



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

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

In Re: 9733820

Date: JULY 8, 2020

Appeal of California Service Center Decision

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

The Petitioner seeks to temporarily employ the Beneficiary 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 California Service Center Director denied the petition, concluding that the Petitioner had not established that the proffered position is a specialty occupation. On appeal, the Petitioner asserts that the Director erred and that the proffered position is a specialty occupation.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). We review the questions in this matter *de novo*. *See Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon *de novo* review, we will dismiss the appeal.

## I. LEGAL FRAMEWORK

Section 101(a)(15)(H)(i)(b) of the Act defines an H-1B nonimmigrant as a foreign national “who is coming temporarily to the United States to perform *services . . . in a specialty occupation* described in section 214(i)(1) . . .” (emphasis added). Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term “specialty occupation” as an occupation that requires “theoretical and practical application of a body of highly specialized knowledge, and 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 section 214(i)(1) of the Act, but adds a non-exhaustive list of fields of endeavor. In addition, 8 C.F.R. § 214.2(h)(4)(iii)(A) provides that the proffered position must meet one of four criteria to qualify as a specialty occupation position.<sup>1</sup> Lastly,

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<sup>1</sup> 8 C.F.R. § 214.2(h)(4)(iii)(A) must be read with the statutory and regulatory definitions of a specialty occupation under

8 C.F.R. § 214.2(h)(4)(i)(A)(1) states that an H-1B classification may be granted to a foreign national who “*will perform services in a specialty occupation . . .*” (emphasis added).

Accordingly, to determine whether the Beneficiary will be employed in a specialty occupation, we look to the record to ascertain the services the Beneficiary will perform and whether such services require the theoretical and practical application of a body of highly specialized knowledge attained through at least a bachelor’s degree or higher in a specific specialty or its equivalent. Without sufficient evidence regarding the duties the Beneficiary will perform, we are unable to determine whether the Beneficiary will be employed in an occupation that meets the statutory and regulatory definitions of a specialty occupation and a position that also satisfies at least one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). The services the Beneficiary will perform in the position determine: (1) the normal minimum educational requirement for entry into the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4. 8 C.F.R. § 214.2(h)(4)(iii)(A).

By regulation, the Director is charged with determining whether the petition involves a specialty occupation as defined in section 214(i)(1) of the Act. 8 C.F.R. § 214.2(h)(4)(i)(B)(2). The Director may request additional evidence in the course of making this determination. 8 C.F.R. § 103.2(b)(8). In addition, a petitioner must establish eligibility at the time of filing the petition and must continue to be eligible through adjudication. 8 C.F.R. § 103.2(b)(1).

## II. PROFFERED POSITION

The Petitioner is a multinational furniture company established in 1988, which “relies primarily on its products being placed prominently [with a large online retailer], to generate sales of its products. The Petitioner is offering the Beneficiary a position as an “e-commerce business analyst.”<sup>2</sup> The Petitioner initially described the duties of the proffered position; later in response to the Director's request for evidence (RFE), the Petitioner repeated those duties, and provided the relative percentage amount of time that the Beneficiary would devote to each job function, as follows:<sup>3</sup>

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section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). 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”).

<sup>2</sup> The Petitioner employed the Beneficiary through STEM-related post-completion optional practical training, and has provided copies of wage statements for her employment with the Petitioner. 8 C.F.R. §§ 274.a.12(c)(3)(i)(C), 214.2(f)(10)(ii)(C).

<sup>3</sup> For the sake of brevity, we will not quote all of the various job descriptions in full; however, we have closely reviewed and considered all of the Petitioner’s job duties. The Petitioner also discusses the Beneficiary’s previous coursework for the purpose of correlating the need for the Beneficiary’s education with the associated job duties of the position. However, we are 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].”).

## *Merchandise Operations*

1. Use data mining techniques to mine both structured and unstructured data to derive user-centric insights, design marketing campaigns and generate reports using Excel Macros and Database Management skills. (40%)
  - Conduct ad-hoc analyses with catalog data to provide insights to enhance our product page on [] and member experience.
  - Data Extraction: Extract and clean the ETL data from PIMS database with database queries.
  - Manipulate and visualize the 3-Dimensional data with database queries and BI software Profitero.
  - Build multiple reports which help analyze [the Petitioner's] business on [a large online retailer's website].
  - Extract data from PIMS database using database queries and load into MS Excel, where VBA macros are used to automate reports.
  - Prepare POS (Point of Sales) Reports, which are used to help analyze different aspects of business such as top selling items on [a large online retailer's website], top brands and categories, sales margin and make strategic decisions.
  - Prepare Returns Report, a crucial report used to help detect defects/concerns in our product assortment. It also helps drive attention to the business area which needs to be fixed to enhance customer experience.
2. Responsible for managing and maintaining accurate data inputs for all facts of [a large retailer's] catalog. (25%)
  - [The Petitioner] utilizes two primary data sources: PIMS Database and [large retailer] Vendor Central. PIMS is the Database where all the historical [Petitioner] data lives. [Large retailer] Vendor Central is the database where all the catalog information, inventory, and [large retailer] sales information lives. The [Beneficiary] is required to make these two different systems communicate with each other in a way that the data integrity is not affected.
  - Export data from [large retailer] Vendor Central using complex database queries into the staging stage where the data gets validated before it moves to the next stage. Cleanse and transform the raw data using different missing data and null data handling strategies in Analysis ToolPak in Excel. Once the data is transformed in the desired format, load the data into the PIMS Database.
  - Develop data alerting tool to compare the incoming Vendor Central data to the existing data in the PIMS database to ensure the data types match.
3. Extract data from PIMS data system and automate data workflow using complex database functions and queries. (20%)
  - Analyze multiple data sources and databases to diagnose, troubleshoot, and improve various data issues.
  - Analyze data on traffic sources and patterns in the impression to monetization funnel and provide actionable insights to marketing teams on campaign analysis, customer segmentation and profiling.

- Leverage Statistical and Engineering Analysis ToolPak to perform full-lifecycle data mining activities including requirements analysis, data quality assessment, data profiling, design and development of analytic data sets, data extraction, transformation, and loading (ETL) from both relational databases and flat-file sources.

#### *Marketing Operations*

4. Define and create business metrics and build dashboards to monitor Key Performance Indicators. (15%)
  - Gather business requirements from the stakeholders and analyze the AS-IS process to build a TO-BE process for better performance, greater efficiency, and improved outcomes.
  - Create reports on marketing Key Performance Indicators including traffic, leads, conversion rates, revenue, channel performance, social media engagement to develop [the Petitioner's] go-to market strategy using Profitero, which demonstrates who effectively [the Petitioner] is achieving its key business objectives and helps drive optimization toward the KPIs (Key Performance Indicators). These reports are viewed and used by different [Petitioner] partner teams to ensure that the product is in good shape.

#### *Relationship Management*

See additional duties set forth above in “*Marketing Operations*” section, which are equally applicable to “*Relationship Management*” responsibilities.

### III. ANALYSIS

For the reasons set out below, we determine that the proffered position does not qualify as a specialty occupation. Specifically, the record provides inconsistent and insufficient information regarding the proffered position, which in turn precludes us from understanding the position’s substantive nature and determining whether the proffered position qualifies as a specialty occupation.<sup>4</sup>

A crucial aspect of this matter is whether the Petitioner has sufficiently described the duties of the proffered position such that we may discern the nature of the position and whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge attained through at least a baccalaureate degree in a specific discipline. When determining whether a position is a specialty occupation, we look at the nature of the business offering the employment and the description of the specific duties of the position as it relates to the performance of those duties within the context of that particular employer’s business operations.

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<sup>4</sup> The Petitioner submitted documentation to support the H-1B petition, including evidence regarding the proffered position and its business operations. While we may not discuss every document submitted, we have reviewed and considered each one.

On the LCA, the Petitioner designated the proffered position under the occupational category “Market Research Analysts and Marketing Specialists” corresponding to the SOC code 13-1161 with a Level I wage,<sup>5</sup> indicating that this occupational category closely corresponds to the proffered position. However, as we will explain the Petitioner has presented inconsistent information about the relative specialization, complexity, and uniqueness of the proffered position.

The Petitioner provides information about its business operations, and indicates the Beneficiary “will play a significant role in supporting the dedicated [Petitioner] [s]ales [t]eam, focusing on merchandising, marketing, and operations.” Throughout the proceedings the Petitioner has emphasized the advanced level of expertise and responsibilities associated with the proffered position, noting for instance that she will:

- [W]ork independently and as part of a cross-functional teams to develop and enhance the various projects to which she is assigned;
- Be the [Petitioner’s] main contact in the [office location] for [the Petitioner’s] IT Specialist located at our headquarters;
- Act as the [large retailer] Vendor Central and PIMS data systems power user and subject matter expert of our [large retailer] sales team;

The Petitioner further asserts that the position requires “an expert level comprehension of all systems and tools our team utilizes includ[ing] [those] of [the Petitioner], [the large retailer], and [third-party] applications.” The Petitioner’s position description also indicates that the position requires a “Bachelor’s degree in Computer Science, Information Science, or related field,” and that “2+ years of experience in Merchandising, Marketing, or E-commerce [is] preferred for entry into the position.”<sup>6</sup> The Petitioner has not substantiated that the asserted duties and responsibilities of the proffered position are consistent with the Level I wage designated in the LCA.

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<sup>5</sup> The Petitioner classified the proffered position at a Level I wage (the lowest of four assignable wage levels). A wage determination starts with an entry level wage and progresses to a higher wage level after considering the experience, education, and skill requirements of the Petitioner’s job opportunity. A Level I wage rate is generally appropriate for positions for which the Petitioner expects the Beneficiary to have a basic understanding of the occupation. U.S. Dep’t of Labor, Emp’t & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

<sup>6</sup> DOL’s *Prevailing Wage Determination Policy Guidance* provides a five-step process for determining the proper wage level for the proffered position. Step two of this process compares the experience described in the O\*NET Job Zone to the requirements for the proffered position. Computer Systems Analysts are classified in Job Zone 4 with a Specialized Vocational Preparation (SVP) rating of “7.0 < 8.0.” This SVP rating means that the occupation requires “over 2 years up to and including 4 years” of specific vocational training. A bachelor’s degree expends two years, permitting the Petitioner to require up to and including two years of experience as the position’s prerequisite before it must increase the wage level. If an employer requires a bachelor’s degree and more than two years of work experience, then at least a one level wage increase is required. *Id.*

Therefore, the Petitioner’s “preference” of more than two years of work experience for the position appears inconsistent with the Level I wage designation in the LCA. The Petitioner must resolve this inconsistency and ambiguity in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Further, the Petitioner also submits job announcements put forth by other companies for positions it claims are “parallel positions from similar organizations” to the proffered position. Company B- requires bachelor’s degrees in a wide variety of fields and three+ years of analytics experience, while company A-A- requires a bachelor’s degree in mathematics, computer science, or engineering and 3-5 years of business analyst experience. The Petitioner has not explained how these positions, which require substantial levels of prior work experience in addition to a bachelor’s degree are parallel to the asserted entry-level position. The Petitioner must resolve the inconsistencies and ambiguities in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The Director determined in her denial that the Petitioner did not establish that the position qualified as a specialty occupation, noting among other things, that the Petitioner’s selection of the Level I wage on the LCA did not show that the nature of the specific duties of the position is complex or unique relative to other positions in the same occupation. On appeal, the Petitioner contends that “the Beneficiary is being paid a salary of \$70,000, which is above a Level II wage for the position (\$69,181), suggesting that an incorrect wage level designated in the LCA can be *cured* through paying an H-1B beneficiary a wage comparable to a higher wage level. We disagree. A petitioner must distinguish its proffered position from others within the same occupation through the proper wage level designation to indicate factors such as the relative complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties.<sup>7</sup>

We agree with the Director that the Petitioner’s designation of this position as a Level I, entry-level position undermines its claim that the position is particularly complex, specialized, or unique compared to other positions *within the same occupation*.<sup>8</sup> We also conclude the Petitioner has not provided a certified LCA that designates a wage level that is commensurate with the asserted duties and responsibilities required of its position.<sup>9</sup> It is the Petitioner’s burden to prove by a preponderance of evidence that it is qualified for the benefit sought. *Matter of Chawathe*, 25 I&N Dec. at 376. In evaluating the evidence, eligibility is to be determined not by the quantity of evidence alone but by its quality. *Id.* As a result, the inconsistent evidence in the record raises important questions as to the actual, substantive nature of the proffered position.

Moreover, we acknowledge that the Petitioner provided duties of the proffered position which may comport, in part, with the typical tasks performed by individuals employed in the “Market Research Analysts and Marketing Specialists” occupational category, noting for instance that she will, among other things, “[c]onduct ad-hoc analyses with catalog data to provide insights to enhance our product page on [] and member experience,” “review and record competitive set for assortment, channel

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<sup>7</sup> See *Prevailing Wage Determination Policy Guidance*, *supra*.

<sup>8</sup> We note that 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.

<sup>9</sup> Therefore, the Petitioner has not submitted an LCA which corresponds to the petition. See 20 C.F.R. § 655.705(b). See also *Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542, 545-546 (AAO 2015).

pricing, deals, events on [the large retailer’s website] and in competitive landscape channel on-line,” and “tracks, reports and analyzes online consumer behavior.”<sup>10</sup> However, the Petitioner has not established that other duties described for the position are consistent with the occupational category. For instance, it stated that the Beneficiary will be engaged in activities, such as:

- Gather business requirements from the stakeholders and analyze the AS-IS process to build a TO-BE process for better performance, greater efficiency, and improved outcomes.
- Defining and creating business metrics and building dashboards to monitor [KPIs].
- Extracts data from [systems] and automates data workflow using complex [] functions, formulas, and queries.
- Managing and maintaining accurate data inputs from the Company’s two primary data sources.

We observe that another occupational category appears to more directly correspond with many of the sales and marketing data analysis functions alluded to in the petition. DOL’s Occupational Information Network (O\*NET) summarizes the “Business Intelligence Analysts” SOC 15-1199.08 occupational category, indicating that individuals employed in the occupation “[p]roduce financial and market intelligence by querying data repositories and generating periodic reports. Devise methods for identifying data patterns and trends in available information sources.” Here, many of the duties of the proffered position appear to be closely related to the “Business Intelligence Analysts” tasks described in the O\*NET report for the occupation,<sup>11</sup> such as:

- Analyze competitive market strategies through analysis of related product, market, or share trends. Synthesize current business intelligence or trend data to support recommendations for action.
- Manage timely flow of business intelligence information to users.
- Collect business intelligence data from available industry reports, public information, field reports, or purchased sources.
- Identify and analyze industry or geographic trends with business strategy implications.
- Analyze technology trends to identify markets for future product development or to improve sales of existing products.
- Generate standard or custom reports summarizing business, financial, or economic data for review by executives, managers, clients, and other stakeholders.
- Identify or monitor current and potential customers, using business intelligence tools. Maintain or update business intelligence tools, databases, dashboards, systems, or methods.
- Create business intelligence tools or systems, including design of related databases, spreadsheets, or outputs.
- Disseminate information regarding tools, reports, or metadata enhancements.

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<sup>10</sup> The O\*NET position summary for the “Market Research Analysts and Marketing Specialists” occupational category may be viewed at <https://www.onetonline.org/link/summary/13-1161> (last visited July 7, 2020.)

<sup>11</sup> See the O\*NET summary report for “Business Intelligence Analysts,” <https://www.onetonline.org/link/summary/15-1199.08> (last visited July 7, 2020).

In general, if the duties of a proffered position involve more than one occupational category (i.e., “Market Research Analysts and Marketing Specialists” and “Business Intelligence Analysts”), the DOL’s *Prevailing Wage Determination Policy Guidance* states that the employer “should default directly to the relevant O\*NET-SOC occupational code for the highest paying occupation.”<sup>12</sup> At the time the Petitioner’s LCA in this petition was certified, the Level I prevailing wage for “Business Intelligence Analysts” in the area of intended employment was \$70,158, which is significantly higher than the prevailing wage for “Market Research Analysts and Marketing Specialists” of \$57,158.<sup>13</sup> Thus, if the Petitioner believed its position falls under more than one occupational category, it should have chosen the relevant occupational code for the highest paying occupation, which was *not* “Market Research Analysts and Marketing Specialists.” Notably, the Petitioner indicates on the petition that it will pay the Beneficiary a rate less than the prevailing wage for the “Business Intelligence Analysts” occupation.

In considering the evidence in its totality, we conclude that the Petitioner has provided inconsistent evidence regarding whether the proffered position properly falls within the “Market Research Analysts and Marketing Specialists” occupational category corresponding to SOC code 13-1161, or within the occupational category for “Business Intelligence Analysts” under SOC 15-1198.08. The Petitioner must also resolve these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92.

In summary, the record presents inconsistent evidence that raises important questions regarding whether the LCA corresponds to the petition, including the occupational category certified therein. It is crucial that an LCA must correspond to the petition in all material aspects, including the prevailing wage and the occupational category certified therein.<sup>14</sup> The regulation at 20 C.F.R. § 655.705(b) requires that U.S. Citizenship and Immigration Services ensure that an LCA actually supports the H-1B petition filed on behalf of the Beneficiary. According to DOL guidance on the LCA, if a proffered position involves a combination of different occupational classifications, then the petitioner should select the relevant occupational code for the highest-paying occupation.<sup>15</sup> For purposes of the LCA, the Petitioner is required to select the occupational code and prevailing wage level that best represents the nature of the job offer, which in turn ultimately determines the appropriate prevailing wage.<sup>16</sup>

Therefore, we conclude that the Petitioner has not sufficiently demonstrated the substantive nature of the proffered position. As a result, the evidence in the record does not adequately communicate (1) the actual work that the Beneficiary will perform; (2) the complexity, uniqueness, or specialization of the tasks; and (3) the correlation between that work and a need for a particular level of education and knowledge.

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<sup>12</sup> See *Prevailing Wage Determination Policy Guidance*, *supra*.

<sup>13</sup> For more information on prevailing wages in the time and area of intended employment, see generally the Foreign Labor Certification Data Center Online Wage Library, <http://www.flcdatcenter.com>. (last visited July 7, 2020).

<sup>14</sup> See Section 212(n)(1) of the Act; 20 C.F.R. § 655.731(a).

<sup>15</sup> See *Prevailing Wage Determination Policy Guidance*, *supra*.

<sup>16</sup> *Id.*



For all of the reasons discussed, the Petitioner has not established the substantive nature of the proffered position. We are therefore precluded from finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4. As the Petitioner has not established eligibility under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), it has not demonstrated that the proffered position qualifies as a specialty occupation.<sup>17</sup>

#### IV. CONCLUSION

In visa petition proceedings, it is a 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.

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<sup>17</sup> As the lack of probative and consistent evidence in the record precludes a conclusion that the proffered position is a specialty occupation and is dispositive of the appeal, we will not further discuss the Petitioner's assertions on appeal.