



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

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

In Re: 9504042

Date: JULY 2, 2020

Appeal of California Service Center Decision

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

The Petitioner, a web-based service provider, seeks to extend the Beneficiary's temporary employment as a "sales engineer" under the H-1B nonimmigrant classification for specialty occupations.<sup>1</sup> 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 California Service Center Director 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. The Director further determined that the Petitioner did not establish the Beneficiary would perform qualifying duties for the period requested on the petition. The matter is now before us on appeal.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence.<sup>2</sup> We review the questions in this matter *de novo*.<sup>3</sup> Upon *de novo* review, we conclude that the preponderance of the evidence satisfies the "specialty occupation" definition at 8 C.F.R. § 214.2(h)(4)(ii) and also the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) for a particular position whose specific duties are so specialized and complex that their performance requires knowledge usually associated with attainment of a baccalaureate or higher degree in a specific specialty. The Petitioner sufficiently developed the position's duties that it demonstrated a nexus between an established course of study leading to a specialty degree, and how such a curriculum is necessary to perform the proffered position's specialized and highly complex duties. Therefore, the record satisfies the fourth criterion of the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A). Additionally, we conclude the availability of specialty occupation work is no longer an issue, and we withdraw the Director's decision on these matters.

---

<sup>1</sup> See Immigration and Nationality Act (the Act) section 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

<sup>2</sup> Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010).

<sup>3</sup> See *Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015).

However, the record appears to support a determination that the prevailing wage rate designated on the Department of Labor (DOL) ETA Form 9035 & 9035E, Labor Condition Application for Nonimmigrant Workers (LCA) was not correctly calculated based on the Petitioner's position requirements.<sup>4, 5</sup> Without knowing the answer to that question, we cannot issue an ultimate eligibility determination because a position that satisfies the statutory and regulatory requirements of a specialty occupation, but is one in which the organization would not pay the appropriate wage cannot be approved as it violates section 212(n)(1) of the Act and the intent to protect the wages and working conditions of U.S. workers. We therefore are withdrawing the Director's decision and remanding the matter for further review of the record and issuance of a new decision. Specifically, the Director should first make a determination on whether the Petitioner included the correct wage rate on the LCA, and that it therefore corresponds to and supports this H-1B petition.

Here, the Petitioner obtained an LCA certified under the Standard Occupational Classification (SOC) code 15-2031, relating to "Sales Engineers" at a Level II prevailing wage rate. While it appears the Petitioner selected the most appropriate SOC code, what is unclear from the present record is whether it properly designated the prevailing wage at a Level II wage rate. We question whether the specific skills required for the job are generally encompassed by the Occupational Information Network description for Sales Engineers.<sup>6</sup>

The Director should take the necessary steps to make this determination. In particular the Director may wish to consider whether several of the functions the Beneficiary would perform are atypical to the designated SOC code and instead align more with the SOC code 15-1199.01 relating to the Software Quality Assurance Engineers and Testers occupation. For instance, the responsibility to "verify[] the bug fix provided by the developers and do re-testing on the failed test cases" and to perform "regression testing, to verify new bug fixes do not impact old features or functions. The beneficiary takes the complete responsibility of the work product quality, by making sure there are no defects in the work product before getting released to the customer."

Additionally, the Director may wish to consider if other duties such as "inventing new features/improvements to existing features" and "building new features/functions" as it relates to the Petitioner's products and services are more akin to the duties under the Software Developers, Applications or the Web Developers occupational categories. Finally, the Petitioner stated the Beneficiary would spend 80 percent of his time in their office in Utah, and the remaining 20 percent

---

<sup>4</sup> While DOL certifies the LCA, U.S. Citizenship and Immigration Services (USCIS) determines whether the LCA's attestations and content corresponds with and supports the H-1B petition. *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). When comparing the standard occupation classification (SOC) code or the wage level indicated on the LCA to the claims associated with the petition, USCIS does not purport to supplant DOL's responsibility with respect to wage determinations. There may be some overlap in considerations, but USCIS' responsibility at its stage of adjudication is to ensure that the content of the DOL-certified LCA "corresponds with" the content of the H-1B petition.

<sup>5</sup> *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, LLC*, 26 I&N Dec. 542, 545-546 (AAO 2015).

<sup>6</sup> *See* Step 4 of the DOL, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://fledatacenter.com/download/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://fledatacenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf).

in their California facilities. The Office of Foreign Labor Certification's Frequently Asked Questions and Answers provide additional guidance stating, "extensive travel outside the local area is not normal to most occupations and a point is almost always added in such circumstances."<sup>7</sup> The Director should consider what, if any impact the Beneficiary's required travel between the two offices has on the prevailing wage rate.

When evaluating which location to rely on to calculate the correct prevailing wage, the Director should consider both the Petitioner's office in Utah as well as its California location. We note that the wages differ for each location and, when relying on a Level II wage rate, the Petitioner did not utilize the location with the highest paying wage on the LCA.

As the Petitioner was not previously accorded the opportunity to address the above, we will remand the record for further review of these issues. The Director may request any additional evidence considered pertinent to the new determination. As such, we express no opinion regarding the ultimate resolution of this case on remand.

**ORDER:** The decision of the Director is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.

---

<sup>7</sup> *OFLC Frequently Asked Questions and Answers*, DOL (June 22, 2020), <https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm>.