



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

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

MATTER OF W-H-D-G-

DATE: APR. 3, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, a company that provides landscape architect services, seeks to temporarily employ the Beneficiary under the H-1B nonimmigrant classification for specialty occupations. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The H-1B program allows a U.S. employer to temporarily employ a qualified foreign worker in a position that requires both (a) the theoretical and practical application of a body of highly specialized knowledge and (b) the attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum prerequisite for entry into the position.

The Director of the Vermont Service Center denied the Form I-129, Petition for Nonimmigrant Worker, concluding that the Petitioner did not establish that the proffered position is a specialty occupation.

The matter is now before us on appeal. In its appeal, the Petitioner states that the Director's decision was understandable given that the Petitioner failed to provide critical information about the position. The Petitioner submits additional evidence and requests that a new decision be rendered.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) 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 this statutory definition, but adds a non-exhaustive list of fields of endeavor. In addition, the regulations provide that the proffered position must meet one of the following criteria to qualify as a specialty occupation:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

8 C.F.R. § 214.2(h)(4)(iii)(A). We have consistently interpreted the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) 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”); *Defensor v. Meissner*, 201 F.3d 384, 387-88 (5th Cir. 2000).

II. ANALYSIS

A. Specialty Occupation

The Petitioner has submitted inconsistent and contradictory evidence regarding nature of the proffered position that precludes it from establishing that the proffered position is a specialty occupation. More specifically, initially the Petitioner claimed that the Beneficiary would serve as a “drafter.” For example, the Petitioner provided the following job titles for the position:

Document	Job Title Provided by the Petitioner
Form I-129	architectural and civil drafter
labor condition application (LCA)	landscape architectural drafter
letter of support	landscape architecture and civil drafter

Furthermore, on the LCA¹ the Petitioner designated the proffered position under the occupational category “Architectural and Civil Drafters” which corresponds to the Standard Occupational

¹ The Petitioner is required to submit a certified LCA to U.S. Citizenship and Immigration Services 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 experience and qualifications who are performing the same services. *See Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542, 545-46 (AAO 2015).

Classification (SOC) code 17-3011.² In an accompanying letter, the Petitioner provided the following job description:

[The Beneficiary] is being offered temporary employment in the position of Landscape Architectural and Civil Drafter at [the Petitioner's business.] He will be responsible to prepare detailed drawings of landscape design and urban planning. In addition, he will also be involved in a wide range of projects including commercial, large-scale residential and healthcare projects. As a drafter, [the Beneficiary] also will have the ability to work with professional architects and landscape architects and provide his planning / design expertise towards projects. The urban planning design knowledge and computer expertise provided by [the Beneficiary] would be a valuable complement to our existing team.

The Petitioner did not specify a degree requirement for the proffered position.

In response to the Director's request for evidence (RFE), the Petitioner stated that it currently employs seven landscape architects, and that because of its work load it needed to hire an individual with unique and excellent drafting skills. According to the Petitioner, the proffered position is for someone who will "take the concepts created by [the company's] Landscape Architects and transfer them to actual computer drawings." The Petitioner indicated that the Beneficiary "may advance to a Landscape Architectural position at some future time." According to the Petitioner, an applicant for the proffered position must possess a minimum of a bachelor's degree in landscape architecture.³

On appeal, however, the Petitioner appears to be claiming for the first time that that the proffered position is for a landscape architect. The Petitioner asserts that all the landscape architects that it currently employs are required to have a baccalaureate degree or higher, and provides their resumes. It asserts that "the complexity of our profession has increased tremendously [in] the past few years," which in turn has "created the need for a minimum of a Baccalaureate . . . to properly prepare and draft our technical plan with the rapidly developing computer based technical software." The Petitioner claims that the degree requirement is common to the industry, and submits job advertisements from the [redacted] on behalf of other firms seeking to hire landscape architects. However, the Petitioner does not address why it designated the

² 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 he will be closely supervised and his work closely monitored and reviewed for accuracy; and (3) that he 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://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.*

³ The Beneficiary holds a master's degree in urban and regional planning.

proffered position under the occupational category of “Architectural and Civil Drafters” on the LCA and previously described the duties of the position as a drafter.

Upon review of the totality of the record, we conclude that the Petitioner has not sufficiently established the nature of the proffered job and whether the Beneficiary will be performing the duties of a: (1) drafter; or (2) landscape architect.

The SOC codes, prevailing wages, job duties, and degree requirements for the occupations of “Architectural and Civil Drafters” and “Landscape Architects” are different. For example, the yearly prevailing wage for a Level I architectural drafter (SOC code 17-3011) in the Petitioner’s location (Broward County, Florida) was \$32,739 during the relevant period. According to the Department of Labor’s (DOL) *Occupational Outlook Handbook (Handbook)*,⁴ an associate’s degree or technical certificate is typically required for the occupation of drafter, and the *Handbook* does not list any licensure requirements.

In contrast, the yearly prevailing wage for a Level I landscape architect (SOC code 17-1012) in the same area during the same period was \$45,261. The *Handbook* indicates that an advanced degree in landscape architecture may be needed for entry into the profession, and licensure as a landscape architect is mandatory in most states (including in Florida, the location of the proffered position).

With respect to the Petitioner’s most recent indication that the position is actually a landscape architect, a petitioner cannot offer a new position to the beneficiary, materially change a position’s associated job responsibilities, or alter the claimed occupational category of a position for the first time in response to an RFE or an appeal. The Petitioner must establish that the position offered to the Beneficiary when the H-1B petition was filed merits classification for the benefit sought. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg’l Comm’r 1978). If significant changes are made to the initial request for approval, the Petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record.

Based on the Petitioner’s inconsistent claims and evidence, it has not established what exactly the proffered position is in this case. Because the Petitioner provided inconsistent information about the position, we are unable to discern the substantive nature of the position, whether or not the claimed job duties relate to the proffered position, and whether the proffered position in fact qualifies as a specialty occupation. Consequently, we are precluded from finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines: (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of

⁴ All of our references are to the 2016-2017 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/ooh/>. We do not, however, maintain that the *Handbook* is the exclusive source of relevant information.

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 what the proffered position is and, consequently, that it satisfies any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), the Petitioner also has not established that the proffered position qualifies as a specialty occupation.

B. LCA Does Not Support the H-1B Petition

As an additional matter, the Petitioner has not provided an LCA that supports the H-1B petition. As mentioned above, the Petitioner submitted an LCA designating the proffered position under the occupational category "Architectural and Civil Drafters," but on appeal it appears to be claiming that the position would be as a landscape architect and has submitted additional evidence relating only to that occupation.

While DOL is the agency that certifies LCAs before they are submitted to U.S. Citizenship and Immigration Services (USCIS), DOL regulations note that the Department of Homeland Security (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). Because the Petitioner indicated after filing that the H-1B that the position is for a landscape architect, the certified LCA for an architectural and civil drafter cannot be used to support the H-1B petition. The Petitioner has described two occupations, which fall under different occupational codes and have different prevailing wages, educational requirements, and job duties.⁵ As such, the Petitioner has not established that it submitted a certified LCA that properly corresponds to the occupation and duties of the proffered position, as required under the Act. As the LCA does not support the H-1B petition, the petition may not be approved for this additional reason.

III. CONCLUSION

The Petitioner has not demonstrated what the proffered position is and, consequently, that the proffered position qualifies as a specialty occupation. Moreover, the Petitioner has not submitted an LCA that supports the H-1B petition. Accordingly, the H-1B petition may not be approved.

ORDER: The appeal is dismissed.

Cite as *Matter of W-H-D-G-*, ID# 287126 (AAO Apr. 3, 2017)

⁵ If the Petitioner believed that its proffered position was a combination of occupations, it was required by DOL to select the occupational category with the higher prevailing wage for the LCA. 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.