



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

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

MATTER OF S-I-, INC.

DATE: JUNE 29, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a computer consulting firm, seeks to temporarily employ the Beneficiary as a “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. 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 have consistently interpreted 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).

II. PROFFERED POSITION

In the initial submission, the Petitioner stated that the Beneficiary will serve as a “programmer analyst” and presented the duties it claimed that the Beneficiary would perform. In response to the Director’s request for evidence (RFE), the Petitioner submitted a revised job description. Thereafter, on appeal, the Petitioner provided an entirely list of the Beneficiary’s duties, stating the following:

Job Responsibility	% Time
Develop, test, and maintain software for the most recent version of the [REDACTED] product.	65%
Development/Maintenance of the Administrative module of the [REDACTED] product.	15%
High level and design for the [REDACTED] product.	10%
Construction Use Case, Sequence diagram etc. for the [REDACTED] product software by analyzing the requirements of the products documents.	10%

III. ANALYSIS

For the reasons set out below, we have determined that the Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation.¹ Specifically, the record (1) does not describe

¹ Although some aspects of the regulatory criteria may overlap, we will address each of the criteria individually.

the position's duties with sufficient detail; and (2) does not establish that the job duties require an educational background, or its equivalent, commensurate with a specialty occupation.²

A. Labor Condition Application

We turn first to the labor condition application (LCA)³ submitted in support of the H-1B petition, in which the Petitioner designated the proffered position under the occupational category "Computer Programmers" corresponding to the Standard Occupational Classification (SOC) code 15-1131 at a Level II. In response to the RFE and on appeal, the Petitioner states that the "most closely aligned position to a Programmer Analyst is a Computer Systems Analyst, SOC code 15-1121."

While these occupational categories may have some general duties in common, they are distinct and separate occupational categories. When the duties of the proffered position involve more than one occupational category, the U.S. Department of Labor (DOL) provides guidance for selecting the most relevant Occupational Information Network (O*NET) code classification. The "Prevailing Wage Determination Policy Guidance" by DOL states the following:

In determining the *nature of the job offer*, the first order is to review the requirements of the employer's job offer and determine the appropriate occupational classification. The O*NET description that corresponds to the employer's job offer shall be used to identify the appropriate occupational classification If the employer's job opportunity has worker requirements described in a combination of O*NET occupations, the [determiner] should default directly to the relevant O*NET-SOC occupational code for the highest paying occupation. For example, if the employer's job offer is for an engineer-pilot, the [determiner] shall use the education, skill and experience levels for the higher paying occupation when making the wage level determination.

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.

Thus, if the Petitioner believed its position was described as a combination of occupations, then according to DOL guidance, the Petitioner should have chosen the relevant occupational code for the highest paying occupation. The prevailing wage for "Computer Programmers" is lower than the prevailing wage for "Computer Systems Analysts." For instance, at the time the Petitioner's LCA

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

³ 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).

was certified, the Level II prevailing wage for “Computer Systems Analysts” in the area of intended employment was \$72,030 per year, while the Level II prevailing wage for “Computer Programmers” in the area of intended employment was \$70,574 per year. Moreover, it is important to note that the offered wage to the Beneficiary is less than the prevailing wage for the “Computer Systems Analysts” occupational category.

Under the H-1B program, a petitioner must offer the Beneficiary wages that are at least the actual wage level paid by the Petitioner to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the application. *See* section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A).

As such, the Petitioner has not established (1) that it submitted a certified LCA that properly corresponds to the claimed occupation and duties of the proffered position; and (2) that it would pay the Beneficiary an adequate salary for his work, as required under the Act, if the petition were granted. These issues preclude the approval of the petition.

B. Position Requirements

Furthermore, the Petitioner has provided inconsistent information regarding the minimum requirements for the proffered position. The Petitioner initially stated that the proffered position requires an individual with advanced education in the field. The Petitioner did not provide any further specifications. Therefore, it appears that an associate’s degree is sufficient.

In response to the RFE, the Petitioner claimed that a bachelor’s degree in computer science/engineering or related field was required for the position. However, in response to the RFE, the Petitioner provided copies its own job postings for the position of programmer analyst, which state different and varying requirements. For example, in some of the advertisements, the minimum educational requirement is an associate’s degree. Notably, the Petitioner also provided a range of acceptable disciplines.

On appeal, the Petitioner states that the position requires a degree in computer science, engineering, information technology of a closely related field. The Petitioner submitted additional job postings showing that its minimum requirement for a programmer analyst position is an associate’s degree.

The Petitioner did not provide an explanation for the variances in the requirements.

C. Job Location

The Petitioner also has provided inconsistent information about the location of the Beneficiary’s employment. While the Petitioner repeatedly claims in the record (including its letters and the LCA) that the Beneficiary will be employed on-site, we observe that the Petitioner submitted several of its

own job postings for the position of programmer analyst that indicate otherwise. The Petitioner indicated the postings were relevant to the matter here. The postings state: “Must be willing to work at unanticipated worksites.”

D. Job Description

The Petitioner provided three separate job descriptions for the proffered position but it did not explain the reason that it submitted multiple descriptions. Moreover, there are inconsistencies in the Petitioner’s allocation of the Beneficiary’s time between the job descriptions. For example:

Job Duty	RFE	Appeal
High level and design	15%	10%
Development/Maintenance of the Administrative module	20%	15%

Moreover, the description of the Beneficiary’s duties lack the specificity and detail necessary to support the Petitioner’s contention that the position is a specialty occupation. For example, the Petitioner claims that the Beneficiary will be a member of the design team and will be involved in development and maintenance of the administrative module. However, these tasks do not communicate the Beneficiary’s actual role or the work that he will perform. Moreover, they do not sufficiently communicate: (1) the complexity, uniqueness or specialization of the tasks; and (2) the correlation between that work and a need for a particular level of knowledge in a specific specialty.

The Petitioner has provided inconsistent information on material aspects of the proffered position (i.e., occupational category, academic requirements, location of the work, duties of the position), therefore, we cannot determine the nature of the position. Thus, the appeal must be dismissed.

Nevertheless, assuming, for the sake of argument, that the proffered duties as described in the record would in fact be the duties to be performed by the Beneficiary, we will analyze them and the evidence of record to determine whether the proffered position as described qualifies as a specialty occupation pursuant to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

E. First Criterion

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

⁴ All of our references are to the 2016-2017 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/ooh/>. We do not, however, maintain that the *Handbook* is the exclusive source of relevant information. That is, the occupational category designated by the Petitioner is considered as an aspect in establishing the general tasks and responsibilities of a proffered position, and USCIS regularly reviews the *Handbook* on the duties and

As previously discussed, on the LCA, the Petitioner designated the proffered position under the occupational category “Computer Programmers” corresponding to the SOC code 15-1131.⁵ Thus, 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.” Bureau of Labor Statistics, U.S. Dep’t of Labor, *Occupational Outlook Handbook*, Computer Programmers (2016-17 ed.). Thus, the *Handbook* does not support the Petitioner’s assertion that a bachelor’s degree is required for entry into this occupation. The *Handbook* reports that the occupation accommodates a wide spectrum of educational credentials, including less than a bachelor’s degree in a specific specialty.

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

F. 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 casts its gaze upon the common industry practice, while the alternative prong narrows its focus to the Petitioner’s specific position.

1. First Prong

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

In determining whether there is such a common degree requirement, factors we often consider include: whether the *Handbook* reports that the industry requires a degree; whether the industry’s

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.

⁵ The Petitioner classified the proffered position at a Level II wage. We will consider this selection in our analysis of the position. The “Prevailing Wage Determination Policy Guidance” issued by the DOL provides a description of the wage levels. DOL’s wage-level guidance specifies that a Level II designation is reserved for positions involving only moderately complex tasks requiring limited judgment. U.S. Dep’t of Labor, Emp’t & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://flcdatacenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf. A prevailing wage determination starts with an entry level wage and progresses to a higher wage level after considering the experience, education, and skill requirements of the Petitioner’s job opportunity. *Id.*

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

As previously discussed, the Petitioner has not established that its proffered position is one for which the *Handbook*, or another authoritative source, reports a requirement for at least a bachelor’s degree in a specific specialty, or its equivalent. We incorporate by reference the previous discussion on the matter.

The Petitioner also submitted copies of several job announcements placed by other employers. First, we note that some of the job postings do not appear to involve organizations similar to the Petitioner. For example, the Petitioner is a software consulting company, whereas the posting are from:

- [REDACTED] - an insurance company with \$8 billion in assets
- [REDACTED] - a university
- [REDACTED] - professional association
- [REDACTED] - emergency care industry
- [REDACTED] - university

The Petitioner did not submit additional evidence or supplement the record of proceedings to establish that these advertising organizations are similar to it.

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 in the same industry without providing a basis for such an assertion.

Second, many of the advertisements do not appear to be for parallel positions. For example, some of the positions appear to be for more senior, experienced employment than the proffered position. For instance, the advertisement for the [REDACTED] requires a bachelor’s degree plus “3 to 5 years of experience in software engineering.” In addition, the position for [REDACTED] is for a “senior” programmer analyst. More importantly, the Petitioner has not sufficiently established that the primary duties and responsibilities of the advertised positions are parallel to the proffered position.⁶

⁶ 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]

Additionally, not all of the postings require a bachelor's degree in a specific specialty (or its equivalent). For example, [REDACTED] states a preference for a degree in computer science or computer information systems. We note that a preference is not an indication of a requirement.

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.⁷ That is, not every deficit of every job posting has been addressed.

Without more, the Petitioner has not provided sufficient evidence to establish that a bachelor's degree in a specific specialty, or its equivalent, is common to the industry in parallel positions among similar organizations. Thus, the Petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

2. Second Prong

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

In this matter, the evidence of record does not distinguish the proffered position as unique from or more complex than other computer programmer positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

Again, the Petitioner has designated the proffered position as a Level II position on the LCA, indicating that it is a position for an employee who has a good understanding of the occupation but who will only perform moderately complex tasks that require limited judgment. *See* U.S. Dep't of Labor, Emp't & Training Admin., *supra*. Therefore, it does not appear that the position is one with complex or unique duties relative to other computer programmer positions, as such a higher-level position would likely be classified at a Level III (experienced) or Level IV (fully competent) wage level, requiring a significantly higher prevailing wage.

We note that while a few related courses may be beneficial in performing certain duties of the position, the Petitioner has not demonstrated how an established curriculum of 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. Upon review, the record lacks sufficiently detailed information

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").

⁷ The Petitioner did not provide any independent evidence of how representative the job postings are of the particular advertising employers' recruiting history for the type of job advertised. As the advertisements are only solicitations for hire, they are not evidence of the actual hiring practices of these employers.

to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

The Petitioner claims that the Beneficiary is well-qualified for the position, and references his 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, and it did not identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. 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).

G. 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.

The record must establish that a petitioner's stated degree requirement is not a matter of preference for high-caliber candidates but is necessitated instead by performance requirements of the position. *See Defensor v. Meissner*, 201 F.3d at 387-88. Were USCIS limited solely to reviewing the Petitioner's claimed self-imposed requirements, 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. *Id.* Evidence provided in support of this criterion may include, but is not limited to, documentation regarding the Petitioner's past recruitment and hiring practices, as well as information regarding employees who previously held the position.

In support of this criterion, the Petitioner provided several of its own job postings. However, the postings provide varying academic requirements and some of the postings indicate that an associate's degree is acceptable for the Petitioner's programmer analyst position. Therefore, the evidence does not support the Petitioner's claim that it will only accept a bachelor's degree or higher for the proffered position.

Moreover, on appeal, the Petitioner submitted a list of its current programmer analyst and evidence relevant to 10 individuals (specifically, copies of their degrees and Form W-2, Wage and Tax Statement, for 2015). It is noteworthy that the list provided on appeal indicates that the Petitioner employs 90 individuals in the position of programmer analyst. Notably, the Petitioner has only provided evidence and educational credentials with respect to 10 of its programmer analysts. Therefore, the evidence demonstrates the educational credentials of only a small number of its programmer analysts.

Moreover, the evidence does not establish that these individuals were hired into positions that are the same or similar to the one offered to the Beneficiary. For example, the Petitioner did not provide the

job duties and day-to-day responsibilities for these individuals. The Petitioner also did not submit any information regarding the complexity of the job duties, supervisory duties (if any), independent judgment required or the amount of supervision received. Accordingly, it is unclear whether the duties and responsibilities of these individuals are the same or similar to the proffered position.

Additionally, based on a review of the 2015 W-2 forms that the Petitioner provided, it appears that eight out of ten individuals are paid a significantly higher salary than the one offered to the Beneficiary at \$70,574 per year. For example: ██████ = \$81,911; ██████ = \$131,828; ██████ = \$103,811; ██████ = \$140,766; ██████ = \$119,538; ██████ = \$86,830; ██████ + \$90,071; and, ██████ = \$98,330. Thus, this strongly suggests that these individuals are employed in a more senior position than the proffered position. In addition, two employees were paid significantly less than the salary offered to the Beneficiary, with annual salaries of \$28,950 and \$49,748. Again, this strongly suggests that they are employed in different positions. The Petitioner did not provide an explanation for the variances in the wages.

Therefore, we conclude that the Petitioner did not provide sufficient documentary evidence to support the assertion that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, directly related to the duties of the position. The Petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

H. 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.

Although the Petitioner generally refers to the Beneficiary's duties as "specialized," we find that 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 sufficient specificity 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.

We also incorporate our earlier discussion and analysis regarding the duties of the proffered position, and the designation of the position in the LCA as a Level II position, and not as the higher Level III (referring to "special skills or knowledge") or Level IV (referring to "complex or unusual problems") wage levels. Thus, the Petitioner has not demonstrated in the record that its proffered position is one with duties sufficiently specialized and complex to satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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IV. CONCLUSION

Because the Petitioner has not satisfied one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it has not demonstrated that the proffered position qualifies as a specialty occupation.

ORDER: The appeal is dismissed.

Cite as *Matter of S-I-, Inc.*, ID# 419246 (AAO June 29, 2017)