



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

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

MATTER OF D-M-S-, LLC

DATE: AUG. 23, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a medical services provider, seeks employ the Beneficiary temporarily as a “business intelligence 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 Form I-129, Petition for a Nonimmigrant Worker, concluding that the record did not establish that the proffered position qualified as a specialty occupation. On appeal, the Petitioner asserts that the Director erred in denying the petition, and did not properly consider all of the evidence.

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 offered 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. Analysis

The Petitioner initially provided the position’s description, and slightly revised those duties in response to the Director’s request for evidence (RFE). For the sake of brevity, we will not quote the most recent version; however, we note that we have closely reviewed and considered the duties. For the reasons discussed below, we have determined that the Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation.¹ Specifically, we conclude that the record does not establish that the job duties require an educational background, or its equivalent, commensurate with a specialty occupation.²

1. Opinion Letters

We would also note that the Petitioner submitted two opinion letters that appear insufficient to meet its burden of proof. The format, language, and analysis in the letters are nearly identical and contain the same errors. In addition, the letter from [REDACTED], an adjunct professor at [REDACTED] stated “[t]hese technical skills are only acquired at a Master’s degree level in the field of computer science. *Only an individual without an advance degree or a Bachelor’s degree in computer science and at least 4 years of experience will not be able to perform the above duties.*” Emphasis added. The letter from [REDACTED] also an adjunct professor at [REDACTED]

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

² The Petitioner submitted documentation to support the petition, including evidence regarding the position and its business operations. While we may not discuss every document submitted, we have reviewed and considered each one.

provided the same statement. However, the word “Only” was “whited out.” The Petitioner did not establish if the professor or someone else altered this document. As a result, not only are the quoted passages ambiguous and inconclusive, but we also question the veracity of Professor [REDACTED] letter.

These marked similarities suggest that the authors did not independently devise the language. We acknowledge that the authors have provided their support for this petition. However, it is unclear whether the letters reflect each author’s independent observations, and thus an informed and unbiased opinion of the minimum requirements to qualify for the proffered position. As the Petitioner has not demonstrated the actual source of the content, these letters carry significantly diminished evidentiary weight. The Petitioner cannot meet its burden of proof relying on this deficient material.³

2. 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. On the DOL ETA Form 9035 & 9035E, Labor Condition Application for Nonimmigrant Workers (LCA), the Petitioner presented in support of this petition, it classified the proffered position under the occupational title “Computer Occupations, All Other,” corresponding to the SOC code 15-1199.⁴ We often look to the U.S. Department of Labor’s (DOL) *Occupational Outlook Handbook (Handbook)*, which is an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁵ However, there are some occupations for which detailed profiles have not been developed, such as for the occupational category Computer Occupations, All Other.⁶

When the *Handbook* does not support the proposition that a proffered position is one that meets the statutory and regulatory provisions of a specialty occupation, it is the Petitioner’s burden to provide probative evidence (e.g., documentation from other objective, authoritative sources) that supports a finding that the particular position in question qualifies as a specialty occupation. When more than one authoritative source exists, we will consider and weigh all of the evidence presented to determine whether the particular position qualifies as a specialty occupation.

³ In evaluating the evidence, the truth is to be determined not by the quantity of evidence alone but by its quality. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

⁴ The Petitioner is required to submit a certified LCA to USCIS to demonstrate that it will pay the Beneficiary 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. Section 212(n)(1) of the Act; 20 C.F.R. § 655.731(a).

⁵ We do not, however, maintain that the *Handbook* is the exclusive source of relevant information.

⁶ Bureau of Labor Statistics, U.S. Dep’t of Labor, *Occupational Outlook Handbook*, “Data for Occupations Not Covered in Detail,” <https://www.bls.gov/ooh/about/data-for-occupations-not-covered-in-detail.htm> (last visited Aug. 22, 2018).

In this case, the Petitioner submitted the Occupational Information Network (O*NET) Summary Report for “Business Intelligence Analysts.” The printout provided general information regarding the occupation; however, it did not support the Petitioner’s assertion regarding the educational requirements for this position. 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. Further, it does not specify the particular type of degree, if any, that a position would require.⁷

Further, the summary report provides the educational requirements of “respondents,” but does not account for 100% of the “respondents.” The O*NET does not distinguish the respondents’ positions within the occupation by career level (e.g., entry-level, mid-level, senior-level). Additionally, the graph in the summary report does not indicate that the “education level” for the respondents must be in a specific specialty.

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

3. 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 concentrates on the common industry practice, 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

⁷ For additional information, see the O*NET Online Help webpage available at <http://www.onetonline.org/help/online/svp>.

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 an authoritative source reports at least a bachelor’s degree in a specific specialty, or its equivalent is required for the proffered position, and we incorporate our previous discussion on this matter. In addition, there are no submissions from the industry’s professional association indicating that it has made a degree a minimum entry requirement. Furthermore, the Petitioner did not submit any letters or affidavits from similar firms or individuals in the Petitioner’s industry attesting that such firms “routinely employ and recruit only degreed individuals.”

In support of the first prong of the second criterion, the Petitioner submitted several job advertisements from other employers. While many employers accepted degrees in a wide variety of fields, to include math, computer science, business, statistics, finance, education, research, and economics, some did not specify any particular field of study for the required degree. Collectively, the advertisements indicate that the positions, if similar to the proffered position, do not have a degree requirement “in *the* specific specialty (or its equivalent),” as required. Section 214(i)(1)(B) of the Act (emphasis added).⁸ See *Royal Siam Corp.*, 484 F.3d at 147; cf. *Matter of Michael Hertz Assocs.*, 19 I&N Dec. 558, 560 (Comm’r 1988).

On appeal, the Petitioner identifies two advertisements, for which the degree requirements were nearly identical to its own. Of these two, the Petitioner has not demonstrated that the advertisements from Franklin Templeton or from California State University are sufficient. Franklin Templeton is a global investment management organization, and the university engages in higher education. As a result, the record does not establish that these companies (1) conduct business in the Petitioner’s industry and (2) are “similar” to the Petitioner.

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

⁸ While the statutory “the” and the regulatory “a” both denote a singular “specialty,” we do not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. See section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor’s or higher degree in more than one specialty is recognized as satisfying the “degree in the specific specialty (or its equivalent)” requirement of section 214(i)(1)(B) of the Act. In such a case, the required “body of highly specialized knowledge” would essentially be the same. Since there must be a close correlation between the required “body of highly specialized knowledge” and the position, however, a minimum entry requirement of a degree in a variety of disparate fields, such as computer science and economics, would not meet the statutory requirement that the degree be “in *the* specific specialty (or its equivalent),” unless the Petitioner establishes how each field is directly related to the duties and responsibilities of the particular position. Section 214(i)(1)(B) of the Act (emphasis added). The Petitioner has not done so here.

b. Second Prong

The Petitioner does not specifically contest this portion of the Director's decision on appeal, and we agree with the Director that the evidence of record does not satisfy this prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

4. 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*, 201 F.3d at 387-88. Were U.S. Citizenship and Immigration Services (USCIS) limited solely to reviewing the 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. *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.

On appeal, the Petitioner states its organizational charts and its own job postings demonstrated that it has satisfied this criterion. Regarding the organizational charts, while each document lists individual names and the degree each employee possesses, this material represents the Petitioner's claim, rather than evidence to support that claim. The Petitioner did not offer a means by which we could verify the contents, nor did it offer material to corroborate it. This falls short of meeting the Petitioner's burden of proof.

Additionally, we conclude the Petitioner's job postings do not demonstrate eligibility under this criterion. For example, the duties of the business analyst III appear more senior than those of the proffered position, as they reflect interaction and coordination with other entities and overall responsibility for a program. Of the four remaining postings, while the duties appear to similar to the proffered position, the Petitioner's education requirements for each position were not consistent. For instance, the Petitioner instituted the following education requirements: (1) two postings required a bachelor's degree in computer science and/or information systems; (2) one posting required a bachelor's degree without any specific discipline; and (3) the final posting required a bachelor's degree, or a foreign equivalent, in electrical and electronics engineering, or a related technical field. Moreover, the Petitioner employs more the 5,000 personnel and it did not provide independent evidence as to how representative these particular job postings are of its recruiting history for the types of jobs advertised. Furthermore, as the postings are only solicitations for hire, they are not evidence of the Petitioner's actual hiring practices.

Without more, the Petitioner has not provided sufficient evidence to establish that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position. Therefore, it has not satisfied the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

5. 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.

While the Petitioner's position description provided the percentage of time the Beneficiary would spend performing each duty in response to the RFE, it did not establish that the duties are more specialized and complex than similar positions that are not usually associated with at least a bachelor's degree in a specific specialty, or its equivalent. The Petitioner's description only reiterated the claimed degree requirement, without providing more comprehensive information relevant to a detailed course of study leading to a specialty degree, and without establishing how such a curriculum is necessary to perform the duties it claims are so complex and unique.

The Petitioner's final claim under this criterion relates to Professor [REDACTED] letter. We incorporate our earlier discussion and analysis regarding the deficiencies related to the opinion letters. Although the Petitioner asserts that the nature of the specific duties is specialized and complex, the record lacks sufficient evidence to support this claim. Therefore, the Petitioner has submitted insufficient evidence to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

II. Labor Condition Application

The purpose of the LCA wage requirement is "to protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring temporary foreign workers."⁹ It also serves to protect H-1B workers from wage abuses. A petitioner submits the LCA to the DOL 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 duties, experience, and qualifications.¹⁰ While DOL certifies the LCA, U.S. Citizenship and Immigration Services determines whether the LCA's content corresponds to and supports the H-1B

⁹ See Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H-1B Visas in Specialty Occupations and as Fashion Models; Labor Certification Process for Permanent Employment of Aliens in the United States, 65 Fed. Reg. 80,110, 80,110-11 (proposed Dec. 20, 2000) (to be codified at 20 C.F.R. pts. 655-56) (indicating that the wage protections in the Act seek "to protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring temporary foreign workers" and that this "process of protecting U.S. workers begins with [the filing of an LCA] with [DOL].").

¹⁰ Section 212(n)(1) of the Act; 20 C.F.R. § 655.731(a); *Venkatraman v. REI Sys., Inc.*, 417 F.3d 418, 422 & n.3 (4th Cir. 2005); *Patel v. Boghra*, 369 F. App'x 722, 723 (7th Cir. 2010); *Michal Vojtisek-Lom & Adm'r Wage & Hour Div. v. Clean Air Tech. Int'l, Inc.*, No. 07-97, 2009 WL 2371236, at *8 (Dep't of Labor Admin. Rev. Bd. July 30, 2009).

petition.¹¹ In order to determine the appropriate wage level, we follow DOL's guidance, which provides a five-step process for determining the appropriate wage level.¹²

The Petitioner indicated on the LCA and the Form I-129, Petition for Nonimmigrant Worker, that the proffered position is business intelligence analyst. On the submitted "Business Intelligence Department Org Chart," however, the Petitioner indicated the Beneficiary holds the title of "Sr. BI Developer." The Petitioner also provided a job posting for the position of Business Intelligence Developer, Senior from its website dated April 21, 2016, which it describes as "an entry-level BI developer" position.¹³

The Petitioner initially stated: "The minimum requirements for this position is a Master's degree in computer Science or related field and experience working with Business Intelligence (BI) and Data Warehouse enterprise platforms and successfully implementing or migrating a large enterprise BI solutions/platform/architecture (Business Object, Micro-Strategy, Tableau, Qualtrics." The Petitioner's correspondence within the initial filing and in response to the Director's RFE did not include the amount of experience it required to qualify for the proffered position.

However, the Petitioner supplemented the record with an "Overview of the Position" (OTP) offered to the Beneficiary that contained more specific experience and education requirements within its response to the RFE. This document reflected in the "education" section that the Petitioner requires either (1) a "MSc. in computer Science and up to 1 years of experience listed below . . ." or (2) a "BS in computer science or related field and 4+ years will be considered." Within the separate experience section, the Petitioner indicates that it requires "2 to 4+ years experience developing and implementing enterprise-scale reports and dashboards" at a minimum. It is unclear whether the Petitioner requires the listed experience in addition to the experience included in its minimum education requirements.

Regardless, considering the Petitioner's requirements from the OTP, it appears its Level II wage rate designation was incorrect. The Petitioner specified a position located within the Computer Occupations, All Other occupational category at a Level II wage rate. Specifically, the Petitioner identified the position as a "business intelligence analyst," which corresponds to the Standard Occupational Classification code 15-1199.08. The Petitioner further indicated the proposed employment would be in [REDACTED] California, which was associated with a prevailing wage of \$61,610 per year. The Petitioner stated on the LCA and in the petition that it would compensate the Beneficiary with \$82,000 per year.

¹¹ See 20 C.F.R. § 655.705(b) ("DHS determines whether the petition is supported by an LCA which corresponds with the petition,...."). See also *Matter of Simeio Solutions*, 26 I&N Dec. 542, 546 n.6 (AAO 2015).

¹² U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009) (DOL guidance), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

¹³ The Petitioner must resolve these inconsistencies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1998).

As previously stated, DOL guidance provides a five step process for determining the proper wage level for the proffered position. Step two of DOL's five-step process compares the experience described in the Occupational Information Network Job Zone to the Petitioner's requirements. Business Intelligence Analysts are classified within Job Zone 4 with a Specialized Vocational Preparation (SVP) rating of "7.0 < 8.0."¹⁴ This SVP rating means that the occupation requires "over 2 years up to and including 4 years" of specific vocational training. A bachelor's degree expends two years, permitting the Petitioner to require up to and including two years of experience as the position's prerequisite without an increase in the wage level. Thus, the Petitioner's stated requirement on the OTP of a "BS in computer science or related field and 4+ years" would result in a three level increase because it is greater than the experience and SVP range permitted of up to two years of experience.¹⁵

Based on the foregoing, it appears the Petitioner should have designated the proffered position as a Level IV on the LCA. Doing so would have resulted in a higher wage than the \$82,000 it is offering the Beneficiary, as a Level IV prevailing wage for the Computer Occupations, All Other category, for the relevant location and timeframe was \$97,365.¹⁶

III. BENEFICIARY QUALIFICATIONS

As the Petitioner has not established that the position is a specialty occupation, we need not address the Beneficiary's qualifications. However, we note that the Petitioner has not demonstrated that: (1) the Beneficiary has any experience in positions that would qualify him for the proffered position, or (2) he has a sufficient amount of experience to satisfy the requirements listed in the OTP document.

Within the Petitioner's initial filing letter, it claimed that [REDACTED] employed the Beneficiary while he was on optional practical training. The Beneficiary served as a database and BI developer from April 2016 through September 2016 for this company. It also indicated that [REDACTED] employed the Beneficiary during his OPT from September 2016 through April 2017. During this employment, the Petitioner claimed the Beneficiary served as a BI developer and ETC developer. Within the Petitioner's letter in response to the RFE, it indicated it hired the Beneficiary as an intern, but it did not specify the dates or the duties the Beneficiary performed for the petitioning organization. The Petitioner's statements made without supporting documentation are of limited probative value and are insufficient to satisfy its burden of proof.

¹⁴ Appendix E of the DOL guidance provides that SVP is the amount of time for an individual to achieve average performance in a specific job-worker situation. The DOL guidance states: "This training may be acquired in a school, work, military, institutional, or vocational environment. Specific vocational training includes: vocational education, apprenticeship training, in-plant training, on-the-job training, and essential experience in other jobs."

¹⁵ See DOL guidance.

¹⁶ For additional information, see the Foreign Labor Certification Data Center, Online Wage Library - FLC Wage Search Wizard available at <http://www.flcdcenter.com/OESWizardStart.aspx>.

IV. CONCLUSION

For the reasons outlined above, the Petitioner has not established eligibility for the benefit sought

ORDER: The appeal is dismissed.

Cite as *Matter of D-M-S-, LLC*, ID# 1364628 (AAO Aug. 23, 2018)