



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

Non-Precedent Decision of the
Administrative Appeals Office

In Re: 9371299

Date: SEP. 30, 2020

Appeal of Vermont 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.¹ 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 Vermont Service Center Director denied the petition, concluding the proffered position is not a specialty occupation. On appeal, the Petitioner asserts 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)(I) of the Act, 8 U.S.C. § 1184(i)(I), 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)(I) 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.² Lastly, 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).

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

² 8 C.F.R. § 214.2(h)(4)(iii)(A) must be read with the statutory and regulatory definitions of a specialty occupation under 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").

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 catalog retailer who operates an online marketplace focused on the sale of plus-sized apparel and home goods, and is offering the Beneficiary a position as a "customer insights analyst."³ The Petitioner initially described the duties of the proffered position; later in response to the Director's request for evidence (RFE), the Petitioner provided another list of job duties, along with the relative percentage amount of time that the Beneficiary would devote to them, as follows:⁴

1. Work with the Manager and Director of Customer Insights to conduct all customer and market research efforts including creating a consumer panel, measuring awareness, consumer sentiment, demographics and lifestyle reporting, competitive benchmarking, etc. (25%)

³ The Petitioner most recently 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).

⁴ For the sake of brevity, we will not quote all of the Petitioner's narrative about the underlying job tasks; however, we have closely reviewed and considered all of the Petitioner's job duties. The Petitioner also discussed 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].").

She will measure brand awareness, consumer sentiments, demographics and lifestyle and will perform competitive benchmarking.

2. Provide analytical support for [], a corporate-wide project designed to identify growth opportunities in the market. (5%)

[She] will track plus-size market trends, competitors' campaigns, and new emerging players. . . monitor market size and market share of competitors by integrating data from NPD and Tableau. . . . conduct plus-size market research projects through online surveys and focus groups to evaluate brand positioning, competitiveness, and consumer behaviors.

3. Pull customer data using SAS and writing advance queries for use of the customer insight surveys and focus group. (10%)
4. Validate survey data accuracy using statistical methods. (15%)

To ensure data accuracy, [she] needs to calculate a statistically valid sample size, generate random samples that are representative of the target audience/population, and also validate data through a series of steps. . . .

5. Use MS Excel VBA (Visual Basic for Applications) to create dashboard to report product ratings and customer satisfaction. (10%)

[She] will manage and collect data from various data sources, including 8 commercial websites, and 8 fulfillment/customer satisfaction surveys, and then integrate and analyze data in Excel. [She] will use Excel VBA and advanced formulas as well as charts and graphs to build the product ratings dashboard and customer service dashboard.

6. Use Tableau to determine sales and order volume by category. (5%)

[She] will connect Tableau to [the Petitioner's] transactional database, and gather the useful sales and order volume data. The sales data extracted from Tableau is further mapped with customer satisfaction survey data, and used to weight the customer satisfaction ratings. . . . This sales and order volume by category data is integrated in the customer satisfaction dashboard. Users of the dashboard include top management and brand leaders, and functional teams such as customer service, merchandise, etc.

7. Provide analytical ad hoc reporting and analysis in the areas of on-line behavior/performance, value of private label credit cards, product and service expansion, impact of promotional offers, etc., with use of MS Excel and SAS. (15%)

The Consumer Insights team is responsible for validating business ideas and strategies through customer research, including various ad hoc projects and

initiatives. Based on specific project goals from marketing, merchandising, or the product team, [she] will assist the manager and the director to conduct adhoc research projects to evaluate customers' reaction, preference, and feedback. She will provide ideas to transform business requests and hypotheses into research questions, and then design specific marketing research methods, execute these research projects, and analyze the data using analytical and statistical tools. Last, she will be responsible for transforming data into PowerPoint reports.

8. Use data mining techniques and analyze sales trends in order to improve customer retention and acquisition. (5%)

[She] will utilize data mining techniques including tracking patterns, outlier detection, clustering and regression models to analyze sales trends in order to improve customer retention and acquisition.

9. Translate raw data into a Power-Point presentation, summarize findings and make it easily understandable for brand managers and the executive team. (10%)

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.⁵ 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.

The Petitioner provides information about its business operations, and indicates the Beneficiary "will support the Director of Customer Insights with market research, brand awareness, consumer sentiment, and competitive benchmarking, etc." On the LCA, the Petitioner designated the proffered position under the occupational category "Market Research Analysts and Marketing Specialists" corresponding to the SOC code 13-1161,⁶ indicating that this occupational category closely corresponds to the proffered position. However, the Petitioner presents inconsistent information about the relative specialization, complexity, and uniqueness of the proffered position.

⁵ 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.

⁶ The Petitioner classified the proffered position at a Level II wage. We will consider this selection in our analysis of the position. The "Prevailing Wage Determination Policy Guidance" issued by the DOL provides a description of the wage levels. DOL's wage-level guidance specifies that a Level II designation is reserved for positions involving only moderately complex tasks requiring limited judgment. 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. A prevailing 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. *Id.*

To begin with, we determine that the Petitioner provides inconsistent statements regarding the minimum requirements for the proffered position. At first, it states the position requires “a bachelor’s degree in marketing, as well as additional experience in business analytics tools, such as SAS and Tableau.” Later, in response to the Director’s request for evidence (RFE) it submits an analysis of the duties of the proffered position asserting that master’s degree-level courses provide “the required marketing research and research method design skills required for this position.”⁷ The Petitioner has not offered an explanation for its differing position requirements, which initially specify a bachelor’s degree requirement in marketing, but then later indicate that master’s degree-level coursework is required for the position. The Petitioner must resolve these 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).

Within the RFE response, the Petitioner further asserts that a bachelor’s degree [in marketing] “fully prepares individuals with the sophisticated skillsets required for the role including proficient marketing research skills [in] areas such as statistics, research methodology design survey data processing and analysis, data integration from multiple sources, and various business tools (SAS, Tableau, etc.) proficiency.” The Petitioner then references “Attachment 10” in the RFE response which contains a master’s degree curriculum in marketing, which it maintains is “evidence of the sophisticated nature of the subjects taught in such a program.” The Petitioner has not adequately explained how a master’s degree curriculum in marketing substantiates the “sophisticated nature” of a baccalaureate degree-level program of study in marketing. Id.

The Petitioner also submits a 2017 job announcement for a “senior researcher, consumer insights” position, which requires a bachelor’s degree in management, data sciences or a closely related field; three years of experience in consumer insight or market research; two years of experience in Qualtrics Research Suite, including Site intercept, panel management, and advanced survey logics which may have been obtained as part of or separate from [the previously specified] three years of experience in consumer insight or market research.” The Petitioner’s submission of the requirements for this senior position within its organization hierarchy, does not confirm the Petitioner’s requirements for the instant position.⁸ Notably, the Director specifically requested evidence of the Petitioner’s past recruiting and hiring practices for the proffered position, including copies of present and past job postings or announcements for the position, to substantiate the Petitioner’s assertion that it requires job applicants to have a minimum of a bachelor’s degree or higher degree in a specific specialty, or its equivalent. Here, the Petitioner puts forth inconsistent requirements for the proffered position, and a

⁷ The Petitioner must establish that the position offered to the Beneficiary when the petition was filed merits classification for the benefit sought. See Matter of Michelin Tire Corp., 17 I&N Dec. 248, 249 (Reg’l Comm’r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See Matter of Izummi, 22 I&N Dec. 169, 176 (Assoc. Comm’r 1998).

⁸ Even if the Petitioner established that its advertised position is comparable to the proffered position (which it has not), the Petitioner’s requirement of a bachelor’s degree in management, without more, is inadequate to establish that a position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as management, without further specification, does not establish the position as a specialty occupation. Cf. Matter of Michael Hertz Assocs., 19 I&N Dec. 558, 560 (Comm’r 1988). In addition to demonstrating that a job requires the theoretical and practical application of a body of specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must also establish that the position requires the attainment of a bachelor’s or higher degree in a specialized field of study or its equivalent.

job announcement for a position senior to the proffered position. For the reasons discussed, we conclude the Petitioner has not sufficiently addressed this aspect.⁹ 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.* The Petitioner's inconsistent requirements for the proffered position alone are sufficient to preclude the petition's approval, as the Petitioner has not demonstrated that the offered position satisfies the definition of a specialty occupation found at section 214(i)(1) of the Act.

Moreover, the Petitioner also submits job announcements put forth by other companies for positions it claims are "parallel positions from similar organizations" with "substantively similar job duties" to the proffered position. Facially, many of the advertised positions appear to be for jobs that encompass greater responsibilities than those detailed for the instant position, as suggested by the expansive requirements for the positions advertised therein. For instance, A- advertised for a "senior manager, marketing insights" position which requires "a bachelor's degree in economics, business administration, marketing, statistics, or research, and 8 years of [experience] strategy, business development, consulting and/or finance experience." A-Inc- is looking for a "marketing coordinator," and requires a bachelor's degree in "marketing, economics, business engineering and/or relevant field of study, and 3-5 years of relevant work experience in acquisition, consumer, and/or product marketing." T-A- is looking for a "consumer insights analyst" and requires a "bachelor's degree in business, economics, marketing," plus 3+ years of experience in consumer insights and analytics."

The Petitioner has not detailed how these positions, which require substantial levels of prior work experience in addition to a bachelor's degree are parallel to the instant wage Level II position. We determine the inconsistent and ambiguous material in the record regarding the proffered position raises questions regarding the substantive nature of the position, and whether the Petitioner properly accounted for the experience, education, special skills, and supervisory duties, if any, of the position.¹⁰ *Matter of Ho*, 19 I&N Dec. at 591-92.

Notwithstanding the above evidentiary shortcomings, the Petitioner's attributes insufficient and inconsistent job duties to the position which further undermine the Petitioner's statements that the position's duties are specialized and complex. In determining the nature of a proffered position, the critical element is not the title of the position, but the duties of the underlying position. As part of our analysis, we review the duties of the proffered position to assess the duties and determine whether the described duties correspond to the duties and tasks listed in the Department of Labor's (DOL) Occupational Information Network (O*NET) summary report for the occupation designated in the LCA, which in this case is "Market Research Analysts and Marketing Specialists." According to O*NET,¹¹ individuals employed within this occupation:

⁹ "Failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the [petition]." 8 C.F.R. § 103.2(b)(14).

¹⁰ See Prevailing Wage Determination Policy Guidance, *supra*.

¹¹ The 2019 O*NET position summary for the "Market Research Analysts and Marketing Specialists" occupational category in the petition may be viewed at <https://web.archive.org/web/20190401174735/https://www.onetonline.org/link/summary/13-1161.00>. (last visited Sep. 25, 2020.)

Research market conditions in local regional, or national areas, or gather information to determine potential sales of product or service, or create a marketing campaign. May gather information on competitors, prices, sales, and methods of market or distribution.”

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, “conduct all customer and market research efforts including creating a consumer panel, measuring awareness, consumer sentiment, demographics and lifestyle reporting, competitive benchmarking, etc.” 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:

- Σ Provide analytical ad hoc reporting and analysis in the areas of on-line behavior/performance, value of private label credit cards, product and service expansion, impact of promotional offers, etc., with use of MS Excel and SAS.
- Σ Use MS Excel VBA (Visual Basic for Applications) to create dashboard to report product ratings and customer satisfaction.
- Σ Provide analytical support for [], a corporate-wide project designed to identify growth opportunities in the market.

We observe that another occupational category appears to more directly correspond with many of the 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 this occupation:

Produce 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,¹² such as:

- Σ Analyze competitive market strategies through analysis of related product, market, or share trends.
- Σ Synthesize current business intelligence or trend data to support recommendations for action.
- Σ Manage timely flow of business intelligence information to users.
- Σ Identify and analyze industry or geographic trends with business strategy implications.
- Σ Analyze technology trends to identify markets for future product development or to improve sales of existing products.

¹² The 2019 O*NET summary report for the “Business Intelligence Analysts” occupational category may be viewed at <https://web.archive.org/web/20190417224022/https://www.onetonline.org/link/summary/15-1199.08>. (last visited Sep. 25, 2020).

- Σ Generate standard or custom reports summarizing business, financial, or economic data for review by executives, managers, clients, and other stakeholders.
- Σ Identify or monitor current and potential customers, using business intelligence tools.
- Σ Maintain or update business intelligence tools, databases, dashboards, systems, or methods.
- Σ Create business intelligence tools or systems, including design of related databases, spreadsheets, or outputs.

On appeal, the Petitioner submits a job posting by a “direct competitor,” which announces an opening for a “customer insights analyst.” The Petitioner characterizes the advertised position as one that is parallel to the proffered position within a similar organization. The job descriptions listed within this job posting also appear more akin to the typical duties performed by “Business Intelligence Analysts,” than to those performed by “Market Research Analysts and Marketing Specialists.” For example, the job posting states that the incumbent will perform duties, such as “[l]everage large scale databases to derive data driven insights into customer behavior,” “[d]evelop dashboards to support insights with visualization of complex data sets,” and “[h]elp execute the roll out of modern business intelligence tools.” The submission of this job announcement raises further questions about whether the position’s duties fall solely within the “Market Research Analysts and Marketing Specialists” occupation.

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 guidance states that the employer “should default directly to the relevant O*NET-SOC occupational code for the highest paying occupation.”¹³ At the time the Petitioner’s LCA in this petition was certified, the Level II prevailing wage for “Business Intelligence Analysts” in the area of intended employment was \$74,443, which is significantly higher than the prevailing wage for “Market Research Analysts and Marketing Specialists” of \$64,085.¹⁴ 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.

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 15-1198.08.¹⁵ Though not raised by the Director in her denial of the petition, these inconsistencies also raise significant questions as to whether the LCA corresponds to and supports the H-1B petition, as required, and appears to constitute an additional reason this petition cannot be approved.¹⁶

¹³ See Prevailing Wage Determination Policy Guidance, *supra*.

¹⁴ 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.flcdatacenter.com>. (last visited Sep. 25, 2020).

¹⁵ Matter of Ho, Dec. at 591-92.

¹⁶ See 20 C.F.R. § 655.705(b). See also Matter of Simeio Solutions, LLC, 26 I&N Dec. 542, 545-546 (AAO 2015). As the proffered position is not a specialty occupation we will not address these issues further, other than to advise the Petitioner that it should be prepared to address them in any future H-1B filings.

When considered collectively, we conclude that the inconsistencies, discrepancies, and lack of probative documentation in the record raise questions as to the substantive nature of the proffered position.¹⁷ The Petitioner has not submitted consistent, corroborative evidence to adequately communicate (1) the nature of the actual work that the Beneficiary would perform, (2) the complexity, uniqueness, or specialization of the tasks, and (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty. Accordingly, the Petitioner has not established that the proffered position is a specialty occupation.¹⁸

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.

¹⁷ Chawathe, 25 I&N Dec. at 376.

¹⁸ 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.