practices and guidance from customers in an effort to integrate and improve methodologies and the end-customer experience</li> <li>b. Enhance the existing [redacted] system</li> <li>c. Define [redacted] enhancement requirements for reports and business processes</li> <li>d. Identify opportunities to improve the utilization of the solution tightening the interfaces and enhancing the acceptance of the [redacted] system</li> </ul> </li> </ul>	<p><b>20%</b></p>
<ul style="list-style-type: none"> <li>• <u>Carry out prototyping plans, procedure documentation and perform the Fit/Gap analysis</u> <ul style="list-style-type: none"> <li>a. Prepare pre-design documentation and offer solutions with requirements and recommendations</li> <li>b. Assist the business users defining the business requirements</li> <li>c. Prepare Functional Design Documents (FDDs)</li> <li>d. Establish system setup by designing and testing procedures and workflows</li> </ul> </li> </ul>	<p><b>20%</b></p>
<ul style="list-style-type: none"> <li>• <u>Prepare, plan and execute data migration plans in scope of the [redacted] roll-out project implementations</u> <ul style="list-style-type: none"> <li>a. Document and review data migration scripts</li> <li>b. Review legacy data tables and provide data migration recommendations</li> <li>c. Provide functional demonstrations using the data tables ported from the legacy [redacted] systems</li> <li>d. Assist and supervise the go-live procedures, provide post go-live support and mitigate any post go-live data issues</li> </ul> </li> </ul>	<p><b>15%</b></p>
<ul style="list-style-type: none"> <li>• <u>Conduct user training, perform periodic system updates, interact with users for future enhancements and resolve software application problems.</u> <ul style="list-style-type: none"> <li>a. Conduct in-class [redacted] user training</li> <li>b. Provide live and on-line presentations on the [redacted] new features and functionality</li> </ul> </li> </ul>	<p><b>15%</b></p>

c. Develop company propriety boot camp classes and the corresponding boot camp training materials for the [REDACTED] project [REDACTED]	
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According to the Petitioner, the proffered position requires a bachelor's degree in computer science, information systems management or related field or its equivalent.

### C. 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 qualifies as a specialty occupation. Specifically, the record does not establish that the job duties require an educational background, or its equivalent, commensurate with a specialty occupation.<sup>2</sup>

#### 1. First Criterion

We turn first to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), 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. 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.<sup>3</sup>

On the LCA, the Petitioner designated the proffered position under the occupational category "Computer Programmers" corresponding to the SOC code 15-1131. We reviewed the *Handbook's* subchapter entitled "How to Become a Computer Programmer," which states, in pertinent part: "Most computer programmers have a bachelor's degree in computer science or a related subject; however, some employers hire workers with an associate's degree."<sup>4</sup> Thus, the *Handbook* does not support the Petitioner's assertion that a bachelor's degree is required for entry into this occupation.

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<sup>2</sup> The Petitioner submitted documentation to support 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.

<sup>3</sup> We do not 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 we regularly review 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.

<sup>4</sup> Bureau of Labor Statistics, U.S. Dep't of Labor, *Occupational Outlook Handbook*, Computer Programmers, on the Internet at <https://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm#tab-4> (last visited Oct. 3, 2018).

The *Handbook* reports that the occupation accommodates a wide spectrum of educational credentials, including less than a bachelor's degree in a specific specialty.

The Petitioner also cites to the Department of Labor's Occupational Information Network (O\*NET) summary report. The summary report for "Computer Programmers" provides general information regarding the occupation; however, it does not support the Petitioner's assertion regarding the educational requirements for these positions. For example, the Specialized Vocational Preparation (SVP) rating cited within O\*NET's Job Zone designates this occupation 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.<sup>5</sup>

In addition, the Petitioner submitted two letters, one from [REDACTED] an associate professor of computer science and information systems at [REDACTED] and the second from [REDACTED] associate professor of computer science and information systems at [REDACTED]. In both letters, the authors: (1) describe the credentials that they assert qualify them 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 science or a related field. We carefully evaluated both assertions in support of the instant petition but, for the following reasons, determined the letters are not persuasive.

First, we note that neither [REDACTED] nor [REDACTED] discuss the duties of the proffered position or the project the Beneficiary will be working on in any substantive detail. Rather, the authors restate the same duties listed in the Petitioner's support letter. They do not discuss them in the specific context of the Petitioner's business. There is no indication that they possess any knowledge of the Petitioner's proffered position beyond this job description, e.g., visited the Petitioner's business, observed the Petitioner's employees, interviewed them about the nature of their work, or documented the knowledge that these workers apply on the job prior to documenting his opinion regarding the proffered position. Their level of familiarity with the actual job duties as they would be performed in the context of the Petitioner's business has therefore not been substantiated.

Moreover, the record does not include evidence that [REDACTED] or [REDACTED] have published, conducted research, run surveys, or engaged in any enterprise, pursuit, or employment - academic or otherwise - regarding the minimum education requirements for the performance of the duties of the proffered position. While they may have anecdotal information regarding recruitment by employers for students who study computer science, the record does not include any relevant research, studies, surveys, or other authoritative publications as part of his review and/or as a foundation for their opinion.

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<sup>5</sup> For additional information, see the O\*NET Online Help webpage available at <http://www.onetonline.org/help/online/svp>.

Further, [REDACTED] also noted that “with a plethora of coding schools available on the Internet, and the myriad of high school and community college courses available, it can be relatively easy for an individual to acquire a certain level of skill and call themselves a ‘programmer’.” Thus, it appears that [REDACTED] is acknowledging that some individuals can enter the position of computer programmer without obtaining a bachelor’s degree in a specific specialty.

[REDACTED] also stated that there are a “plethora of technical/trade schools available on the Internet, and the myriad of high school and community college courses available where it can be relatively easy for an individual to acquire a certain level of information and call him or herself a programmer/developer.” Again, it appears that [REDACTED] is also acknowledging that some individuals can enter the position of computer programmer without obtaining a bachelor’s degree in a specific specialty.

We may, in our discretion, use advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, we are not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm’r 1988). As a reasonable exercise of our discretion we discount the advisory opinion letters as not probative of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

We conclude that the Petitioner has not established that the proffered position is located within an occupational category for which a relevant, authoritative source indicates that the normal minimum entry requirement is at least a bachelor’s degree in a specific specialty, or the equivalent. Moreover, the Petitioner has not provided documentation from a probative source to substantiate its assertion regarding the minimum requirement for entry into this particular position. The Petitioner therefore has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

## 2. 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 common industry practice with regard to positions that are “parallel” to the one under consideration, while the alternative prong narrows its focus to the Petitioner’s specific position.

### a. 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.

We generally consider the following sources of evidence to determine if there is such a common degree requirement: 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 establish 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 (considering these "factors" to inform the commonality of a degree requirement) (S.D.N.Y. 1989)).

The Petitioner provided several job vacancy announcements placed by other companies that we reviewed. Notably, the Petitioner did not provide any independent evidence of how representative these job advertisements are of the particular advertising employer's recruiting history for the type of job advertised. Further, as they are only solicitations for hire, they are not evidence of what qualifications were ultimately required for the positions.

Upon review of the documents, we find that the Petitioner's reliance on the job announcements is misplaced. First, the Petitioner has not demonstrated that these organizations are similar. 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). It is not sufficient for the Petitioner to claim that an organization is similar and conducts business in the same industry without providing a legitimate basis for such an assertion. Several of the submitted job postings do not even list the name of the company and it is impossible to determine if they are similar to the Petitioner. In addition, some of the advertising organizations do not appear to be similar such as the following: Admiral Instruments – support the user interface for the scientific research instrumentation; Randstad Technologies – a company that employs over 5,300 employees and appears to be much larger than the Petitioner; and, Mission Federal Credit Union – a credit union company.<sup>6</sup>

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. That is, as the evidence does not establish that similar organizations in the same industry routinely require at least a bachelor's degree in a specific specialty, or its equivalent, for parallel positions, not every deficit of every job posting has been addressed.

Accordingly, the Petitioner has not satisfied the first alternative prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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<sup>6</sup> It must be noted that even if all of the job postings indicated that a requirement of a bachelor's degree in a specific specialty is common to the industry in parallel positions among similar organizations (which they do not), the Petitioner has not demonstrated 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, given that there is no indication that the advertisements were randomly selected, 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").

b. Second Prong

We will now 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.

In support of the petition, the Petitioner provided information regarding the proffered position and its business operations. When discussing H-1B employment, the Petitioner's description must be comprehensive enough to properly ascertain the minimum educational requirements necessary to perform those duties. While a few related skills and techniques may be beneficial in performing certain duties of the position, the Petitioner has not demonstrated how an established curriculum of such 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. The Petitioner indicated that a [REDACTED] specialist is needed to work on high-level activities. However, the job description lacks sufficient details of the project in which the Beneficiary will work on and the complexity or uniqueness of the duties for these projects, or the independent judgment required, or the amount of supervision received. The Petitioner has not distinguished the proffered position as more complex or unique from other positions that can be performed by persons without such a degree.

The Petitioner claims that the Beneficiary is well-qualified for the position, and references the Beneficiary's education and experience as evidence that the proffered position is a specialty occupation. 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. Here, the Petitioner did not sufficiently develop relative complexity or uniqueness as an aspect of the duties of the position. Thus, it cannot be concluded that the Petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

3. 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.

To merit approval of the petition under this criterion, the record must establish that a petitioner's imposition of a degree requirement is not merely 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 we limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the 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*, 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.

In response to the RFE, the Petitioner submitted the credentials of 6 "entry-level computer program analysts." The Petitioner does not explain or document the duties and responsibilities of these positions and how their knowledge compares to the proffered position, nor does it articulate the body of highly specialized knowledge required for these positions. The record lacks evidence establishing that their work has the same or similar substantive responsibilities, duties, and performance requirements as the proffered position

The Petitioner was established in 2009. The Petitioner did not provide the total number of people it has employed to serve in the proffered position. Consequently, it cannot be determined how representative the Petitioner's claim regarding 6 individuals (over a 9 year period of time) is of the Petitioner's normal recruiting and hiring practices.

In addition, in response to the RFE, the Petitioner provided a job posting for a computer programmer analyst that it posted on the company's website. It is not clear when this advertisement was posted and for how long. The Petitioner did not provide further information or evidence regarding its recruiting history for the position. Without more, the submission of one posting is not persuasive in establishing that the Petitioner normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the position.

Therefore, the Petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

#### 4. 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.

In support of the petition, the Petitioner provided information regarding the proffered position and its business operations. The Petitioner also provided a more extensive job description with the percentage of time spent on each duty. However, the Petitioner has not sufficiently developed relative specialization and complexity as an aspect of the proffered position. The proposed duties have not been described with enough detail to show that they are more specialized and complex than other computer programmer positions that are not usually associated with at least a bachelor's degree in a specific specialty, or its equivalent. The Petitioner does not establish how the generally described duties elevate the proffered position to a specialty occupation.

As the Petitioner did not sufficiently develop relative specialization and complexity as an aspect of the duties of the position, it has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

*Matter of D-R-, Inc.*

## II. 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.

**ORDER:** The appeal is dismissed.

Cite as *Matter of D-R-, Inc.*, ID# 1660309 (AAO Oct. 11, 2018)