



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

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

MATTER OF [REDACTED]

DATE: MAY 18, 2017

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a “procurement & processors of scrap metal for export” company, seeks to extend the Beneficiary’s temporary employment as a “logistics 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 Vermont Service Center denied the petition. The Petitioner appealed the denial, which we dismissed on the basis that the proffered position does not qualify as a specialty occupation.

The matter is before us on another motion to reconsider. This is the Petitioner’s fifth motion. In support of the instant motion, the Petitioner submits a brief and copies of previously submitted evidence. We will deny the motion.

I. MOTION REQUIREMENTS

A motion to reconsider is based on an *incorrect application of law or policy*. The requirements of a motion to reconsider are located at 8 C.F.R. § 103.5(a)(3). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

II. ANALYSIS

For the following reasons, we find that the Petitioner has not established that our prior decision was incorrect at the time of that decision; therefore, the motion to reconsider will be denied.

A motion to reconsider must establish that our decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). We do not consider new facts or evidence in a motion to reconsider. Further, a motion to reconsider must be supported by a pertinent precedent or

adopted decision, statutory or regulatory provision, or statement of U.S. Citizenship and Immigration Services or Department of Homeland Security policy.

In its motion, the Petitioner again explains the duties and responsibilities of the proffered position. Particularly, the Petitioner highlights that logistics is an “integral part of the market research function but it is only incidental and should not be confused with the logistics function per se.” The Petitioner confirms that 75% of the Beneficiary’s duties are market research duties while 25% are logistics analyst duties, and that the “Market Research Analysts and Marketing Specialists” occupational classification is most appropriate given the “primary” nature of the duties. The Petitioner asserts that we erred by emphasizing the “logistics aspect” over the “market research” aspect of the proffered position. Additionally, the Petitioner highlights the nature of its company, the difficulties of finding a qualified, bilingual candidate such as the Beneficiary, and the Beneficiary’s contributions to the business. The Petitioner asserts that the petition should have been approved based on the record.

Upon review, we find that the Petitioner has not demonstrated that our prior decision was legally or factually incorrect based on the record at the time of filing. The Petitioner has made the same arguments and submitted the same supporting documents in prior motions, and we have determined them to be insufficient to demonstrate eligibility in this matter.

Regarding the nature of the proffered position, we understand the Petitioner’s point that logistics and market research duties are entwined. However, this does not negate the proffered position’s logistics duties. The Petitioner claims that logistics duties are incidental. However, the Petitioner also acknowledges that the Beneficiary’s logistics duties comprise 25% of his time: accordingly, we find that his logistics duties are not incidental, but rather, are predictable, recurring, and substantive.¹ We thus maintain that our analysis of the proffered position under the “Logisticians” occupational category was proper.²

Moreover, even if we were to focus solely on the position’s “market research” duties, this aspect also does not demonstrate that we erred in our analysis of the proffered position. In other words, even if properly classified under the “Market Research Analysts and Marketing Specialists” occupational classification (which it is not), the Petitioner still has not demonstrated how the proffered position qualifies as a specialty occupation.

¹ The two definitions of “incidental” in *Webster’s New College Dictionary* 573 (Third Edition, Hough Mifflin Harcourt 2008) are (1) “occurring or apt to occur as an unpredictable or minor concomitant,” and (2) “of a minor, casual, or subordinate nature.”

² We also maintain that the Petitioner should have classified the proffered position under the “Logisticians” occupational classification on the labor condition application. When a position involves duties of more than one occupational classification, the labor condition application should reflect the occupational classification of the most relevant, i.e., highest-paying, occupation. 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. The Petitioner has not demonstrated that the prevailing wage for a “Market Research Analysts and Marketing Specialists” position in the area and time period of intended employment was higher than that for a “Logisticians” position, so as to demonstrate that we erred in analyzing the proffered position under the “Logisticians” classification.

For instance, we previously discussed information found in the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* about "Market Research Analysts and Marketing Specialists," which we consider an authoritative source on the normal educational requirement for this and other occupational categories it addresses. In particular, we discussed the *Handbook's* information that, in addition to bachelor's degrees in market research, bachelor's degrees in various fields such as statistics, math, and computer science are all common for entry into the "Market Research Analysts and Marketing Specialists" occupation.³ Based on the various types of acceptable degrees, we concluded that market research analyst positions do not normally require at least a bachelor's degree *in a specific specialty* (or the equivalent) in order to qualify as a specialty occupation.⁴ The Petitioner's motion does not address this aspect of our prior analysis.

On motion, the Petitioner repeatedly references the Beneficiary's language abilities and education. The Petitioner resubmits the evaluation of the Beneficiary's academic degrees, and claims that this "should alone suffice the requirement of this Appeal and lead to approval." But the Petitioner conflates the issue of beneficiary qualifications with the issue of specialty occupation. As we have previously stated, the test to establish a position as a specialty occupation is not education or experience of a proposed beneficiary, but whether the position itself requires at least a bachelor's degree in a specific specialty, or its equivalent. Thus, the Petitioner's statements and evidence regarding the Beneficiary's education and language abilities are not relevant to determining whether the proffered position qualifies as a specialty occupation.

Likewise, the Petitioner's discussion of the Beneficiary's achievements and importance to the company are not relevant to demonstrating that the position itself qualifies as a specialty occupation. We acknowledge the Petitioner's statements about the Beneficiary's contributions, such as how he increased the company's net income and sourced materials from different countries. We also acknowledge the Petitioner's claims about the difficulties of hiring qualified, bilingual candidates. But we cannot properly consider these factors in our analysis of the proffered position. Without more, the given examples of the Beneficiary's accomplishments (e.g., the submitted profit and loss statement and photographs of raw materials) do not demonstrate how the proffered position qualifies as a specialty occupation. The Petitioner's motion does not demonstrate how we erred in finding the record insufficient to establish eligibility.

Finally, the Petitioner has not supported its motion with a pertinent decision, statutory or regulatory provision, or statement of policy, as required for a motion to reconsider. 8 C.F.R. § 103.5(a)(3).

³ U.S. Department of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2016-17 ed., <https://www.bls.gov/ooh/business-and-financial/market-research-analysts.htm#tab-4> (last visited May 16, 2017).

⁴ Section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii) define a "specialty occupation" as an occupation that requires, in part, the attainment of a bachelor's or higher degree in a *specific specialty* (or its equivalent). To be consistent with the statutory and regulatory definition, we interpret the term "degree" in 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any bachelor's 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 (5th Cir. 2000).

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Instead, it acknowledges that “there is no precedent decision available.” While we note the Petitioner’s request, we decline to issue a precedent decision in this case.

III. CONCLUSION

The Petitioner has not established that our prior decision was incorrect at the time of that decision. Therefore, the Petitioner has not met the requirements for a motion to reconsider.

ORDER: The motion to reconsider is denied.

Cite as *Matter of* [REDACTED] ID# 316040 (AAO May 18, 2017)