



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

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

MATTER OF W-M- INC

DATE: SEPT. 5, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a taxi management company, seeks to continue to temporarily employ the Beneficiary as an “electrical engineer” 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, concluding that the record does not demonstrate that 1) the proffered position qualifies as a specialty occupation; and 2) the Petitioner paid the Beneficiary the required wage for the duration of the previous H-1B approval.

On appeal, the Petitioner submits additional evidence and asserts that the Director erred in the decision.

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

I. SPECIALTY OCCUPATION

A. 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” 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 (5th Cir. 2000).

B. Proffered Position

In response to the Director’s request for evidence (RFE), the Petitioner explained that, as part of its operations as a taxi management company, it “maintains, repairs, installs and troubleshoots the GPS trackers and the Passenger Information Monitor (PIM), which includes the credit card machines and are strictly secured.” The Petitioner also explained that the PIM “displays a map showing the vehicle’s current location, in addition to providing news and entertainment” and “assists in returning lost property by improving information flow” with the Taxi & Limousine Commission (TLC).

The Petitioner provided the following information regarding the duties of the proffered position and the approximate percentage of time spent on each of the duties (note: errors in original have not been changed):

- Operate computer-assisted engineering to test and supervise the installation of electrical equipment, components and systems of the GPS trackers, PIMs and credit card devices installed in taxicabs. (65%)
- Direct and coordinate installation, maintenance, support and testing activities to ensure compliance with TLC regulations (5%)

- Maintain direct contact with TLC and CMT (credit card machine company) (10%)
- Design, implement and improve electrical components for GPS trackers and PIM devices installed in taxis (5%)
- Confer with other engineers and specialists to discuss potential existing electrical engineering projects or products (5%)
- Operate and improve electronic equipment at the company's location by applying advanced repair techniques and relying on service manual instructions and pre-established guidelines to perform repairs (5%)
- Analyze electronic equipment, credit card devices, computer systems, and GPS systems to determine the root cause and to follow-up with the appropriate repair (2%)
- Maintain the standard protocol for the Point of Sale (credit card machine) (1%)
- Deliver technical and service peripherals on various POS computer workstations. For example: calibrating scales, repairing scanners, displays, keyboards and power supplies (1%)
- Use of satellite navigation technologies to support applications with the taxicab industry for the company (1%)

The Petitioner also states that “[c]andidates are required to have a BS, MS or PhD in electrical engineering or the equivalent.”

C. 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.¹ The record (1) does not sufficiently demonstrate the substantive nature of the proffered position; and (2) does not establish that the position requires an educational background, or its equivalent, commensurate with a specialty occupation.

On the labor condition application (LCA)² submitted in support of the H-1B petition, the Petitioner designated the proffered position under the occupational category “electrical engineers” corresponding to the Standard Occupational Classification code 17-2071 at a Level I wage.³

¹ Although some aspects of the regulatory criteria may overlap, we will address each of the criteria individually.

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 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

However, the Petitioner did not submit a job description that adequately conveys the substantive work to be performed by the Beneficiary. To establish eligibility, the Petitioner must describe the Beneficiary's specific duties and responsibilities in the context of its business operations, demonstrate that a legitimate need for an employee exists, and substantiate that it has H-1B caliber work for the Beneficiary for the duration of the employment period requested in the petition.

For example, the Petitioner stated that it "maintains, repairs, installs and troubleshoots" the electronic components in taxi cabs, including GPS trackers, the PIM, and the credit card machines. According to the U.S. Department of Labor (DOL)'s *Occupational Outlook Handbook* (the *Handbook*),⁴ which we recognize as an authoritative source on the duties of the wide variety of occupations that it addresses, "[e]lectrical engineers design, test, and supervise the manufacturing of electrical equipment, such as electric motors, radar and navigation systems, communications systems, or power generation equipment."⁵ They "also design the electrical systems of automobiles and aircraft." The Petitioner has not, however, provided evidence that it designs or manufactures the equipment it "maintains, repairs, installs and troubleshoots."⁶ Instead, the Petitioner provide generic and vague duties such as "[m]aintain direct contact with TCL and CMT (credit card machine company)" or "operate and improve electronic equipment at the company's location by applying advanced repair techniques and relying on service manual instructions and established guidelines to perform repairs" that do not delineate the substantive knowledge required to perform such functions. The Petitioner has not conveyed sufficient information to establish the relative complexity, uniqueness, or specialization of the proffered position or its duties.

On the other hand, the *Handbook's* descriptions of other occupational categories appear to be more consistent with the Petitioner's description for the proffered position. For example, the *Handbook* states that "[e]lectrical and electronics installers and repairers install or repair a variety of electrical equipment in telecommunications, transportation, utilities, and other industries."⁷ It also states that

results. DOL, 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. A 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.*

⁴ All of our references are to the 2016-2017 edition of the *Handbook*, which may be accessed at the Internet site <https://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.

⁵ For additional information regarding the occupational category "electrical engineers," see <https://www.bls.gov/ooh/architecture-and-engineering/electrical-and-electronics-engineers.htm#tab-2> (last visited Sept. 5 31, 2017).

⁶ Notably, the Petitioner indicates that 5% of the Beneficiary's duties consist of "design, implement and improve electrical components for GPS trackers and PIM devices installed in taxis," but has not submitted evidence to substantiate its claim.

⁷ For additional information regarding the occupational category "electrical and electronics installers and repairers," see <https://www.bls.gov/ooh/installation-maintenance-and-repair/electrical-and-electronics-installers-and-repairers.htm#tab-2> (last visited Sept. 5, 2017).

“[e]lectrical engineering technicians install and maintain electrical control systems and equipment, and modify electrical prototypes, parts, and assemblies to correct problems.”⁸ The Petitioner, therefore, has not sufficiently established that it correctly classified the proffered position as that of an electrical engineer.

Further, according to the Petitioner’s RFE response, “the beneficiary is the only qualified engineer in our company. The other employees are mechanics. . . and [t]he beneficiary possesses the knowledge necessary to train and supervise current and incoming mechanics.” The Petitioner’s designation of the position as entry-level contradicts the Beneficiary’s claimed roles in training and supervising mechanics, “supervis[ing] the installation of electrical equipment, components and systems,” and “direct[ing] and coordinat[ing] installation, maintenance, support and testing activities.” We also note that, according to the Form I-129, Petition for Nonimmigrant Worker, the Petitioner has only five employees. As the Petitioner did not submit an organization chart, it is unclear how many mechanics he will be supervising and training, who will perform the actual installations, who he will direct and coordinate with, and with which other engineers and specialists he will confer. The Petitioner must resolve these inconsistencies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1998).

In support of the petition, the Petitioner submitted a letter from [REDACTED] of the [REDACTED] which states that the position of electrical engineer is a specialty occupation. However, we find that the letter is not persuasive. Notably, [REDACTED] provides only a brief, general description of the Petitioner’s business activities and does not demonstrate in-depth knowledge of the Petitioner’s specific business operations or how the duties of the position would actually be performed in the context of the Petitioner’s business enterprise. [REDACTED] also does not discuss the duties of the proffered position in any substantive detail. To the contrary, he simply listed the tasks in bullet-point fashion with little discussion. He does not provide a substantive, analytical basis for his opinion and ultimate conclusion. His opinion does not relate his conclusion to specific, concrete aspects of this petitioner’s business operations to demonstrate a sound factual basis for the conclusion about the educational requirements for the particular position here at issue. Moreover, he did not support his conclusions by providing copies or citations of any research material used. He has not provided sufficient facts that would support the assertion that the proffered position requires at least a bachelor’s degree in a specific specialty (or its equivalent). We may, in our discretion, use opinion statements submitted by the Petitioner as advisory. *Matter of Caron Int’l, Inc.*, 19 I&N Dec. 791, 795 (Comm’r 1988). However, where an opinion is not in accord with other information or is in any way questionable, we are not required to accept or may give less weight to that evidence. *Id.*

For all of the above reasons, we find that the Petitioner has not credibly established the substantive nature of the work to be performed by the Beneficiary. We are, therefore, precluded from finding

⁸ For additional information regarding the occupational category “electrical and electronics engineering technicians,” see <https://www.bls.gov/ooh/architecture-and-engineering/electrical-and-electronics-engineering-technicians.htm#tab-2> (last visited Sept. 5, 2017).

that the proffered position satisfies any of the 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.

The Petitioner, therefore, has not established that the proffered position is a specialty occupation.⁹

II. LCA

We also find that the Petitioner has not submitted an LCA that corresponds to and supports the petition. Differently stated, the Petitioner has not demonstrated that it has and will continue to comply with the terms and conditions of the certified LCA.

A. Legal Framework

General requirements for filing immigration applications and petitions are set forth at 8 C.F.R. § 103.2(a)(1) in pertinent part as follows: “Every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions . . . and such instructions are incorporated into the regulations requiring its submission.”

The regulations require that before filing an H-1B petition, a petitioner obtain a certified LCA from DOL in the occupational specialty in which the H-1B worker will be employed. *See* 8 C.F.R. §§ 214.2(h)(4)(i)(B), 214.2(h)(4)(iii)(B)(1). The instructions that accompany the H-1B petition form also specify that a petition must be filed with evidence that an LCA has been certified by DOL.

While DOL is the agency that certifies LCA applications before they are 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 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):

⁹ We are not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 597 (Comm'r 1988); *see also Sussex Eng'g, Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987). Furthermore, we are not bound to follow a contradictory decision of a service center. *La. Philharmonic Orchestra v. INS*, No. 98-2855, 2000 WL 282785, at *2 (E.D. La. 2000).

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 we ensure that an LCA actually supports the H-1B petition filed on behalf of the Beneficiary.

In addition, the regulation at 20 C.F.R. § 655.731 separately governs an H-1B petitioner's wage obligations with respect to the LCA. This regulation generally requires that the H-1B employer fully pay the LCA-specified H-1B annual salary: (1) "cash in hand, free and clear, when due" (except for authorized deductions); and (2) as payments reported as the employee's earnings, with appropriate withholdings for the employee's taxes, to the Internal Revenue Service (IRS) and all other appropriate federal, state, and local governments in accordance with any other applicable law. *See* 20 C.F.R. § 655.731(c).

B. Analysis

The certified LCA submitted to support the instant petition is for a Level I, entry-level position under the "Electrical Engineers" for the proffered wage of \$70,000 per year.

The Director found that the Petitioner had not established that it paid the Beneficiary the proffered salary for the validity of its prior petition. The Director noted that the proffered salary was \$65,000 per year. According to the submitted 2014 W-2 Wage and Tax Statement (W-2), the Petitioner paid the Beneficiary \$35,003.76. In response to the RFE, the Petitioner submitted an additional W-2 from another company, [REDACTED] which paid the Beneficiary \$29,160.98. However, a beneficiary is authorized to work in an H-1B position only for the employer that filed the H-1B petition. *See generally* 8 C.F.R. § 214.2(h)(1)(i), (2)(i). While we acknowledge the Petitioner's statement that both companies "have the same owner and are part of the same [REDACTED]" the Petitioner did not provide sufficient documentation to support its claims or to establish that the payments by [REDACTED] satisfy the Petitioner's wage requirements. Further, the Petitioner's statement that "payroll is handled either by the company the employee performs the work for or by another company within the [REDACTED] that covers more than one business by location" raises concerns that the Beneficiary performed work for more than just the petitioning entity and that the Petitioner may intend for him to continue to do so.

On appeal, the Petitioner states that "[a]s of 2014, payroll for its employees has been paid only through [REDACTED] and [REDACTED]" which directly contradicts the Beneficiary's 2014 W-2 from the Petitioner. The Petitioner also claims that it paid the Beneficiary \$70,000 in wages and submits copies of the Beneficiary's 2015 W-2s which indicate that [REDACTED] paid him \$29,195.98 and [REDACTED] paid him \$8,753.49.

While the Petitioner contends that [REDACTED] also paid the Beneficiary \$32,050.53 on a Form 1099, it did not include a copy or an explanation as to why those payments were not reflected on the W-2. The Petitioner, therefore, has not established that it paid the Beneficiary the proffered salary for the validity of its prior petition.¹⁰ Further, without additional evidence, it is not clear whether the Petitioner, or another entity, intends to pay the proffered salary and whether the Petitioner is the true employer of the Beneficiary. Therefore, we cannot conclude that the Petitioner has met its burden of proof in establishing that it will comply with the terms and conditions of the certified LCA.¹¹

III. EMPLOYER-EMPLOYEE RELATIONSHIP

Finally, we will briefly address the issue of whether or not the Petitioner qualifies as a United States employer. The Petitioner is requesting an extension of the Beneficiary's H-1B status, but companies other than the petitioning entity paid the Beneficiary. In addition, as stated by the Petitioner, "payroll is handled either by the company the employee performs the work for or by another company within the [REDACTED] that covers more than one business by location," which indicates that the Beneficiary may have been performing work for another company and may continue to do so. The Petitioner has not provided sufficient documentation evidencing the substantive nature of the work the Beneficiary would perform for the period of time requested or where exactly and for whom the Beneficiary would be providing services. As a result, we are unable to determine who has or will have actual control over the Beneficiary's work or duties, or the condition and scope of the Beneficiary's services. In other words, based on the evidence of record, it is not clear whether the Petitioner, or any other company which it may represent, will have and maintain an employer-employee relationship with the Beneficiary for the duration of the requested employment period. *See* 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer" and requiring the Petitioner to engage the Beneficiary to work such that it will have and maintain an employer-employee relationship with respect to the sponsored H-1B nonimmigrant worker).

¹⁰ It is noted that the Director shall send to the petition a notice of intent to revoke the approval of the petition if the Director finds that the Petitioner violated the terms and conditions of the approved petition, e.g., by failing to pay the Beneficiary the wage attested on the approved petition. *See* 8 C.F.R. § 214.2(h)(11)(iii)(A)(3).

¹¹ In the event of a material change to the terms and conditions of employment specified in the original petition such as this, a petitioner must file an amended or new petition with USCIS with a new corresponding LCA. 8 C.F.R. § 214.2(h)(2)(i)(E). Furthermore, petitioners must "immediately notify the Service of any changes in the terms and conditions of employment of a beneficiary which may affect eligibility" for H-1B status and, if they will continue to employ the beneficiary, file an amended petition. 8 C.F.R. § 214.2(h)(11)(i)(A). *See generally Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542 (AAO 2015) (describing a petitioner's obligations to file an amended or new petition with a new corresponding LCA).

For the discussed reasons, it does not appear that the Petitioner complied with its obligations to notify USCIS and file a new and amended petition (with a new corresponding LCA). 8 C.F.R. § 214.2(h)(2)(i)(E); 8 C.F.R. § 214.2(h)(11)(i)(A).

IV. CONCLUSION

The Petitioner has not established eligibility for the requested benefit

ORDER: The appeal is dismissed.

Cite as *Matter of W-M- Inc*, ID# 505888 (AAO Sept. 5, 2017)