



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

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

In Re: 10270658

Date: SEPT. 30, 2020

Appeal of Vermont Service Center Decision

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

The Petitioner, an immigration law firm, seeks to temporarily employ the Beneficiary as a “market research analyst” under the H-1B nonimmigrant classification for specialty occupations. 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 did not establish that the proffered position is 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. Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). 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. 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).

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 provided the following job duties for the position:

- (1) **Market Research** (15% of the position) The position will be responsible for measuring supply and development of multiple markets, including but not limited to visa immigration markets and ancillary service markets around the world. To measure these, the Position will be responsible for collecting surveyed information from potential clients, firms, and affiliates such as relocation companies, payroll companies, etc. Position requires knowledge attained through a Bachelor's Degree in Marketing because they must be able to gather and understand complex data from the visa immigration market and ancillary service markets around the world utilizing research skills learned during higher education.
- (2) **Data Analysis** (35% of the position) The position, under the guidance of a supervisor, will be responsible for measuring this large amounts of accumulated data from attorneys, law firms, and clients to set up market programs utilizing Infusionsoft program and company property software, [REDACTED] Infusionsoft is offers an e-mail marketing and sales platform, including products to manage and optimize the customer life-cycle, customer relationship management, marketing automation, lead capture, and e-commerce. The position must be able adeptly work between the two data platforms to develop an easy-to-understand picture of the current market. This includes the creation of graphics and economic charts, presentation of their findings in front of attorneys and other staff members, and simulation creation of future developments in the market. Position requires knowledge attained through a Bachelor's Degree in Marketing because they must be able

to analyze and organized large amounts of market data utilizing skills and knowledge attained through higher education.

- (3) **Market Strategizing** (50% of the position) The position will be responsible for developing multiple strategies for the firm to reach the international market within the limitations of the firm's capabilities. This includes the internal capabilities (Strengths and Weaknesses of the Firm) and the external variables (Opportunities and Threats to the Market) currently present. The position will meet with attorneys to review any new market developments that may alter current strategies, including updates to any projected charts or graphs through Microsoft Office. The position will also be responsible for a written report to increase office understanding of current firm strategies. Position requires knowledge attained through a Bachelor's Degree in Marketing because they must be able to develop, under the guidance of a supervisor, firm market goals while understanding the capabilities of the firm to capture these markets.

According to the Petitioner, the proffered position requires a minimum of a bachelor's degree in business administration, or a related field. Separately, the Petitioner also states that the position requires a bachelor's degree in marketing.

### III. ANALYSIS

Upon review of the record in its totality, we conclude that due to inconsistencies in the record the Petitioner has not sufficiently established the services in a specialty occupation that the Beneficiary would perform, which precludes a determination of whether the proffered position qualifies as a specialty occupation under sections 101(a)(15)(H)(i)(b), 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(i)(A)(1), 8 C.F.R. § 214.2(h)(4)(ii) and (iii)(A).<sup>1</sup>

For instance, the Petitioner did not consistently describe the nature and scope of the Beneficiary's position. The Petitioner initially emphasized in its support letter that it considers the proffered position to be entry level and requiring only a basic understanding of the occupation. It further stated the Beneficiary's data analysis and market strategizing duties would be conducted under the guidance of a supervisor. But, in a separate document submitted with the initial filing, the Petitioner also described the role and responsibilities of the proffered position as equivalent to those of the general manager position discussed in *Arctic Catering, Inc., on Behalf of MacMillan v. Thornburgh*. See 769 F. Supp. 1167, 1168 (D. Colo. 1991). As summarized by the Petitioner, the position in *Arctic Catering* involved "extensive management and financial responsibilities and also required the performance of a broad scope of complex activities." The Petitioner then claimed that "[t]he instant case involves a similarly broad and complex set of activities to be executed by the beneficiary who is the final discretionary authority in the chain of command for the company." The job duties initially listed by the Petitioner did not include financial or management duties and are inconsistent with the duties of a market research analyst. The Petitioner has not explained this apparent discrepancy.

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

As another example of a similar inconsistency, in its response to the Director's request for evidence (RFE), the Petitioner submitted a copy of a slide presentation describing the Petitioner's organization. In one of the slides, the Beneficiary is listed by name and she is described as handling "client relationships and finances." Again, such financial and management duties appear inconsistent with the duties of the position as described elsewhere by the Petitioner. And, as a result, we are uncertain as to the level of responsibility which the Beneficiary will hold within the law firm and if the duties listed adequately encompass the true scope of her responsibilities.

Further, the Beneficiary's resume submitted on appeal raises additional questions regarding the Beneficiary's position. Although her resume lists her current title as a "market research analyst," it also indicates that her day-to-day duties include "doing quotes, invoices, follow-up on customers, answering phones, taking payments, [and] posting business activities onto different software." It further states that she keeps track of accounts, monitors bill payments, and verifies, allocates, and records transactions in excel spreadsheets and QuickBooks. Finally, she indicates that she creates "new lead[s] or initiate[s] new petition[s] for immigrant/non-immigrant visas through [the Petitioner's] website." Thus, the majority of the Beneficiary's duties as described on her resume appear to encompass clerical, bookkeeping, client management, and legal assistant duties that are unrelated to the market research, data analysis, and market strategizing duties the Petitioner claims are her primary responsibilities. Further, the record does not establish how such administrative duties require a highly specialized knowledge and at least a bachelor's degree in a specific specialty. Notably, the Petitioner's firm only has seven employees and the record does not demonstrate how the Beneficiary will be relieved from performing duties that do not qualify as a specialty occupation.<sup>2</sup>

We also conclude that the Petitioner's degree requirements are inconsistent.<sup>3</sup> The Petitioner initially indicates that the proffered position requires a business administration or other closely related degree. Later, in its job duty descriptions it indicates a marketing degree is required. Moreover, in the same document in which the Petitioner compares its position to that of the general manager position in *Arctic Catering*, the Petitioner states that the "uniqueness of the duties involved in the position at question, including the traditional professional position of engineer and areas such as management, administration, and, client counseling require as an absolute minimum for entry into the position a university degree in [e]ngineering or a closely related field." This additional inconsistency and the lack of explanation for it is especially problematic because a requirement for an engineering or closely related degree further calls into question the substantive nature of the position and whether the Beneficiary's responsibilities were adequately encompassed within the duties as described.<sup>4</sup>

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<sup>2</sup> It is reasonable to assume that the that size of an employer's business has or could have an impact on the claimed duties of a particular position. See *EG Enters., Inc. v. Dep't of Homeland Sec.*, 467 F. Supp. 2d 728 (E.D. Mich. 2006). Thus, the size of a petitioner may be considered as a component of the nature of the petitioner's business, as the size impacts upon the actual duties of a particular position.

<sup>3</sup> The Petitioner claims that the Beneficiary is well-qualified for the position, and also references her qualifications. However, the test to establish a position as a specialty occupation is not the education or experience of a particular beneficiary, but whether the position itself requires at least a bachelor's degree in a specific specialty, or its equivalent. Given the inconsistencies in the record, the Petitioner did not sufficiently establish whether a degree in a specific specialty is actually required for the position.

<sup>4</sup> We recognize that in the response to the RFE and on appeal the Petitioner appears to ultimately settle on requiring a marketing degree. However, the purpose of the RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to an RFE, the Petitioner cannot materially

These discrepancies are significant because they preclude us from understanding what exactly the Beneficiary would be doing and what the Petitioner's minimum requirements are for this position. Moreover, they prevent us from determining whether the Petitioner submitted a certified labor condition application (LCA)<sup>5</sup> which corresponds to and supports the H-1B petition.<sup>6</sup>

As presently constituted, the record does not establish that the LCA corresponds with and supports the petition.<sup>7</sup> On the LCA, the Petitioner designated the proffered position under the Standard Occupational Classification (SOC) code and title 13-1161, "Market Research Analysts and Marketing Specialists," at a Level I wage rate.<sup>8</sup> Based on the Occupational Information Network (O\*NET) report for "Market Research Analysts and Marketing Specialists," the primary responsibilities for this occupation are: "Research market conditions in local, regional, or national areas, or gather information to determine potential sales of a product or service, or create a marketing campaign. May gather information on competitors, prices, sales, and methods of marketing and distribution."<sup>9</sup> As noted, the record contains inconsistent information regarding the duties and level of responsibilities for the proffered position. As such, we cannot adequately determine if the LCA corresponds to the petition.

With respect to the LCA, the governing U.S. Department of Labor (DOL) regulations provide clear guidance for selecting the most relevant O\*NET occupational code classification.<sup>10</sup> The "Prevailing Wage Determination Policy Guidance" states the following (emphasis added):

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

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change a position's title, its level of authority within the organizational hierarchy, its associated job responsibilities, or the requirements of the position. Likewise, the Petitioner cannot make such changes on appeal. The Petitioner must establish when the petition was filed that the position offered to the Beneficiary 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).

<sup>5</sup> A petitioner submits the LCA to demonstrate that it will pay an H-1B worker the higher of either the prevailing wage for the occupational classification in the area of employment or the actual wage paid by the employer to other employees with similar duties, experience, and qualifications. Section 212(n)(1) of the Act; 20 C.F.R. § 655.731(a).

<sup>6</sup> While the U.S. Department of Labor (DOL) is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b).

<sup>7</sup> *See* 20 C.F.R. § 655.705(b); *Simeio Solutions*, 26 T&N Dec. at 546 n.6.

<sup>8</sup> A prevailing wage determination starts with an entry-level Level I wage and progresses to a higher wage level, up to Level TV, after considering the experience, education, and skill requirements of the Petitioner's job opportunity. U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://fcddatacenter.com/download/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://fcddatacenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf).

<sup>9</sup> O\*NET Summary Report for 13-1161.00 - Market Research Analysts and Marketing Specialists, <https://www.onetonline.org/link/summary/13-1161.00> (last visited Sept. 28, 2019).

<sup>10</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://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

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.

Thus, for example, if the position here actually combines market research analyst duties with general manager duties relating to the firm's finances and client support, as the Petitioner's argument in its initial filing suggests, then the Petitioner should have provided an LCA corresponding to SOC code 11-1021.00 for "General and Operations Managers" because a Level I wage for that occupation would be \$48,755 per year, for the same timeframe and location. Whereas the submitted LCA with a Level I prevailing wage of \$34,986 per year for "Market Research Analysts and Marketing Specialists" is nearly \$14,000 lower.<sup>11</sup> Nevertheless, given the inconsistencies in the record, we are precluded from determining which SOC code best corresponds to the proffered position.

Where there are inconsistencies in the record, the Petitioner must resolve them with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.* Here, the Petitioner has not provided independent, objective evidence pointing to where the truth lies.

Without such evidence, and in the absence of a sufficiently reliable job description, the Petitioner has not demonstrated the substantive nature of the work to be performed by the Beneficiary. This therefore precludes a conclusion 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 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. As the Petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position qualifies for classification as a specialty occupation.

**ORDER:** The appeal is dismissed.

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<sup>11</sup> To determine the appropriate prevailing wage, see the appropriate location and timeframe on the *Online Wage Library - FLC Wage Search Wizard*, Foreign Labor Certification Data Center <https://flcdacenter.com/OESWizardStart.aspx>.