



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

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

In Re: 8779892

Date: JULY 8, 2020

Appeal of Vermont Service Center Decision

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

The Petitioner, a wholesale clothing company, seeks to temporarily employ the Beneficiary as an “accountant” 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 Vermont Service Center Director approved the petition, but later revoked the approval after serving a notice of her intent to revoke (NOIR) it. In the revocation notice, the Director concluded based on a review of the record, including material provided by the Petitioner in conjunction with an administrative site visit by USCIS officers to the Petitioner's offices subsequent to the approval of the petition, that the Petitioner had violated the terms and conditions of the approved petition.<sup>1</sup>

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 Upon *de novo* review, the Director's decision to revoke the approval of the petition is withdrawn. The matter will be remanded to the Director for further consideration and action.

**I. REVOCATION AUTHORITY**

U.S. Citizenship and Immigration Services (USCIS) may revoke the approval of an H-1B petition pursuant to 8 C.F.R. § 214.2(h)(11)(iii), which states the following:

- (A) *Grounds for revocation.* The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:
  - (1) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition; or
  - (2) The statement of facts contained in the petition . . . was not true and correct, inaccurate, fraudulent, or misrepresented a material fact; or

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<sup>1</sup> *See* 8 C.F.R. § 214.2(h)(11)(iii)(A)(3).

- (3) The petitioner violated terms and conditions of the approved petition; or
  - (4) The petitioner violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of this section; or
  - (5) The approval of the petition violated paragraph (h) of this section or involved gross error.
- (B) *Notice and decision.* The notice of intent to revoke shall contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal. The petitioner may submit evidence in rebuttal within 30 days of receipt of the notice. The director shall consider all relevant evidence presented in deciding whether to revoke the petition in whole or in part . . . .

The Director's statements in the NOIR noting deficiencies in the record at the time of filing were adequate to notify the Petitioner of her intention to revoke the approval of the petition in accordance with the provisions at 8 C.F.R. § 214.2(h)(11)(iii). The Director cited to the ground for revocation at 8 C.F.R. § 214.2(h)(11)(iii)(A)(3) and discussed her reasons for concluding, based upon a review of the record and new information that was unavailable at the time of the July 2018 petition approval, that the Petitioner had violated the terms and conditions of the approved petition.

In her August 2019 revocation notice she concluded that (1) the initially submitted labor condition application (LCA) does not correspond to the working conditions at the Petitioner's location as the wages paid to the Beneficiary after the approval of the petition did not meet or exceed the prevailing wage determination in the LCA, and (2) that the claimed duties of the proffered position do not correspond to the occupation designated in the LCA. However, as we will explain, the Director should first consider whether the approval of the petition violated 8 C.F.R. § 214.2(h) or involved gross error, in light of the Petitioner's impermissible and material changes to critical aspects of the proffered position *prior* to the petition's approval.<sup>2</sup>

On the LCA initially submitted in support of the H-1B petition, the Petitioner designated the proffered position under the occupational category "Accountants and Auditors" corresponding to (SOC) code 13-2011.<sup>3</sup> The Director issued an August 2017 request for evidence (RFE), asking the Petitioner for evidence that the Level I wage level and the occupation designated in the LCA corresponds to the

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<sup>2</sup> See 8 C.F.R. § 214.2(h)(11)(iii)(A)(5).

<sup>3</sup> The Petitioner classified the proffered position at a Level I wage (the lowest of four assignable wage levels). 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. 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. This wage rate indicates: (1) that the Beneficiary will be expected to perform routine tasks that require limited, if any, exercise of judgment; (2) that she will be closely supervised and his work closely monitored and reviewed for accuracy; and (3) that she will receive specific instructions on required tasks and expected results. 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).

petition.<sup>4</sup> In response, the Petitioner submitted evidence that it had filed an amended petition<sup>5</sup> on the Beneficiary's behalf supported by an LCA which designated the proffered position therein as a Level II accountant position within the "Accountants and Auditors" corresponding to the Standard Occupational Classification (SOC) code 13-2011.<sup>6</sup> It submitted a copy of the amended petition in which the Petitioner noted in part 9:

The [P]etitioner is filing an amended petition because of material changes in the [B]eneficiary's employment, which consist of a significant change in salary to a Level II wage which is adequate to the duties described in the original petition as well as the amended petition. The new wage level is also reflected in the LCA attached to the amended petition.

The Petitioner further asserted in its letter submitted in the RFE response that the petitioner filed the amended petition "with the accompanying new certified LCA containing a new wage level II to notify USCIS of a significant increase in the [B]eneficiary's annual salary from \$55,515 to a salary of \$69,930, which is a level II salary adequate to the complexity of the duties of the proffered position. Based on the above, it appears that by the Petitioner's own admission it impermissibly and materially changed the nature of the proffered position after the filing of this petition.

In response to an RFE or thereafter, the Petitioner cannot offer a new position to the Beneficiary, or materially change aspects of the proffered position including changes to the LCA submitted in support of the petition. The Petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). 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). For this reason, the Director should consider whether the approval of the petition based on facts that materially changed after the filing of the petition violated 8 C.F.R. § 214.2(h) or involved gross error in accordance with 8 C.F.R. § 214.2(h)(11)(iii)(5).

Moreover, the Director should also consider whether the Beneficiary's proposed tasks and job responsibilities as presented in the evidence submitted *prior* to the approval of the petition were sufficient to support the Petitioner's claim that the proffered position was a specialty occupation at the time of the approval of the petition.

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

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<sup>4</sup> A petitioner submits the LCA to the U.S. Department of Labor (DOL) 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>5</sup> *See* EAC 18 019 52035. USCIS records show that the Director denied the Petitioner's amended petition in December 2018, concluding that the proffered position therein was not a specialty occupation.

<sup>6</sup> This new LCA was certified by DOL in October 2017 after the filing of the instant petition, and was submitted in support of the amended petition. A copy of this LCA was also included in the Petitioner's November 2017 RFE response.

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>7</sup> 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).

As discussed, on the LCA submitted in support of the H-1B petition, the Petitioner designated the proffered position under the occupational category “Accountants and Auditors” corresponding to (SOC) code 13-2011. According to DOL’s Occupational Information Network (O\*NET), the core duties of accountants include “[a]nalyze financial information and prepare financial reports to determine or maintain record of assets, liabilities, profit and loss, tax liability, or other financial activities within an organization.”<sup>8</sup> The Petitioner initially provided a set of eight job functions with the relative percentage of time the Beneficiary will devote the job functions, as follows (verbatim):<sup>9</sup>

**1. Financial Accounting (15% to 20%)**

- Prepare month-end close entries and reporting.
- Perform cost center reviews.
- Perform account analysis as needed.
- Assist with preparing various financial reporting presentations including budgets, plans and forecasts.

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<sup>7</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 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>8</sup> O\*NET Summary Report for “Accountants,” <https://www.onetonline.org/link/summary/13-2011.01> (last visited July 7, 2020).

<sup>9</sup> The Petitioner noted “as the [Beneficiary’s] day-to-day duties will not be static you will find that the following percentages add up to more than 100% of time will vary (*sic*) depending on the project to which she is assigned.”

- Compute taxes owed and prepare tax returns, ensuring compliance with payment, reporting, or other tax requirements.
  - IRS audits prevention and compliance.
2. **Process and Update of Daily Sales Transactions for Retail Stores (25%)**
    - Process and update sales as well as releasing updated sales to the retail reporting system.
    - Run reports monthly for the updated sales and post to the general ledger in the retail reporting system.
  3. **Sales Audit Functions of Daily Transactions for Retail Stores (25%)**
    - Run sales audit reports on a daily basis.
    - Work with store managers to resolve problems, fix errors, and investigate unusual and/or unauthorized activity at the transaction level.
    - Ensure all credit card depositions have been settled and work with managers to correct any issues.
    - Work closely with store managers on financial policies and procedures.
  4. **Sales Audit Functions of Daily Transactions for E-commerce (25%)**
    - Review orders shipped.
    - Research discrepancies in E-commerce transactions.
    - Research unusual and/or unauthorized activity at the transaction level.
    - Work with managers to ensure all transactions are handled correctly.
  5. **Month-end and Year-end Close Reporting for Retail Stores (20%)**
    - Review orders shipped.
    - Research discrepancies in E-commerce transactions.
    - Research unusual and/or unauthorized activity at the transaction level.
    - Work with managers to ensure that all transactions are handled correctly.
  6. **Maintain Inventory Integrity for Retail Stores (20%)**
    - Prepare weekly cycle counts or additional counts as needed to ensure accurate inventory levels at all stores.
    - Make adjustments based on variances of cycle counts after approval by management.
    - Assist in the year-end physical counts at the retail stores and the accurate updating of the book inventory to reflect the results of the physical inventory for all locations.
  7. **Prepare Retail Reporting for Annual Audit (10%)**
    - Work as internal auditor to provide necessary retail reporting documentation, as well as walk through detail.
  8. **Budgeting (10%)**
    - Review budgets for accuracy and completeness.
    - Assisting with updating budget templates.

The Petitioner initially provided a broad range of duties for the proffered position, including some duties that fall within the typical duties for an accountant within the “Accountants and Auditors” occupational category corresponding to the (SOC) code 13-2011. However, many of the proffered position’s job duties appear to in line with the general duties of the occupational category “Bookkeeping, Accounting, and Auditing Clerks” corresponding to the SOC code 43-3031. According to O\*NET, the core duties of this category include “Compute, classify, and record numerical data to keep financial records complete. Perform any combination of routine calculating, posting, and verifying duties to obtain primary financial data for use in maintaining accounting records. May also check the accuracy of figures, calculations, and postings pertaining to business transactions recorded by other workers.”<sup>10</sup>

The initially stated duties of the proffered position include tasks such as “[p]rocess and update sales as well as releasing updated sales to the retail reporting system,” “prepare weekly cycle counts or additional counts as needed to ensure accurate inventory levels at all stores,” “[a]ssist in the year-end physical counts at the retail stores and the accurate updating of the book inventory to reflect the results of the physical inventory for all locations,” “[e]nsure all credit card depositions have been settled and work with managers to correct any issues,” “[r]eview orders shipped,” and “[w]ork with store managers to resolve problems, fix errors, and investigate unusual and/or unauthorized activity at the transaction level.” Based on the initially provided job duties, the position does not appear to require a bachelor's degree in a specific discipline, or the equivalent to perform the duties, it is not a specialty occupation.

In response to the Director’s January 2018 RFE, the Petitioner provided an updated description of the duties with differing estimates of the relative time percentages that the Beneficiary will devote to the position’s job tasks; that also omitted mention of some of the initially presented job duties, but still included a wide range of job tasks that appear to be more in keeping with the tasks typically performed by “Bookkeeping, Accounting, and Auditing Clerks” corresponding to SOC code 43-3031, such as “[a]ssist in the year-end physical counts at the retail stores and the accurate updating of the book inventory to reflect the results of the physical inventory for all locations,” “ensure all cc deposits settled,” and “run sales audit reports on a daily basis.” This material and other evidence in the record strongly suggests the Beneficiary’s position includes non-qualifying duties inconsistent with those of a specialty-occupation caliber position.

The Petitioner also newly claims that the Beneficiary is “managing [the Petitioner’s new accounting software implementation] and heading up designer relationships, finance and general product and project development.”<sup>11</sup> However, the record does not sufficiently illustrate what these duties actually

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<sup>10</sup> O\*NET Summary Report for “Bookkeeping, Accounting, and Auditing Clerks,” <https://www.onetonline.org/link/summary/43-3031.00> (last visited July 7, 2020). We also observe that that the “Bookkeeping, Accounting, and Auditing Clerks” occupations are Job Zone Three occupations as described in the O\*NET. The O\*NET material about the education level for Job Zone Three states “[m]ost occupations in this zone require training in vocational schools, related on-the-job experience, or an associate’s degree.” See O\*NET Online Help, <https://www.onetonline.org/help/online/zones#zone3> (last visited July 7, 2020). According to the O\*NET, these occupations do not require at least a bachelor's degree.

<sup>11</sup> Again, 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).

entail. Here, the generalized descriptions, along with other evidence about the Petitioner's business operations included in the record *prior* to the petition's approval do not appear to adequately convey any particular detail regarding the demands, level of responsibilities, and requirements necessary for the performance of the duties. Thus, the Director should also determine whether the Petitioner adequately described the Beneficiary's job duties to establish a necessary correlation between any dimension of the proffered position and a need for a particular level of education, or educational equivalency, in a body of highly specialized knowledge in a specific specialty.

In summary, while the evidence in the record suggests that the Petitioner violated the terms and conditions of the Beneficiary's approved employment, the Director should first consider whether the petition should have been approved *to begin with*, based on the initially submitted evidence, the Petitioner's August 2017 RFE response, and evidence provided in response to her January 2018 RFE, in order to determine whether the petition's approval violated 8 C.F.R. § 214.2(h) or involved gross error.<sup>12</sup> The Director should then consider the job descriptions and other evidence the Petitioner provided in its initial filing, in response to her RFEs, her NOIR, in conjunction with the USCIS administrative site visit to the Petitioner's offices, and on appeal in order to ultimately determine whether (and upon what grounds) the petition should be revoked pursuant to 8 C.F.R. § 214.2(h)(11)(iii).

Accordingly, the matter will be remanded to the Director for further consideration. The Director may request any additional evidence considered pertinent to the new determination and any other issue. As such, we express no opinion regarding the ultimate resolution of this case on remand.

**ORDER:** The decision of the Director is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.

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<sup>12</sup> See 8 C.F.R. § 214.2(h)(11)(iii)(A)(5).