



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

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

In Re: 9503864

Date: JUNE 30, 2020

Appeal of California Service Center Decision

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

The Petitioner, an advertising agency, seeks to employ the Beneficiary temporarily as a “digital marketing analyst” 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 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>

As noted, the Director concluded that the proffered position is not a specialty occupation. However, the record of proceeding is not sufficiently developed to allow us to determine whether the proffered position is actually located within the occupational category for which the Department of Labor (DOL) ETA Form 9035 & 9035E, Labor Condition Application for Nonimmigrant Workers (LCA) was certified.<sup>4, 5</sup> Without knowing the answer to that question, we cannot determine the actual, substantive

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<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).

<sup>4</sup> While Department of Labor (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> Before filing a petition for H-1B classification, the regulation requires petitioners to obtain certification from DOL that the organization has filed an LCA in the occupational specialty in which its foreign national personnel will be employed. 8 C.F.R. § 214.2(h)(4)(i)(B)(1).

nature of the position. This means that we cannot make a determination on the specialty-occupation question based on the current record. 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 determine whether: (1) the Petitioner obtained a certification from DOL that it filed an LCA in the occupational specialty in which the Beneficiary would be employed; and (2) the LCA was certified for the appropriate occupational category, and therefore corresponds to and supports this H-1B petition.<sup>6</sup>

It is unclear from the record whether the Petitioner established that the proffered position's duties actually correspond with those of positions located within SOC code 15-1199, corresponding to the occupational title "Computer Occupations, All Other"; the SOC code the Petitioner designated on the LCA. We note the Petitioner selected that SOC based on the subordinate SOC code 15-1199.10 for Search Marketing Strategists. The Petitioner included duties that appear atypical to the SOC code on the LCA. Specifically, we observe that some duties appear properly classified under 11-2021.00 SOC code relating to the Marketing Managers occupation and exceeded the responsibilities of the Search Marketing Strategists occupational category. For instance, within the initial filing the Petitioner indicated the Beneficiary would develop marketing strategies and develop unique strategies to meet the client's objectives. We note the Search Marketing Strategists only participate in developing marketing strategies as that responsibility primarily rests within the Marketing Managers occupation. Other responsibilities appear to fall outside the Search Marketing Strategists occupation such as developing requests for proposals and intentions to negotiate with the Petitioner's clients.

On the issue of whether we can provide relevant analysis of a position as a specialty occupation, a petitioner's selection of the incorrect SOC code on the LCA may preclude such an evaluation. The initial issue concerns the statutory and regulatory definitions of a specialty occupation and how these focus on the broader occupation as a whole, and the use of an incorrect occupational code may result in an erroneous outcome, or one that does not properly assess the actual nature of the occupation in which the Beneficiary would engage.

A subordinate concern relates to the education requirements we consider under the regulatory criteria and how these may differ markedly from one occupational classification to the next. It would not be a valuable use of USCIS resources to analyze the position requirements under an incorrect SOC code. For instance, under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), degree requirements to enter an occupation are not the same for all positions in a particular field of endeavor. As an example, degree requirements for positions located in the Software Developers, Applications occupation (usually a bachelor's degree, typically in computer science, software engineering) would generally be different from those in the Web Developers category (an associate's degree in web design or a related field is the most common requirement).<sup>7</sup> Likewise, when considering 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), a degree requirement considered common to the industry for one occupation may also be distinct in comparison to others.

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<sup>6</sup> See 8 C.F.R. § 214.2(h)(4)(i)(B)(1); *Simeio Solutions*, 26 I&N Dec. at 546 n.6; 20 C.F.R. § 655.705(b).

<sup>7</sup> See the relative entry for each occupational title found at <https://www.bls.gov/ooh/>.

Additionally, the Marketing Managers occupational classification demands a higher paying wage than the SOC code designated on the LCA.<sup>8</sup> Even if the Petitioner demonstrates that the Search Marketing Strategists SOC code was correct, the Director should evaluate whether the duties that appear atypical to the selected SOC code would lead to an adverse determination regarding the propriety of the Level I wage rate the Petitioner selected on the LCA, and whether the organization complied with the DOL's five-step guidance in determining the appropriate wage rate.<sup>9</sup>

Accordingly, the matter will be remanded to the Director to consider the LCA issues and enter a new decision. The Director may request any additional evidence considered pertinent to the new determination and any other issue. 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.

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<sup>8</sup> For examples, see the *Online Wage Library - FLC Wage Search Wizard*, Foreign Labor Certification Data Center, <https://www.flcdatcenter.com/OESQuick.aspx>.

<sup>9</sup> DOL, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009) (DOL guidance), available at [http://flcdatcenter.com/download/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://flcdatcenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf).