



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

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

In Re: 8867586

Date: JULY 2, 2020

Appeal of Vermont Service Center Decision

Form I-129, Petition for a Nonimmigrant Worker

The Petitioner, a community retail pharmacy, seeks to temporarily employ the Beneficiary as a “regulatory and compliance 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 Vermont Service Center denied the petition, concluding that the record does not establish that the Beneficiary is qualified for the proffered position. The matter is now before us on appeal.

While we conduct *de novo* review on appeal, we conclude that a remand is warranted in this case because the Director’s decision is insufficient for review. Specifically, the Director must determine whether the proffered position 1) 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>1</sup> and 2) qualifies for classification as a specialty occupation. We therefore are withdrawing the Director’s decision and remanding the matter for further review of the record and issuance of a new decision.

On the LCA, the Petitioner designated the proffered position under the occupational category for “Pharmacists,” corresponding to the Standard Occupational Classification (SOC) code 29-1051.<sup>2</sup> The Petitioner selected a Level I wage as corresponding to the job requirements, necessary experience,

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<sup>1</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>2</sup> *See* <https://www.onetonline.org/link/summary/29-1051.00>

education, special skills, and other requirements of the proffered position. The Director should compare the duties of the proffered position to those provided in the Occupational Information Network (O\*NET). The DOL's "Prevailing Wage Determination Policy Guidance" provides clear guidance for selecting the most relevant O\*NET occupational code classification, as follows:

In determining the *nature of the job offer*, the first order is to review the requirements of the employer's job offer and determine the appropriate occupational classification. The O\*NET description that corresponds to the employer's job offer shall be used to identify the appropriate occupational classification . . . . If the employer's job opportunity has worker requirements described in a combination of O\*NET occupations, the NPWHC should default directly to the relevant O\*NET-SOC occupational code for the highest paying occupation. For example, if the employer's job offer is for an engineer-pilot, the NPWHC shall use the education, skill and experience levels for the higher paying occupation when making the wage level determination.

In addition, we note the following from the Frequently Asked Questions Section of the DOL's Office of Foreign Labor Certification website<sup>3</sup> regarding when the National Prevailing Wage Center (NPWC) considers a position to include a combination of occupations:

While there are common skill sets that may be applied to more than one occupation, the NPWC looks to the job duties, the employer's requirements, and conditions of employment to determine the occupational SOC code and assess a wage level in that occupation. In principle, when skill sets cross disciplines a point is added on the worksheet in Appendix C of the Prevailing Wage Determination Policy Guidance - Nonagricultural Immigration Program (Revised November 2009) (PWD Policy Guidance), which will raise the wage level by one level. For example, when a computer programmer is also required to market his or her program, the NPWC will view this as two distinct occupations. Therefore, a worksheet in Appendix C of the Prevailing Wage Guidance is created for each occupation, and the wage level for each occupation is raised by one level. Moreover, as described in the PWD Policy Guidance, the NPWC will assign the SOC code for the occupation that has the higher wage.

Occupations with overlapping skills in such fields as computers, mathematics, or business operations will usually not be seen as a combination of occupations as long as they do not require two distinct skill sets. However, the NPWC will assign the SOC based on the occupation with the higher wage and will issue a wage based on the appropriate level without adding an additional point for a combination of occupations.

Additionally, when skill sets are not normal to either occupation, an additional point is added. Using the example above, in the instances where a computer programmer who is required to market his/her program also is required to have knowledge of a foreign language, a point is added, separate from the point for combination of occupation.

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<sup>3</sup> See <https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm?q!511> (last accessed June 25, 2020).

According to O\*NET, pharmacists generally:

Dispense drugs prescribed by physicians and other health practitioners and provide information to patients about medications and their use. May advise physicians and other health practitioners on the selection, dosage, interactions, and side effects of medications.<sup>4</sup>

O\*NET provides a list of 20 tasks related to the occupation for a pharmacist. While we acknowledge that some of these tasks may relate to the duties of the proffered position, it appears that the O\*NET entries for regulatory affairs managers (SOC code 11-9199.01), compliance managers (SOC code 11-9199.02), or regulatory affairs specialists (SOC code 13-1041.07) may be more closely aligned with the proffered position. O\*NET provides the following general summaries, along with a list of specific tasks:

Regulatory Affairs Managers (SOC code 11-9199.01)

- Plan, direct, or coordinate production activities of an organization to ensure compliance with regulations and standard operating procedures.

Compliance Managers (SOC code 11-9199.02)

- Plan, direct, or coordinate activities of an organization to ensure compliance with ethical or regulatory standards.

Regulatory Affairs Specialists (SOC code 13-1041.07)

- Coordinate and document internal regulatory processes, such as internal audits, inspections, license renewals, or registrations. May compile and prepare materials for submission to regulatory agencies.

Management Analysts

- Conduct organizational studies and evaluations, design systems and procedures, conduct work simplification and measurement studies, and prepare operations and procedures manuals to assist management in operating more efficiently and effectively. Includes program analysts and management consultants.

The Director should compare the job descriptions the Petitioner provided to the complete list of “tasks” provided for in O\*NET to determine whether the Petitioner selected the most appropriate SOC code.

We acknowledge the Petitioner’s statements regarding the selection of the O\*NET occupation with the higher paying wage. However, it is not clear that the duties listed correspond to the O\*NET occupation requested, or a combination of O\*NET occupations that would lead to the one requested, but rather are encompassed by a different O\*NET occupation that is better suited to the duties of the

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<sup>4</sup> *Id.*

proffered position. Again, the O\*NET description that corresponds to the employer's job offer shall be used to identify the appropriate occupational classification.<sup>5</sup>

The Director should determine whether the record satisfies the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(I), which requires a petitioner to obtain certification from DOL that it has filed an LCA "in the occupational specialty in which the alien(s) will be employed" and if the petition is supported by an LCA that corresponds to the petition under 20 C.F.R. § 655.705(b). In the event the Director concludes that the Petitioner provided the correct SOC code on the LCA, she should then determine whether or not the Petitioner accurately reflected the required wage level.

If the Director concludes that the Petitioner has satisfied all of the above, she should then determine whether the position qualifies as a specialty occupation based upon the information in the record. Only if she concludes that the position qualifies as a specialty occupation should the Director then determine whether the Beneficiary qualifies for the proffered position.<sup>6</sup>

**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>5</sup> U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://flcdatacenter.com/download/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://flcdatacenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf).

<sup>6</sup> Specifically, the Director is required to follow long-standing legal standards and determine first, whether the proffered position qualifies for classification as a specialty occupation, and second, whether the Beneficiary was qualified for the position at the time the nonimmigrant visa petition was filed. *Cf Matter of Michael Hertz Assocs.*, 19 I&N Dec. 558, 560 (Comm'r 1988) ("The facts of a beneficiary's background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation].").