



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

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

MATTER OF F- INC

DATE: OCT. 10, 2018

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, an information technology company that provides process automation for immigration workflow, seeks to temporarily employ the Beneficiary as a “programmer I” under the H-1B nonimmigrant classification for specialty occupations. 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 Vermont Service Center denied the petition, concluding that the proffered position does not qualify as a specialty occupation.

On appeal, the Petitioner submits additional evidence and asserts that the Director’s decision was erroneous.

Upon *de novo* review, we will dismiss the appeal.¹

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.

¹ We follow the preponderance of the evidence standard as specified in *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010).

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).

II. PROFFERED POSITION

The Petitioner claims to be an information technology company that provides process automation for immigration workflow. It seeks to employ the Beneficiary as a “programmer I.” In response to the Director’s request for evidence (RFE), the Petitioner provided the following overview of the job duties for the position:

Job Duties	Percentage of Time Spent
Participate in the technical review of project deliverables inducing requirement specifications, functional designs, technical designs and other project documentation to ensure the testability of requirements.	15%
Analyzing business requirements for accuracy, completeness and testability, working with development to identify the performance requirements against which success will be measured. Creates/modifies project test plans based on specific requirements.	15%

Design and develop automated scripts using Load Runner (C/C++), Jmeter (Java) based on business use cases for the application. Creating scripts using various protocols such as JAVA, LDAP, Citrix, Http, WinSock, VB, C, C++, AWS.	25%
Design scenarios in HP tools to evaluate the performance of the application. Execute different kinds of performance tests like load test, stress, volume and endurance tests. Monitor various metrics like memory utilization, CPU and disk utilization, response times, server metrics using monitoring tools like CA Wily Inter scope and DynaTrace.	25%
Analyze the results using Load Runner Analysis and based on Analysis Pinpoint application bottlenecks, memory leaks ahead of time to help increase application performance. Engage in deep dive meetings with the application and middle ware team to access the cause of any issue and the appropriate solution to fix it.	20%

According to the Petitioner, the position requires at least a bachelor's degree in computer science, engineering, information technology, or a related field.

III. 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.² Specifically, the record does not establish that the job duties require an educational background, or its equivalent, commensurate with a specialty occupation.³

A. First Criterion

The criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I) 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.⁴

² Although some aspects of the regulatory criteria may overlap, we will address each of the criteria individually.

³ The Petitioner submitted documentation to support the H-1B petition, including evidence regarding the proffered position and its business operations. Although we may not discuss every document submitted, we have reviewed and considered each one.

⁴ We do not maintain that the *Handbook* is the exclusive source of relevant information. The occupational category

On the labor condition application (LCA)⁵ submitted in support of the H-1B petition, the Petitioner designated the proffered position under the occupational category “Computer Programmers” corresponding to the Standard Occupational Classification code 15-1131. The subchapter of the *Handbook* titled “How to Become a Computer Programmer” states, in relevant part, that “[m]ost computer programmers have a bachelor’s degree in computer science or a related subject; however, some employers hire workers with an associate’s degree [and] some employers hire workers who have other degrees or experience in specific programming languages.”⁶

According to the *Handbook*, the requirements to perform the duties of the computer programmer occupation incorporate a wide spectrum of educational credentials, including less than a bachelor’s degree in a specific specialty. For example, the *Handbook* states that some employers hire workers who have an associate’s degree. Furthermore, while the *Handbook’s* narrative indicates that most computer programmers obtain a degree (either a bachelor’s or associate’s degree) in computer science or a related field, the *Handbook* does not report that at least a bachelor’s degree in a *specific specialty*, or its equivalent, is normally the minimum requirement for entry into the occupation.

For example, the *Handbook* does not establish that the “other degrees” are in the same specialty as “computer science.” The *Handbook* also does not establish that the “experience in specific programming languages,” even when combined with “other degrees,” is equivalent to a bachelor’s or higher degree in a particular specialty. In sum, the *Handbook’s* observation that an associate’s degree, other degrees, or experience in specific programming languages qualify a worker to enter into the “Computer Programmer” occupation does not support the conclusion that a bachelor’s or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the proffered position. The *Handbook*, therefore, does not support that a bachelor’s degree in a specific specialty is normally the minimum requirement for entry into the occupation.

On appeal, the Petitioner submits a copy of DOL’s Occupational Information Network (O*NET) summary report for “Computer Programmers,” listed as SOC code 15-1131.00. The Petitioner points to the fact that computer programmers are listed as a Job Zone 4 in the O*NET, which indicates that the position requires considerable preparation. A Job Zone 4 designation, however, does not demonstrate that a bachelor’s degree in any specific specialty is required, and does not demonstrate that a position so designated is in a specialty occupation as defined in section 214(i)(1)

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. Nevertheless, to satisfy the first criterion, 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 A petitioner submits the LCA to 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. Section 212(n)(1) of the Act; 20 C.F.R. § 655.731(a).

⁶ Bureau of Labor Statistics, U.S. Dep’t of Labor, *Occupational Outlook Handbook*, Computer Programmers, <https://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm#tab-4> (last visited Oct. 10, 2018).

of the Act and 8 C.F.R. § 214.2(h)(4)(ii). The Petitioner did not demonstrate how positions within Job Zone 4 require a bachelor's degree in a specific specialty.

The Petitioner also cites *Next Generation Tech., Inc. v. Johnson*, (S.D.N.Y. Sept. 29, 2017) as relevant here. This case arises out of different jurisdictions than the instant matter.⁷ Nevertheless, even if we considered the logic underlying the matter, we find that the Petitioner has not demonstrated that the proffered position is a specialty occupation.

The court in *Next Generation* relied in part on a U.S. Citizenship and Immigration (USCIS) policy memorandum regarding "Computer Programmers" indicating generally preferential treatment toward computer programmers, and "especially" toward companies in that particular petitioner's industry. However, USCIS rescinded the policy memorandum cited by the court in *Next Generation*.⁸

The Petitioner submitted letters from [REDACTED] Evaluator-Partner of Foreign Credentials at [REDACTED] and [REDACTED], Managing Partner and CEO of [REDACTED]. In their letters, [REDACTED] and [REDACTED] (1) describe the credentials that they assert qualify them to opine upon the nature of the proffered position; (2) state that they have reviewed an outline of the duties of the position; and (3) state that these duties require at least a bachelor's degree, or its equivalent, in computer science, information systems, a related field of engineering, or other related field. We carefully evaluated their assertions in support of the instant petition but find them insufficient.

[REDACTED] and [REDACTED] state that they reviewed the duties of the proffered position. However, [REDACTED] does not identify the duties in his letter, and neither evaluator discusses them in substantive detail. Moreover, neither evaluator demonstrates in-depth knowledge of the Petitioner's operations or how the duties of the position would actually be performed in the context of its business enterprise. For example, they do not discuss the Beneficiary's duties as they would be performed in response to the end user requirements, or how the Beneficiary in his role as a programmer I will function within the Petitioner's business operations.

We note that the Petitioner submitted these evaluations to establish that a bachelor's degree in computer science or a related field is common to the industry and that only an individual with such a degree would be able to perform the duties described. Although both evaluators offer these conclusions, the letters do not include analysis of why such a degree is required. Additionally, although both evaluators claim to be experienced software professionals, they do not offer examples of the commonality of such requirements. [REDACTED] does not offer evidence of objective

⁷ In contrast to the broad precedential authority of the case law of a United States circuit court, we are not bound to follow the published decision of a United States district court in matters arising even within the same district. See *K-S-*, 20 I&N Dec. at 719-20. Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before us, the analysis does not have to be followed as a matter of law. *Id.*

⁸ See USCIS Policy Memorandum PM-602-0142, *Rescission of the December 22, 2000 "Guidance memo on H1B computer related positions"* (Mar. 31, 2017), [https://www.uscis.gov/sites/default/files/files/nativedocuments/PM-6002-0142-H1B ComputerRelatedPositions Rescission.pdf](https://www.uscis.gov/sites/default/files/files/nativedocuments/PM-6002-0142-H1B%20ComputerRelatedPositions%20Rescission.pdf).

surveys, or even anecdotal evidence to describe how his conclusions were reached. In addition, other than the *Handbook* (discussed in our decision above), [REDACTED] does not discuss additional studies, surveys, industry publications, authoritative publications, or other sources of empirical information that he may have consulted to complete his evaluation.

We may, in our discretion, use opinion statements submitted by the Petitioner as advisory. *Matter of Caron Int'l, Inc.*, 19 I&N Dec. 791, 795 (Comm'r 1988). 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. *Id.* Consistent with *Matter of Caron*, we find that these evaluations do not satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and, for the sake of efficiency, hereby incorporate this finding into our analysis of the remaining specialty-occupation criteria.

The record lacks sufficient evidence to support that the position, as described, is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the Petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

B. 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). The first prong addresses the common industry practice, while the alternative prong focuses on the Petitioner’s specific position.

1. 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 (S.D.N.Y. 1989) (considering these “factors” to inform the commonality of a degree requirement)).

As already discussed, the Petitioner has not established that its proffered position is one for which the *Handbook* (or other independent, authoritative sources) reports an industry-wide 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. Also, the record does not contain a submission from the industry’s

professional association indicating that it has made a degree a minimum entry requirement, or 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 this criterion, the Petitioner submitted copies of job announcements placed by other employers. However, 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. For instance, the Petitioner did submit information regarding the employers' industry base, revenue or staffing. The Petitioner did not sufficiently supplement the record of proceedings to establish that these advertising organizations are similar.

Moreover, many of the advertisements do not appear to involve parallel positions. For example, some of the positions appear to be for more senior, experienced employment than the proffered position.⁹ Further, some of the postings do not include sufficient information about the tasks and responsibilities for the advertised positions. Thus, the Petitioner has not sufficiently established that the primary duties and responsibilities of the advertised positions are parallel to the proffered position.

In addition, some of the postings do not indicate that at least a bachelor's degree in a directly related specific specialty (or its equivalent) is required.¹⁰ For instance, the posting placed by Transperfect lists a "BA/BS or MS degree" as one of its qualifications, and the posting by Codero simply states "Bachelor Degree Required."¹¹ Further, the advertisement placed by Corus360 does not specify the level of education required (e.g., associate's degree, baccalaureate) for the position. Overall, the job

⁹ For instance, the posting placed by Alight, Inc. states a requirement of a bachelor's degree in computer science, engineering, or equivalent, "3+ years of solid experience with JavaScript and one of the major JavaScript MVC frameworks (Angular, Ember, react, Backbone)," and "experience with Node.js or developing backend services or APIs using other technologies." In addition, the advertisement placed by Insightly requires an "expert in CMS-based development," "expert-level JavaScript programming," and "expert knowledge of JQuery, Bootstrap.js, HTML, CSS, and Ajax," as well as a bachelor's degree in computer sciences or a related field, or equivalent experience. (Emphasis added). The posting by Qualtrics requires "2+ years of meaningful experience" in addition to a bachelor's degree in computer science or a related field. Finally, WP Engine requires 2-5 years of writing high quality software applications as well as a bachelor's degree in computer science or a related field, or equivalent experience.

¹⁰ As discussed, the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but a bachelor's degree in a specific specialty that is directly related to the duties of the position. See section 214(i)(1)(b) of the Act and 8 C.F.R. § 214.2(h)(4)(ii).

¹¹ While a general-purpose bachelor's degree, such as a degree in business or business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam*, 484 F.3d at 147.

postings suggest, at best, that although a bachelor's degree is sometimes required for these positions, a bachelor's degree in a *specific specialty* (or its equivalent) is not.¹²

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.¹³ That is, not every deficit of every job posting has been addressed.

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

The second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) 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.

On appeal, the Petitioner does not assert that the proffered position qualifies as a specialty occupation under the second prong of the second criterion, and it does not contest the Director's adverse findings under this prong. Accordingly, the record as constituted does not satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

C. 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. If we were 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

¹² 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").

¹³ 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.

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 claims that it always hires degreed individuals. In support of this assertion, the Petitioner provided copies of resumes for its other employees, along with copies of their diplomas. However, upon review, the documentation submitted is for two individuals holding marketing intern positions.

The issue before us is not the credentials of employees holding other positions within the company, but whether the Petitioner has established that it normally requires a bachelor's degree in a specific specialty, or the equivalent, for the *proffered position of programmer I*. The Petitioner did not submit evidence of its hiring history for the proffered position, nor did it claim to have previously employed any other individuals in the position of programmer I. Consequently, the credentials of the Beneficiary alone are not representative of the Petitioner's normal recruiting and hiring practices. The Petitioner has not persuasively established that it 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 third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

D. 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.

Here, the Petitioner does not discuss how the nature of the duties is so specialized and complex. We have reviewed the Petitioner's duty descriptions; however, the language in the duty descriptions is too general to determine whether the specific duties are so specialized and complex that the knowledge required to perform is associated with a degree in a specific specialty. For example, the Petitioner states that the Beneficiary will "design and develop automated scripts." Without additional specific information, the record does not establish what exactly the Beneficiary would design, develop, and implement. The Petitioner also indicates that he "participates in the technical review of project deliverables," "analyz[es] business requirements for accuracy," and "execute[s] different kinds of performance tests." These other descriptions contain similarly generalized language without sufficient context and detail. In sum, the Petitioner did not sufficiently develop specialization and complexity as an aspect of the duties of the position, and it did not identify any tasks that are so specialized and complex that the knowledge required to perform them is usually associated with a bachelor's degree in a specific specialty.

On appeal, the Petitioner again relies on the letters from [REDACTED] and [REDACTED]. Upon review, however, we note that while the evaluators opine that this position requires at least a bachelor's degree in various fields, neither opines that the duties of the position are specialized and

complex. As discussed above, neither evaluator discuss in detail the specific nature of the Beneficiary's day-to-day duties, and neither indicates that they have performed any research regarding the nature of the Beneficiary's employment within the context of the Petitioner's business operations beyond reviewing the statement of duties presented by the Petitioner.

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).

IV. CONCLUSION

The Petitioner has not established eligibility for the benefit sought.

ORDER: The appeal is dismissed.

Cite as *Matter of F- Inc*, ID# 1407012 (AAO Oct. 10, 2018)