



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

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

MATTER OF G-E-R-, INC.

DATE: MAY 8, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner seeks to temporarily employ the Beneficiary under the H-1B nonimmigrant classification for specialty occupations as a "strategic market research analyst." *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 a Nonimmigrant Worker, concluding that the Petitioner did not establish that the proffered position is a specialty occupation and, consequently, that there is sufficient work for the Beneficiary in a specialty occupation.

The matter is now before us on appeal. On appeal, the Petitioner submits additional evidence and claims that the proffered position qualifies as a specialty occupation and that there is sufficient work for the Beneficiary.

Upon *de novo* review, we will dismiss the appeal.¹

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

¹ To the extent that the Director appears to have specified that a market research analyst position "is traditionally considered" to be a specialty occupation, we withdraw that statement. We also withdraw the Director's finding that the Petitioner did not establish that there is sufficient work available for the requested period. Both of these statements are conclusory, and unsupported by an analysis of the Petitioner's evidence or a citation to any binding precedent or legal authority.

- (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

We first turn to the labor condition application (LCA)² submitted in support of the H-1B petition, in which 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.³ The Petitioner reports that a candidate must have a

² The Petitioner is required to submit a certified LCA to us 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, 545-546 (AAO 2015).

³ 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. U.S. Dep’t of Labor, Emp’t & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009),

master's degree in marketing or international business,⁴ as well as a familiarity and an understanding of Chinese culture, along with fluency in English and Mandarin to qualify for the proffered position.⁵

The U.S. Department of Labor (DOL) guidance states that wage levels should be determined only after selecting the most relevant occupational code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation. Factors to be considered when determining the wage level for a position include the relative complexity of the job duties, as well as the levels of judgment, supervision, and understanding required to perform the job duties.

DOL guidance states that a Level I (entry) 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 her work closely monitored and reviewed for accuracy; and (3) that she will receive specific instructions on required tasks and expected results.⁶ According to DOL, a Level I wage should be considered for research fellows, workers in training, or internships.⁷ Further, a language requirement other than English in a job offer generally is considered a special skill for all occupations (with the exception of Foreign Language Teachers and Instructors, Interpreters, and Caption Writers).⁸

Therefore, the Petitioner's assertion that the proffered position requires a master's degree and involves a significant level of responsibility and expertise, as well as foreign language skills, do not appear to be reflected in the wage level chosen by it on the LCA.⁹ The statements regarding the requirements, appear to be materially inconsistent with the certification of the LCA for a Level I position. This conflict challenges the overall credibility of the petition in establishing the nature of the proffered position and in what capacity the Beneficiary will be employed.

available at http://flcdatacenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf.

⁴ In response to the Director's request for evidence (RFE), the Petitioner stated that that it had hired the Beneficiary during her period of optional practical training specifically because the position requires a master's degree in marketing and the Beneficiary possesses this degree. The Petitioner provided a list of proposed duties and the master's degree coursework which the Petitioner claimed corresponds to the given duty.

⁵ The Petitioner classified the position at a Level I wage for worksites in [redacted] New York and [redacted] Texas.

⁶ 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.

⁷ *Id.*

⁸ *Id.*

⁹ A petitioner must distinguish its proffered position from others within the occupation through the proper wage level designation to indicate factors such as complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties. *Id.* Through the wage level, the Petitioner reflects the job requirements, experience, education, special skills/other requirements and supervisory duties. *Id.*

Moreover, the Petitioner claims that the Beneficiary will perform market research and marketing development duties; however, the Petitioner has only one employee – specifically, the company President.¹⁰ The evidence does not indicate that the Petitioner has any subordinate employees to relieve the Beneficiary from performing non-qualifying duties and the Petitioner has not sufficiently addressed this issue. Thus, we must question whether the duties provided by the Petitioner for the proffered position accurately reflect the work the Beneficiary will perform.

Because the Petitioner provided inconsistent or incomplete information about the position, we are unable to discern the substantive nature of the position. 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 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.

The Petitioner has not established the nature and minimum requirements for the proffered position and, consequently, that it satisfies any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the Petitioner 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. More specifically, 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 that the position requires, for example, a master's degree, a significant level of responsibility and expertise, and fluency in Mandarin, the certified LCA for an Level I wage does not appear to support and correspond to the H-1B petition. The Petitioner has made conflicting claims to DOL and USCIS regarding the proffered position. Therefore, the petition may not be approved for this additional reason.

¹⁰ The Petitioner claimed to have “two partners in the company with over 50 years of experience,” but also claimed to have only one employee and named only its President.

III. CONCLUSION

The Petitioner has not demonstrated the nature of the proffered position and, consequently, that it qualifies as a specialty occupation. Moreover, the Petitioner has not submitted an LCA that supports the H-1B petition.

ORDER: The appeal is dismissed.

Cite as *Matter of G-E-R-, Inc.* ID# 274704 (AAO May 8, 2017)