



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

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

MATTER OF G-W-R-E-, CORP.

DATE: FEB. 9, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a five-employee commercial and residential real estate brokerage company, seeks to temporarily employ the Beneficiary as a “visual and digital illustrator” 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, California Service Center, denied the petition. The Director concluded that the Petitioner had not established that the proffered position qualifies as a specialty occupation.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that it has satisfied all evidentiary requirements.

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

I. LEGAL FRAMEWORK

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. PROFFERED POSITION

In the H-1B petition, the Petitioner stated that the Beneficiary will serve as its “visual and digital illustrator.” In a letter submitted in support of the petition, the Petitioner stated the job duties for the position as follows (bullet points added and paraphrased for clarity):

- Explore a wide range of concepts with a deep understanding of aesthetics and core design principles;
- Conceptualize and communicate ideas into innovative designing;
- Combine artistic talent with research on listed property to design visual and digital marketing materials to create most functional and appealing product design;
- Create new visual brand language in collaborating with marketing strategies; and
- Assist company’s real estate agents and brokers in learning about, becoming proficient in, and applying instructional technology to promote their own properties or projects.

The Petitioner stated that the proffered position requires a minimum of a bachelor’s degree in “Fine Arts, News Media, Design, Architecture, or related principles.”¹

¹ We note that the Petitioner repeatedly refers to a “news media” degree while the Beneficiary’s degree is in “new media.”

In response to the Director's request for evidence (RFE), the Petitioner distributed the above duties into three categories and allocated the Beneficiary's time to those categories as follows (paraphrased for brevity):

- Explore a wide range of concepts with a deep understanding of aesthetics and core design principles – 25%;
- Conceptualize and communicate ideas into innovative designing, combine artistic talent with research on listed property to design visual and digital marketing materials, and create new visual brand language in collaboration with market strategies – 40%; and
- Assist company's real estate agents and brokers in learning about, becoming proficient in, and applying instructional technology to promote their own properties or projects – 35%.

The Petitioner added a narrative to the above categories explaining the concept, theory, technique, and skills of illustration. The Petitioner noted that the visual and digital illustrator will "design visual and digital marketing materials" including the real estate post sign, company stationery, gift recycling bag, investment offering memorandums such as brochures, pitch books, and executive summaries, business presentations, and interactive floor plans. The Petitioner stated that the visual and digital illustrator must be able to design quality graphical user interfaces, and be proficient in current and emerging web and mobile technologies and standard design software packages in order to use and teach those technologies to the company's real estate agents.

III. ANALYSIS

Upon review of the record in its totality and for the reasons set out below, we determine that the Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation. Specifically, the record does not (1) describe the position's duties with sufficient detail; and (2) establish that the job duties require an educational background, or its equivalent, commensurate with a specialty occupation.²

On the labor condition application (LCA)³ submitted in support of the H-1B petition, the Petitioner designated the proffered position under the occupational category "Commercial and Industrial Designers" corresponding to the Standard Occupational Classification code 27-1021.⁴ We have

² The Petitioner submitted documentation in support of the H-1B petition, including evidence regarding the proffered position and its business operations. While we may not discuss every document submitted, we have reviewed and considered each one.

³ The Petitioner is required to submit a certified LCA to USCIS 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).

⁴ 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

reviewed the Petitioner's descriptions of duties, including the Petitioner's table comparing the duties of the proffered position to the duties listed in the Occupational Information Network (O*NET) Online Summary Report for a "Commercial and Industrial Designer," offered on appeal. The Petitioner claims that the only difference in the positions of an industrial and commercial designer and the proffered position is that the industrial and commercial designer's "job involves manufactured goods and [the proffered position] involves real estate, houses." We disagree.

We recognize the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁵ The *Handbook* reports that industrial designers⁶ "develop the concepts for manufactured products, such as cars, home appliances, and toys" and "combine art, business, and engineering to make products that people use every day." See U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2016-17 ed., "Industrial Designers," <https://www.bls.gov/ooh/arts-and-design/industrial-designers.htm#tab-2> (last visited Feb. 1, 2017). While both the *Handbook's* overview of the industrial designer occupation and the Petitioner's description of its visual and digital illustrator include elements of aesthetics and conceptualizing design, an industrial designer develops actual goods and/or products while the proffered position is involved in creating marketing materials to advertise goods, in this matter real estate.⁷

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.*

⁵ 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. That is, the occupational category designated by the 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. To satisfy the first criterion, however, 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.

⁶ The *Handbook* identifies this occupation as an industrial designer occupation and not a "commercial and industrial designer" occupation.

⁷ We also note that the *Handbook* reports that a "bachelor's degree in industrial design, architecture, or engineering is usually required for entry-level industrial design jobs," and that "[m]ost industrial design programs include courses that industrial designers need in design: drawing, computer-aided design and drafting (CADD), and three-dimensional modeling," as well as including "courses in business, industrial materials and processes, and manufacturing methods that industrial designers need when developing their design." See U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2016-17 ed., "Industrial Designers," <https://www.bls.gov/ooh/arts-and-design/industrial-designers.htm#tab-4> (last visited Feb. 1, 2017). As the Beneficiary's bachelor's degree is in fine arts in new media, her degree would not qualify her to perform the duties of an industrial engineer.

(b)(6)

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The Petitioner also submitted advertisements for a graphic designer, a UX Visual Designer, and a senior designer, to establish that a degree in a specific specialty is common to the industry in parallel positions among similar organizations. The record does not include any advertisements for an industrial designer. Additionally, the Petitioner submitted an opinion letter prepared by [REDACTED] Associate Director [REDACTED] who opines that “[a] ‘Visual and Digital Illustrator’ position falls within the broader field of Graphic Design.” This information underscores the conclusion that the proffered position is not an industrial designer position.

We have reviewed the Petitioner’s description of duties and other information in the record to determine whether there is sufficient evidence to identify the occupation of the proffered position and to determine whether the duties, as described, require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor’s or higher degree in a specific specialty, or its equivalent, is required to perform them.

The Petitioner has provided a generalized description of the Beneficiary’s proposed duties which does not convey sufficient substantive information to establish the relative complexity, uniqueness and/or specialization of the proffered position or its duties. Accordingly, we are unable to discern the nature of the actual position and whether the tasks described entail the need for a particular level of education, or educational equivalency, in a body of highly specialized knowledge in a specific specialty.

Furthermore, the Petitioner’s claimed entry requirement of a bachelor of fine arts, news media, design, architecture, or a related degree for the proffered position, without more, is inadequate to establish that the proposed position qualifies as a specialty occupation. 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 architecture and news media, 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).

In other words, while the statutory “the” and the regulatory “a” both denote a singular “specialty,” 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. *See* section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). This also includes even seemingly disparate specialties providing, again, the evidence of record establishes how each

acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

The Petitioner has not demonstrated that the fields of new(s) media, design, architecture, and all of the fine arts are closely related specialties, and how these fields are directly related to the duties and responsibilities of the proffered position. While these fields may share some basic courses, the Petitioner did not establish that the required "body of highly specialized knowledge" is essentially the same. Accordingly, as such evidence does not establish a minimum requirement of at least a bachelor's degree *in a specific specialty*, or its equivalent, for entry into the occupation, it does not support the proffered position as being a specialty occupation.

The Petitioner has not established the substantive nature of the work to be performed by the Beneficiary, which therefore precludes a 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 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.

Consequently, 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. The appeal will be dismissed and the petition denied for this reason.

IV. LCA DOES NOT CORRESPOND TO PETITION

As the Petitioner did not demonstrate that the proffered position is a specialty occupation, we need not fully address other issues evident in the record. That said, we wish to identify an additional issue to inform the Petitioner that this matter should be addressed in any future proceedings.⁸

Specifically, the petition cannot be approved because the Petitioner has not provided a certified LCA that corresponds to the petition. The job title and occupation code on the LCA submitted with the petition is for a "Commercial and Industrial Designer," certified for SOC code 27-1021.

While DOL is the agency that certifies an LCA before it is 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

⁸ In reviewing a matter *de novo*, we may identify additional issues not addressed in the Director's decision. *See Spencer Enters., Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

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

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the Beneficiary. As the Petitioner has not demonstrated that the proffered position is a commercial or industrial designer position, the Petitioner has not submitted a valid LCA that has been certified for the proper occupational classification, and the petition is not approvable for this additional reason.

V. CONCLUSION

The burden is on the Petitioner to show eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of G-W-R-E-, Corp.*, ID# 186362 (AAO Feb. 9, 2017)