



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

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

In Re: 8989118

Date: JUNE 2, 2020

Appeal of Vermont Service Center Decision

Form I-129, Petition for Nonimmigrant Worker (H-1B)

The Petitioner seeks to temporarily employ the Beneficiary as an “analyst, pricing strategy and optimization” 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 Vermont Service Center denied the petition, concluding that the evidence of record does not establish that the proffered position qualifies as a specialty occupation.

In these proceedings, it is the Petitioner’s burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012). 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”).

B. Analysis

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. 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 will consider the information contained in the U.S. Department of Labor’s (DOL) *Occupational Outlook Handbook (Handbook)* regarding the duties and educational requirements of the wide variety of occupations it addresses.³

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.

³ 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. 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.

The Petitioner submitted the required DOL ETA Form 9035 & 9035E, Labor Condition Application for Nonimmigrant Workers (LCA) with this petition, where it classified the proffered position under the occupational title “Computer Occupations, All Other,” corresponding to the Standard Occupational Classification (SOC) code 15-1199.08; more specifically, the Petitioner stated that the position corresponds to the SOC sub-code and category 15-1198.08, “Business Intelligence Analysts.”⁴ We note that there are occupational categories which are not covered in detail by the *Handbook*.⁵ The *Handbook* suggests that for at least some of the occupations, little meaningful information could be developed. When the *Handbook* does not support the proposition that a proffered position is a specialty occupation, it is the Petitioner’s responsibility to provide probative evidence (e.g., documentation from other objective, authoritative sources) that indicates whether the particular position in question qualifies as a specialty occupation.

The Petitioner referenced DOL’s Occupational Information Network (O*NET) summary report for “Business Intelligence Analysts” - SOC code 15-1199.08 in support of this criterion. The O*NET Summary Report provides general information regarding the occupation, but it does not support the Petitioner’s assertion regarding the educational requirements for the occupation. For example, the Job Zone Four designation indicates that most, but some do not, require a four-year bachelor’s degree. It does not specify the specific field of study, if any, from which the degree must come. The occupation’s Specialized Vocational Preparation (SVP) rating of 7 < 8 is even less persuasive. 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, experience, and formal education which, by definition, includes high school education and commercial or shop training.⁶ The SVP rating also does not specify the particular type of degree, if any, that a position would require. Moreover, the report does not indicate that the degrees of the respondents were in a specific specialty and does not distinguish the respondents’ positions by career level (e.g., entry-level, mid-level, senior-level) or other relevant aspects. For all these reasons, we are not persuaded by the Petitioner’s citations to O*NET.

In the instant matter, the Petitioner has not provided sufficient documentation from a probative, authoritative 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)(I).

⁴ The Petitioner is required to submit a certified LCA to U.S. Citizenship and Immigration Services (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 note that occupational categories for which the *Handbook* only includes summary data includes a range of occupations, including for example, postmasters and mail superintendents; agents and business managers of artists, performers, and athletes; farm and home management advisors; audio-visual and multimedia collections specialists; clergy; merchandise displayers and window trimmers; radio operators; first-line supervisors of police and detectives; crossing guards; travel guides; agricultural inspectors, as well as others.

⁶ For additional information, see the O*NET Online Help webpage available at <http://www.onetonline.org/help/online/svp>.

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 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 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) (considering these “factors” to inform the commonality of a degree requirement)).

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

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’ revenue or staffing. The Petitioner did not sufficiently supplement the record of proceedings to establish that these advertising organizations are similar.

Moreover, 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.⁷ Further, some of the postings do not include sufficient information about the tasks and responsibilities for the

⁷ For instance, the posting placed by Scenic Tours Pty Ltd. states a requirement for a bachelor’s degree and “2+ years of experience in analytical base role.”

advertised positions. Thus, the Petitioner has not sufficiently established that the primary duties and responsibilities of the advertised positions are parallel to those of the proffered position.

In addition, none of the postings indicate that at least a bachelor's degree in a directly related specific specialty (or its equivalent) is required.⁸ For instance, the postings placed by Scenic Tours Pty Ltd. and Road Scholar state that a bachelor's degree is required, but they do not state that a specific specialty is required. In addition, the advertisement placed by Explorica Inc. states "Bachelor Degree preferred in business analytics, mathematics, statistics, accounting or finance." A *preference* for a degree in a field is not necessarily an indication of a minimum *requirement*. Overall, the job 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.⁹

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.¹⁰ 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).

b. 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.

We reviewed the Petitioner's statements regarding the proffered position; however, the Petitioner has not sufficiently developed relative complexity or uniqueness as an aspect of the proffered position. For instance, the Petitioner did not sufficiently explain how the following tasks require a bachelor's degree in a specific specialty, or its equivalent:

⁸ 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).

⁹ 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").

¹⁰ 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.

- Actively monitoring changes to cabin categories, optional extensions/tours, and port taxes, and summarizing changes in daily report (20%);
- Tracking revenue of each email, catalog, and direct mail piece (10%);
- Ensuring correct implementation of pricing and capacity controls of all products (20%);
 - Conducting competitive marketing analysis
 - Understanding regional itineraries and performance-based profit margins
 - Strategically altering base price in accordance with product demand
- Collaborating with Operations department in improving trip itineraries to minimize cost and maximize demand (10%);
- Building price grids based on market knowledge for each catalog and direct mail piece (15%);
- Proofing promotional print materials, web product pages, and email pricing content (10%);
- Conducting research of foreign markets, including vendors, competitors, and potential customers (5%);
- Utilizing tools such as SQL and Advanced Microsoft Excel to develop budget forecasts which maximize margins (5%); and
- Assisting Revenue Managers with key analytical projects and ad hoc duties (5%).

The listed job duties and tasks, when read in combination with the Petitioner's Level I-designation on the LCA, suggest that this particular position is not so complex or unique relative to other business intelligence analysts that the duties can only be performed by an individual with a bachelor's degree or higher in a specific specialty, or its equivalent.¹¹ The Petitioner stated that it requires a master's degree in economics, or a related field. However, while a few related courses may be beneficial in performing certain duties of the position, the Petitioner has not sufficiently demonstrated how an established curriculum of 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.

In addition, the Petitioner provided copies of the Beneficiary's sample work product. However, the Petitioner did not sufficiently explain how these documents distinguishes and differentiates the duties of the proffered position from the typical duties performed by other business intelligence analysts, and why the proffered duties require a baccalaureate (or higher degree) in a specific specialty, or its equivalent, as claimed.

¹¹ A prevailing wage determination starts with an entry-level wage (Level I) and progresses to a higher wage level (up to Level IV) after considering the experience, education, and skill requirements of the Petitioner's job opportunity. U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://fldatacenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf.

A low wage-level designation does not preclude a proffered position from classification as a specialty occupation, just as a high wage-level designation does not definitively establish such a classification. In certain occupations (e.g., doctors or lawyers), a Level I, entry-level position would still require a minimum of a bachelor's degree in a specific specialty, or its equivalent, for entry. Similarly, however, a Level IV wage-designation would not reflect that an occupation qualifies as a specialty occupation if that higher-level position does not have an entry requirement of at least a bachelor's degree in a specific specialty, or its equivalent. That is, a position's wage-level designation may be a relevant factor but is not itself conclusive evidence that a proffered position meets the requirements of section 214(i)(1) of the Act.

The Petitioner claims that the Beneficiary is well-qualified for the position, and references her qualifications. 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. 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. Accordingly, the Petitioner has not 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.

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 Petitioner asserts that it requires its employees to possess a master's degree in economics for the proffered position. However, upon review of the record, we observe that the Petitioner did not submit information regarding employees who currently or previously held the position. The record does not establish that the Petitioner normally requires at least a bachelor's degree in a specific specialty, or its equivalent, directly related to the duties of 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.

For the reasons similar to those discussed under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), we find that the Petitioner has not established 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). 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 I position relative to others within the same occupational category.

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.

II. LABOR CONDITION APPLICATION

Finally, we wish to identify an additional issue to inform the Petitioner that this matter should be addressed in any future proceedings.¹² Specifically, the Petitioner has not demonstrated that the LCA corresponds to the petition.

As noted above, the Petitioner specified a position located within the “Computer Occupations, All Other;” more specifically, the Petitioner stated that the position corresponds to the “Business Intelligence Analysts” occupational category, corresponding to the SOC code 15-1199.08. The Petitioner further indicated a Level I wage on the LCA. The Petitioner’s minimum requirements for the proffered position is a master’s degree in economics, or a related field. Considering the Petitioner’s education requirement, it appears its Level I wage rate designation was incorrect.

To assess whether the wage indicated on the H-1B petition corresponds with the wage level listed on the LCA, USCIS applies DOL’s guidance, which provides a five step process for determining the appropriate wage level. U.S. Dep’t of Labor, Emp’t & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009). We will focus directly on step three of DOL’s aforementioned five step process for wage level determinations. The third step involves a comparison of the Petitioner’s education requirement to that listed in Appendix D of the DOL guidance.¹³ The Petitioner’s stated minimum education requirement is a master’s degree in economics, or a related field. Because the education requirement contained in the Appendix indicates that the usual education level for business intelligence analysts is a bachelor’s degree, the Petitioner’s master’s degree requirement warrants a one level increase in the wage.

Therefore, we conclude that the Petitioner has not demonstrated that the LCA corresponds with and supports the petition.

III. CONCLUSION

The appeal will be dismissed for the above stated reasons, with each considered an independent and alternative basis for the decision. In visa petition proceedings, it is the petitioner’s burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.

¹² In reviewing a matter *de novo*, we may identify additional issues not addressed in the Director’s decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff’d*, 345 F.3d 683 (9th Cir. 2003) (“The AAO may deny an application or petition on a ground not identified by the Service Center.”).

¹³ Appendix D of the DOL guidance provides a list of professional occupations with their corresponding usual education level.