



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

Non-Precedent Decision of the
Administrative Appeals Office

In Re: 10374076

Date: SEP. 30, 2020

Appeal of California Service Center Decision

Form I-129, Petition for a Nonimmigrant Worker

The Petitioner, a career guidance and counseling company, seeks to temporarily employ the Beneficiary as a “marketing 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 California Service Center denied the petition, concluding that the record did not establish that the proffered position qualifies as a specialty occupation. The matter is now before us on appeal.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. 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. ANALYSIS

Upon review of the entire record,¹ for the reasons set out below, we have determined that the Petitioner has not 1) demonstrated that the proffered position qualifies as a specialty occupation, or 2) submitted a certified labor condition application (LCA) that corresponds to the petition.

A. Specialty Occupation

The Director concluded that the Petitioner did not establish that the proffered position qualifies as a specialty occupation. In her decision, the Director thoroughly discussed the Petitioner’s failure to meet any of the four regulatory criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) – (4). Upon consideration of the record, we adopt and affirm the Director’s decision with the comments below. See *Matter of P. Singh*, Attorney, 26 I&N Dec. 623 (BIA 2015) (citing *Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA

¹ While we may not discuss every document submitted, we have reviewed and considered each one.

1994); see also *Chen v. INS*, 87 F.3d 5, 7-8 (1st Cir. 1996) (“[I]f a reviewing tribunal decides that the facts and evaluative judgments prescinding from them have been adequately confronted and correctly resolved by a trial judge or hearing officer, then the tribunal is free simply to adopt those findings” provided the tribunal’s order reflects individualized attention to the case).

First, we’d like to address the Petitioner’s comments regarding typographical errors used by the Director in her decision. The Petitioner points out that the Director “misidentifies the proffered position as a “Computer Systems Analyst” throughout the decision” and “references evidence written by a whimsical “Professor” that was in fact, never submitted.” While the Petitioner’s comments are noted, these typographical errors do not discredit the Director’s decision. Here, the Director made a single reference² to “computer systems analyst” when discussing the O*NET summary report submitted by the Petitioner. Although the Director referred to the report with a different position title, the following discussion of the report was accurate in content.³ Then, when discussing the authors of multiple letters submitted by the Petitioner in support of the second criterion, the Director referred to them collectively as “the letter writers” but for three instances where the Director merely stated “professor.” While the Petitioner is correct in that it did not submit any letter from a “professor,” it is apparent that these references were an oversight on the part of the Director, and she was referring to “the letter writers.” Regardless, the fact that the Director used the word “professor,” rather than “the letter writers,” does not diminish the discussion of the letters or the evidence presented. As such, it appears that the two instances where the Director made typographical errors have no bearing in her decision, and were, in fact, harmless errors.

Regarding the Director’s discussion of the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), we would add that the U.S. Department of Labor’s (DOL) Occupational Outlook Handbook (Handbook), in discussing “Market Research Analysts and Marketing Specialists” corresponding to the Standard Occupational Classification (SOC) code 13-1161 states, in pertinent part, that market research analysts typically need a bachelor’s degree in market research or a related field.⁴ According to the Handbook, some individuals have degrees in fields such as statistics, math, computer science, business administration, the social sciences, or communications. It continues by stating that some jobs require a master’s degree and that many analysts complete degrees in fields such as statistics and marketing or earn a master’s degree in business administration (MBA).⁵

The Handbook reports that market research analysts have degrees and backgrounds in a wide-variety of disparate fields. The Handbook further identifies various courses as essential to this occupation, including statistics, research methods, and marketing and further elucidates that courses in communications and social sciences (such as economics, psychology, and sociology) are also important. Therefore, although the Handbook indicates that market research analysts may need an advanced degree, particularly for “leadership positions or positions that perform more technical research,” it also indicates that degrees and backgrounds in various fields are acceptable for jobs in

² The Director did not refer to the proffered position as a “computer systems analyst” at any time in her decision.

³ The brief O*NET discussion in the Director’s decision analyzed the information in the report submitted by the Petitioner for “Market Research Analysts and Marketing Specialists” accurately.

⁴ Bureau of Labor Statistics, U.S. Dep’t of Labor, Occupational Outlook Handbook, Market Research Analysts <https://www.bls.gov/ooh/business-and-financial/market-research-analysts.htm#tab-4> (last visited Sept. 21, 2020).

⁵ *Id.*

this occupation – including computer science and the social sciences, as well as statistics and communications.⁶

In addition to recognizing degrees in disparate fields, i.e., social science and computer science, as acceptable for entry into this field, the Handbook also states that “[o]thers have backgrounds in business administration.” Although a general-purpose bachelor’s degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *Royal Siam Corp.*, 484 F.3d at 147. Therefore, the Handbook’s recognition that a general, non-specialty “background” in business administration, or one of a number of other fields, is sufficient for entry into the occupation strongly suggests that a bachelor’s degree in a specific specialty is not a standard, minimum entry requirement for this occupation. The Handbook, therefore, does not support the assertion that at least a bachelor’s degree in a specific specialty, or its equivalent, is normally the minimum requirement for these positions.

The narrative of the Handbook further reports that some employees obtain professional certification to demonstrate a level of professional competency. It continues by outlining the requirements for market research analysts to achieve the Professional Researcher Certification (PRC), and states that candidates qualify based upon their experience and knowledge. According to the Handbook, the PRC is granted by the Marketing Research Association, now known as the Insights Association,⁷ to those who pass an exam, have at least three years of experience working in opinion and market research, and complete 12 hours of industry-related education courses.⁸

We reviewed the Insights Association’s website, which confirms the Handbook’s statement regarding the requirements for the PRC (i.e., passage of an exam, three years of relevant industry experience, and 12 hours of industry-related education), and further specifies that the “education” necessary to apply for PRC is “12 industry-related education hours within the two preceding years.”⁹ The website

⁶ In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor’s or higher degree in more than one specialty is recognized as satisfying the “degree in the specific specialty (or its equivalent)” requirement of section 214(i)(1)(B) of the Act. In such a case, the required “body of highly specialized knowledge” would essentially be the same. Since there must be a close correlation between the required “body of highly specialized knowledge” and the position, however, a minimum entry requirement of a degree in two disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be “in the specific specialty (or its equivalent),” unless the Petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required body of highly specialized knowledge is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added).

Whether read with the statutory “the” or the regulatory “a,” both readings denote a singular “specialty.” Section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). Still, we do not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. This also includes even seemingly disparate specialties provided the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

⁷ The Marketing Research Association merged with the Council of American Survey Research Organizations in 2017 to become the Insights Association. See <http://www.insightsassociation.org/about> (last visited Sept. 21, 2020). The Insights Association is therefore the successor to the Marketing Research Association.

⁸ The Insights Association website states that it “strives to effectively represent, advance, and grow the research profession and industry.” *Id.*

⁹ See <http://www.marketingresearch.org/advance-career/prc/get-certified> (last visited Sept. 21, 2020).

includes information regarding “How to Enter the Industry” which lists a variety of possible degrees, such as business administration, liberal arts, statistics/math, qualitative analysts, computer science, social science, and communications, and a variety of “helpful skills,” including “attention to detail,” “presentation skills,” and “basic computer skills.”¹⁰ It does not indicate that a market research analyst position has any specific minimum academic requirement for entry, nor does it state that it requires any particular level of education to be identified as qualified and possessing a level of expertise or competence. Instead, the Insights Association’s website highlights the importance of professional experience and industry-related professional courses (through conferences, seminars, and webinars).

Consequently, neither the Handbook nor the Insights Association website support the assertion that at least a bachelor’s degree in a specific specialty, or its equivalent, is normally the minimum requirement for these positions.

Further, the information from DOL’s Occupational Information Network (O*NET) summary report for “Market Research Analysts and Marketing Specialists” listed as SOC code 13-1161.00, though relevant, also does not establish the Petitioner’s eligibility under the first criterion, as it does not establish that a bachelor’s degree in a specific specialty, or the equivalent, is normally required. The summary report provides general information regarding the occupation; however, it does not support the Petitioner’s assertion regarding the educational requirements for these positions. For example, the Specific Vocational Preparation (SVP) rating, which is defined as “the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation,” cited within O*NET’s Job Zone designates this position as having an SVP 7 < 8. This indicates that the occupation requires “over 2 years up to and including 4 years” of training.¹¹ While the SVP rating provides the total number of years of vocational preparation required for a particular position, it is important to note that it does not describe how those years are to be divided among training, formal education, and experience – and it does not specify the particular type of degree, if any, that a position would require.¹² The O*NET summary report for this occupation also does not specify that a degree is required, but instead states, “most of these occupations require a four-year bachelor’s degree, but some do not.” Similar to the SVP rating, the Job Zone Four designation does not indicate that any academic credentials for Job Zone Four occupations must be directly related to the duties performed.

Additionally, we note that the summary report provides the educational requirements of “respondents.” However, the respondents’ positions within the occupation are not distinguished by career level (e.g., entry-level, mid-level, senior-level). Additionally, the graph in the summary report does not indicate that the “education level” for the respondents must be in a specific specialty.¹³ Thus, the Petitioner’s reliance on the 100% of “respondents” claiming to hold at least a bachelor’s degree as a demonstration that a bachelor’s degree is the normal requirement for the occupation is misguided. A requirement for a bachelor’s degree alone is not sufficient. Instead, we construe the term “degree”

¹⁰ See <https://www.insightsassociation.org/career-guide> (last visited Sept. 21, 2020).

¹¹ This training may be acquired in a school, work, military, institutional, or vocational environment. Specific vocational training includes: vocational education, apprenticeship training, in-plant training, on-the-job training, and essential experience in other jobs.

¹² For additional information, see the O*NET Online Help webpage available at <http://www.onetonline.org/help/online/svp>.

¹³ Nor is it apparent whether these credentials were prerequisites to these individuals’ hiring.

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.*, 484 F.3d at 147 (describing “a degree requirement in a specific specialty” as “one that relates directly to the duties and responsibilities of a particular position”).

O*NET, therefore, also does not support the assertion that at least a bachelor’s degree in a specific specialty, or its equivalent, is normally the minimum requirement for these positions.

Nor is the case law the Petitioner cited sufficient to satisfy the first criterion. The Petitioner cited *Residential Finance Corp. v. USCIS*, 839 F. Supp. 2d 985 (S.D. Ohio 2012). We agree that “[t]he knowledge and not the title of the degree is what is important.” However, in general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor’s or higher degree in more than one specialty is recognized as satisfying the “degree in the specific specialty (or its equivalent)” requirement of section 214(i)(1)(B) of the Act. In such a case, the required “body of highly specialized knowledge” would essentially be the same. Since there must be a close correlation between the required “body of highly specialized knowledge” and the position, however, a minimum entry requirement of a degree in two disparate fields, such as English and business, would not meet the statutory requirement that the degree be “in the specific specialty (or its equivalent),” unless the Petitioner establishes how each field is directly related to the duties and responsibilities of the particular position. Section 214(i)(1)(B) of the Act (emphasis added).¹⁴ For the aforementioned reasons, however, the Petitioner has not met its burden to establish that the particular position offered in this matter requires a bachelor’s or higher degree in a specific specialty, or its equivalent, directly related to its duties in order to perform those tasks.

In any event, the Petitioner has furnished no evidence to establish that the facts of the instant petition are analogous to those in *Residential Finance*.¹⁵ Again, we are not bound to follow the published decision of a United States district court in matters arising even within the same district. See *K-S-*, 20 I&N Dec. at 719-20. It is also important to note that in a subsequent case reviewed in the same jurisdiction, the court agreed with our analysis of *Residential Finance*. See *Health Carousel, LLC v. USCIS*, No. 1:13-CV-23, 2014 WL 29591 (S.D. Ohio 2014).

The Petitioner also cited to a recent district court case, *Raj and Co. v. USCIS*, 85 F. Supp. 3d 1241 (W.D. Wash. 2015), and claims that it is relevant here.¹⁶ We reviewed the decision; however, the Petitioner has not established that the duties and responsibilities, level of judgment, complexity,

¹⁴ The court in *Residential Finance* did not eliminate the statutory “bachelor’s or higher degree in the specific specialty” language imposed by Congress. Rather, it found that the petitioner in that case had satisfied the requirement.

¹⁵ The district judge’s decision appears to have been based largely on the many factual errors made by the Director in the decision denying the petition. We further note that the Director’s decision was not appealed to us. Based on the district court’s findings and description of the record, if that matter had first been appealed through the available administrative process, we may very well have remanded the matter to the service center for a new decision for many of the same reasons articulated by the district court if these errors could not have been remedied by us in our de novo review of the matter.

¹⁶ In contrast to the broad precedential authority of the case law of a United States circuit court, we are not bound to follow the published decision of a United States district court in matters arising even within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge’s decision will be given due consideration when it is properly before us, the analysis does not have to be followed as a matter of law. *Id.* at 719.

supervisory duties, independent judgment, or amount of supervision in that case are analogous to the position proffered here.¹⁷ There is little indication that the positions are similar.

Further, in *Raj*, the court stated that a specialty occupation requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent. The court confirmed that this issue is well-settled in case law and with the agency's reasonable interpretation of the regulatory framework. In the decision, the court noted that "permitting an occupation to qualify simply by requiring a generalized bachelor degree would run contrary to congressional intent to provide a visa program for specialized, as opposed to merely educated, workers." The court stated that the regulatory provisions do not restrict qualifying occupations to those for which there exists a single, specifically tailored and titled degree program; but rather, the statute and regulations contain an equivalency provision.¹⁸

In *Raj*, the court concluded that the employer met the first criterion. We must note, however, that the court stated that "[t]he first regulatory criterion requires the agency to examine the generic position requirements of a market research analyst in order to determine whether a specific bachelor's degree or its equivalent is a minimum requirement for entry into the profession." Thus, the decision misstates the regulatory requirement. That is, the first criterion requires the petitioner to establish that a baccalaureate or higher degree (in a specific specialty) or its equivalent is normally the minimum requirement for entry into the particular position.

Consequently, if the court meant to suggest that any position classified under the occupational category "Market Research Analysts" would, as it stated, "come within the first qualifying criteria" – we must disagree.¹⁹ The occupational category designated by a petitioner is considered as an aspect in establishing the general tasks and responsibilities of a proffered position, and USCIS regularly reviews the Handbook on the duties and educational requirements of the wide variety of occupations that it addresses. However, to satisfy the first criterion, the burden of proof remains on the petitioner to submit sufficient evidence to support a finding that its particular position would normally have a minimum, specialty degree requirement or its equivalent for entry. That is, to determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title or designated occupational category. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the beneficiary and determine whether the position qualifies as a specialty occupation. See generally *Defensor*, 201 F.3d 384.

Nevertheless, it is important to note that the court in *Raj* determined that the evidence in the record demonstrated that the particular position proffered required a bachelor's degree in market research or

¹⁷ We note that the Director's decision was not appealed to our office. Based on the district court's findings and description of the record, if that matter had first been appealed through the available administrative process, we may very well have remanded the matter to the service center for a new decision in our de novo review of the matter.

¹⁸ We agree with the court that a specialty occupation is one that requires the attainment of a bachelor's or higher degree in a specific specialty or its equivalent. We further note that a petitioner must also demonstrate that the position requires the theoretical and practical application of a body of highly specialized knowledge in accordance with section 214(i)(1)(B) of the Act and 8 C.F.R. § 214.2(h)(4)(ii), and satisfy one of the four criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

¹⁹ In *Raj*, the court quoted a brief excerpt from the Handbook; however, the quotation is from the 2012-2013 edition rather than the current 2014-2015 edition (which contains several revisions). Further, we observe that the court did not address the section of the Handbook indicating that there are no specific degree requirements to obtain the Professional Researcher Certification credential – and therefore to work as a market research analyst.

its equivalent as a minimum for entry. Further, the court noted that “[t]he patently specialized nature of the position sets it apart from those that merely require a generic degree.” The position in Raj can, therefore, be distinguished from the instant position. Here, the duties and requirements of the position as described in the record of proceeding do not indicate that this particular position proffered by the petitioner is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the Petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Regarding the Director’s discussion of the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) and (4), we would add the following analysis regarding the job duties of the proffered position. We reviewed the Petitioner’s statements regarding the proffered position; however, while the Petitioner stated that the marketing analyst “is expected to develop custom monitoring, analyze data and provide strategic insights, create marketing campaigns, report performance metrics, and ultimately help drive new business,” it has not sufficiently developed relative specialization, complexity, or uniqueness as an aspect of the proffered position. That is, the Petitioner has not explained in detail how tasks such as:

- Σ develop custom monitoring and analysis to improve online and social media campaign performance
- Σ use third party data, Google Analytics, and software such as search engine optimization, to diagnose the company's business performance and to make projections and forecasting
- Σ stay up to date with programs for data manipulation, current site analytics and marketing-server tracking capabilities
- Σ conduct stakeholder interviews and surveys and build performance metrics to quantify client satisfaction with the company’s services and clients’ success rate
- Σ provide data analysis and strategic insights to build revenue growth roadmap for the company's marketing efforts
- Σ monitor and analyze the effectiveness of landing pages, display banner, advertisements with web optimization solutions by improving webpage design, interface experience, etc.
- Σ integrate multi-channel marketing to drive more traffic and to reach target group
- Σ develop requirement artifacts to be used in marketing project execution
- Σ troubleshoot data integration and data tracking issues
- Σ support the development and administration of special marketing programs and promotions
- Σ use multiple data sources to create and present weekly and monthly digital channel reports
- Σ monitor and report on competitors’ online activities and marketing performance
- Σ make presentations to the company on projects update, expected deliverables
- Σ create, maintain and coordinate marketing event calendar throughout the company

require the theoretical and practical application of a body of highly specialized knowledge. These listed duties, when read in combination with the evidence found in record of proceedings, suggests that this particular position is not so specialized, complex, or unique relative to other marketing analysts that the duties can only be performed by an individual with a bachelor’s degree or higher in a specific specialty, or its equivalent.

The Petitioner also submitted a weekly schedule for the Beneficiary while in the proffered position outlining the tasks she performs on a daily basis. However, the tasks outlined in this document also

suggest that the proffered position is not specialized, complex, or unique. For example, the Petitioner stated that the Beneficiary performed the following tasks throughout the week:

- Σ plan out social media content themes and post schedule for the week using a project management system
- Σ set up tracking tools to monitor click-thru rate and views for each post
- Σ monitor consulting team's performance
- Σ proofread social media article drafted by marketing intern
- Σ track the number of views of today's new online posting
- Σ analyze how many new followers gained from previous week
- Σ review readers' comments on Wechat to gain key insights, and record common themes
- Σ proofread marketing associate's social media post and insert referral positions to increase audience interactions
- Σ research updated news and policies related to international students on the USCIS website, as well as search study abroad related news from China
- Σ report phone meeting highlights to the marketing manager
- Σ plan new company informational pack design with entire marketing team as well as select career counselors to confirm brand message, team biographies, and overall aesthetic
- Σ train marketing interns in advanced company and industry knowledge
- Σ teach marketing interns how to search reference materials and data online and how to find new topics for content creation
- Σ create a questionnaire to connect opinions of current and potential clients regarding add-on services
- Σ record and edit CEO's video and upload to online platforms
- Σ update new coach information on the official company website
- Σ translate the new coach's information into Chinese and update on coach bio brochure
- Σ Meet with project partner to discuss the preparation of the startup for job fair event
- Σ draft job description, prepare informational flyers, and print program vouchers to advertise company services

Here, the Petitioner has not explained how tasks, such as those listed above, require the theoretical and practical application of a body of highly specialized knowledge. Specifically, we have no information on why planning social media content themes, researching information related to international students, recording and editing the CEO's video, updating new coach information, or translating the new coach information into Chinese requires specialized knowledge that can only be learned in a bachelor's degree program in the specifically identified fields. Moreover, we have no information on how the Beneficiary will set up tracking tools, monitor consulting team's performance, plan new company informational pack design with entire marketing team, train marketing interns, or why this signifies specialty occupation work.

Further, the Petitioner submitted samples of the Beneficiary's work product. We have reviewed the work samples submitted by the Petitioner. However, the Petitioner did not explain why the production of these documents would require a bachelor's degree, or the equivalent, in a specific specialty.

Here, the Petitioner did not sufficiently develop relative complexity or uniqueness as an aspect of the duties of the position, and it did not identify any tasks that are so complex or unique that only a

specifically degreed individual could perform them. Accordingly, the Petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). Nor has the Petitioner established that its proffered position is one with duties sufficiently specialized and complex to satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

In addition, on appeal, the Petitioner submits new evidence relating to the four criteria. We note that the Director requested this type of material within the request for evidence (RFE), but the Petitioner did not submit it at that time. Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, we will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988); see also *Matter of Obaigbena*, 19 I&N Dec. 533, 537 (BIA 1988). If the Petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the Director's RFE. *Id.* Under the circumstances, we need not and do not consider the sufficiency of the evidence submitted for the first time on appeal.

B. LCA

We must also address the LCA submitted in support of the H-1B petition. The LCA serves as the critical mechanism for enforcing section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). See Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H-1B Visas in Specialty Occupations and as Fashion Models; Labor Certification Process for Permanent Employment of Aliens in the United States, 65 Fed. Reg. 80,110, 80,110-11 (proposed Dec. 20, 2000) (to be codified at 20 C.F.R. pts. 655-56) (indicating that the wage protections in the Act seek “to protect U.S. workers’ wages and eliminate any economic incentive or advantage in hiring temporary foreign workers” and that this “process of protecting U.S. workers begins with [the filing of an LCA] with [DOL].”). According to section 212(n)(1)(A) of the Act, an employer must attest that it will pay a holder of an H-1B visa the higher of the prevailing wage in the “area of employment” or the amount paid to other employees with similar experience and qualifications who are performing the same services.²⁰

While DOL is the agency that certifies LCA applications before they are submitted to U.S. Citizenship and Immigration Services (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, Petition for a Nonimmigrant Worker, actually supports that petition. The regulation at 20 C.F.R. § 655.705(b) states, in pertinent part (emphasis added):

For H-1B visas . . . DHS accepts the employer’s petition (DHS Form I-129) with the DOL-certified LCA attached. In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the

²⁰ See 20 C.F.R. § 655.731(a); *Venkatraman v. REI Sys., Inc.*, 417 F.3d 418, 422 & n.3 (4th Cir. 2005); *Patel v. Boghra*, 369 F. App’x 722, 723 (7th Cir. 2010); *Michal Vojtisek-Lom & Adm’r Wage & Hour Div. v. Clean Air Tech. Int’l, Inc.*, No. 07-97, 2009 WL 2371236, at *8 (Dep’t of Labor Admin. Rev. Bd. July 30, 2009).

nonimmigrant meet the statutory requirements for H-1B visa classification.

The Petitioner designated the proffered position under the occupational category “Market Research Analysts and Marketing Specialists” corresponding to the Standard Occupational Classification code 13-1161 at a Level I wage. DOL’s guidance explains that it is through the wage level that the Petitioner reflects the job requirements, experience, education, special skills/other requirements and supervisory duties.²¹ It further provides that “[a] language requirement other than English in an employer’s job offer shall generally be considered a special skill for all occupations, with the exception of Foreign Language Teachers and Instructors, Interpreters, and Caption Writers” and requires a one level increase in the wage.²² At the time of filing and again in response to the RFE, the Petitioner specifically stated that “fluency in Mandarin or Cantonese is a necessity to check our competitors’ activities,” thus applying a Mandarin or Cantonese language requirement for entry into the proffered position.²³

The Petitioner, therefore, has not submitted a certified LCA that accurately reflects the Petitioner’s foreign language requirement. As a result, even if the Petitioner were to establish that the proffered position is a specialty occupation, the petition is not approvable because the record lacks an LCA which corresponds to the proper wage level. To permit otherwise would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A). In this matter, the Level II prevailing wage for the proffered position at the time of filing in Cook County, IL was \$49,338.00 per year, \$12,876.00 more per year than the salary required by the LCA, and \$7,738.00 more per year than the salary offered to the Beneficiary.²⁴

II. CONCLUSION

The appeal will be dismissed for the above stated reasons, with each considered an independent and alternative basis for the decision. In visa petition proceedings, it is the 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 here, and the petition will remain denied.

ORDER: The appeal is dismissed.

²¹ 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.

²² Id.

²³ The Petitioner identified the requirements for entry into the proffered position as follows: “at least a bachelor’s degree, preferably a master’s degree, in Marketing, Business, Statistics, and fluency in Mandarin or Cantonese is a necessity to check our competitors’ activities.”

²⁴ See [https://www.flcdatacenter.com/OesQuickResults.aspx?code=27-3022&area=\[\]&year=19&source=1](https://www.flcdatacenter.com/OesQuickResults.aspx?code=27-3022&area=[]&year=19&source=1).