



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

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

MATTER OF G-E-, INC.

DATE: MAR. 18, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a B2B Internet asset exchange provider, seeks to temporarily employ the Beneficiary as an “enterprise delivery manager” under the H-1B nonimmigrant classification. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The Director, California Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

I. ISSUES

The issues before us are whether (1) the proffered position qualifies as a specialty occupation; and (2) the Beneficiary is qualified to serve in a specialty occupation position in accordance with the applicable statutory and regulatory provisions.

II. 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) states, in pertinent part, the following:

Specialty occupation means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the

attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must meet one of the following criteria:

- (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.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Fed. Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets 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 proffered 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”). Applying this standard, USCIS regularly approves H-1B petitions for qualified

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individuals who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the individual, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position or an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

B. Proffered Position

In the Form I-129, the Petitioner stated that the Beneficiary would mainly work "at office of an affiliate of Petitioner, [REDACTED] MN [REDACTED] Wage certified for both addresses." In the support letter dated March 27, 2015, the Petitioner provided the Beneficiary's job duties, which it stated "are, essentially, those of a senior **Market Research Analyst**[".]". In addition, the Petitioner stated that "[t]he job can only be performed effectively by a person with substantial professional qualifications, which, at a minimum, translate to a Bachelor's Degree or equivalent" and "[b]ecause of the highly technical nature of this particular industry, the preferred degree is in the Engineering or Computer Science areas or some related discipline."¹

In response to the RFE, the Petitioner provided a revised job description, along with the approximate percentage of time the Beneficiary would spend on each duty, as follows:

**A. Creation and Delivery of Sales Presentations; Keep Up with Company Technology
(Approximately 8 hours per week = 20%)**

Create and deliver effective technical presentations on connectivity, integration and interfaces, including graphics, Power Point presentations, interactive presentations, computer demonstrations and "White Papers" to promote the technological and

¹ It must be noted that a *preference* that a degree be in a specific specialty is insufficient to establish the proffered position as qualifying as a specialty occupation position. This assertion by the Petitioner is tantamount to an admission that the proffered position is not in fact a specialty occupation.

related advantages of the company's IT solutions over comparable competitors' products. Research the technological, cost and efficiency aspects of competitors' IT solutions. Meet with in-house technical personnel on a weekly basis, in person and remotely via Webex web meetings, teleconferences, etc., to keep abreast of the Company's own technologies, specifications, and innovations; maintain and augment detailed extensive knowledge of all company IT products, including the program structure and architecture, applications, functions, and underlying computer processes. Demonstrate the IT aspects of the company's hosted and downloaded product content to existing and prospective clients.

**B. Respond to Inquiries and Requests for Proposals ("RFPs")
(Approximately 8 hours per week = 20%)**

Research existing and potential clients' businesses, industry sectors, and technology needs to create specifically targeted presentation packages and programs. Develop, present, and/or respond to proposals and inquiries for specific client requirements, including request for proposal responses and industry-specific solutions, showcasing the superiority, quality and cost-efficiency of [the Petitioner's] IT solutions. Identify and follow-up on opportunities for up-sell and cross-sell of company IT products. Create and manage all client related RFP (Request for Proposal), SOW (Statement of Work) and BRD (Business Requirements Documents), Process Flow charts and Client Reporting requirements and deliverables. Manage customized projects while bridging between customer and design team. Project based team management with scope, time and cost control.

**C. Client Contract and Sales Activities
(Approximately 8 hours per week = 20%)**

Investigate, analyze and understand customer IT environment and technical requirements for their E-commerce applications and articulate these requirements to the sales and service teams. Root Cause Analysis and development of quality improvement strategies based on content audit reports and customer response with proper preventive measure. Meet with existing clients and potential new clients, both alone and with company technology and support personnel. Contact via in-person meetings, telephone, video conference, web conference, E-mail, Fax, etc. Initial meetings and frequent follow-up on a regularly scheduled basis, and also as-need for specific projects. Prepare and deliver specifically targeted technical presentations that explain the advantages of [the Petitioner's] IT solutions. Demonstrate the IT aspects of the company's product content, and improvements and modifications, to existing and prospective clients, at in-person meetings or via web. Confer with clients and their in-house engineers and other IT- and marketing-related personnel to assess IT data solutions needs, plans and requirements, and to determine existing technology infrastructure and appropriate IT products and solutions. Ascertain

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whether existing [redacted] product line -- and which products within [redacted] product line -- are appropriate, or whether custom IT solutions are needed. Work with clients to establish parameters of IT services to be purchased and deployed. Ascertain and explain how [the Petitioner's] IT products can be designed or modified to suit client needs.

Advise client technical and marketing personnel on how to use and deploy [the Petitioner's] IT solutions most efficaciously.

**D. Work with In-House Programming and Engineering Professionals to Turn Proposals and Orders into Projects
(Approximately 6 hours per week = 15%)**

Communicate orders and specifications to in-house programming, software engineering and related technical personnel, both in North America and in Pakistan; and meet with tech personnel to explain and determine nature of project. Participate in planning and modifying IT product configuration to meet client needs articulate these requirements to the sales and service teams. Participate in design and configuration planning. Provide technical documentation for both clients and in-house IT personnel. Propose, strategize and implement production and quality processes improvements/re-design with effective operational improvement plan. Participate in planning and modifying IT product configurations to meet client needs. Create and maintain product content modelling as it related to client requirements.

**E. Oversee and Monitor Progress of IT Solutions Ordered By/Sold to Clients
(Approximately 5 hours per week = 12.5%)**

Act as de facto Project Manager for creation of custom IT solutions and modifications of existing products for customers. Participate in design and configuration process, and help oversee roll-out from planning through debugging and deployment. Provide liaison between in-house IT professionals and client personnel to resolve technical questions and problems, explain technology issues and answer technology questions, and to keep clients abreast of progress of IT product orders.

**F. Post-Sales/Installation Follow-Up
(Approximately 5 hours per week = 12.5%)**

Respond to technical questions regarding [the Petitioner's] IT product after deployment. Identify additional integration opportunities to increase sales in professional services and be able to articulate a consistent integration strategy with customers. Provide and/or oversee technical support and services to clients or other staff members regarding the use, operation, and maintenance of deployed IT

solutions, and resolve technical issues that arise. Diagnose client problems with installed IT product, and work with in-house IT professionals to resolve technical problems. Assure completeness and currency of product documentation and arrange for instruction and training. Identify additional integration opportunities to increase sales in professional services. Manage customer relationship through a successful integration. Assist in assignment of company personnel, including support, service, and management resources, in order to meet account performance objectives and customer expectations.

The Petitioner also stated that “the vast majority of the job duties described above are [*sic*] duties that require substantial technical expertise, which would normally be acquired only by completion of university studies in an applicable tech-related major, or by equivalent combination of education and experience.”

A. Analysis

Upon review of the record of proceedings, we find that there are inconsistencies and discrepancies in the petition and supporting documents, which lead us to question the services the Beneficiary will perform, as well as the actual nature and requirements of the proffered position. When a petition includes numerous discrepancies, those inconsistencies will raise concerns about the veracity of the Petitioner’s assertions.

For example, the Petitioner has provided inconsistent information regarding the Beneficiary’s work site. For instance, on the Form I-129 in Part 5, item 5, the Petitioner provided the following information:

Will the beneficiary work off-site? No Yes

However, on the Form I-129, H Supplement on page 19, the Petitioner indicated the following:

Part D. Off-Site Assignment of H-1B Beneficiaries

No Yes a. The beneficiary of this petition will be assigned to work at an off-site location for all or part of the period for which H-1B classification is sought.

No explanation for this variance was provided.

In addition, the Petitioner has provided inconsistent information regarding the educational requirement for the proffered position. For instance, in the support letter, the Petitioner stated that the proffered position requires a bachelor’s degree or equivalent and “the preferred degree is in the Engineering or Computer Science areas or some related discipline.” However, in response to the RFE, the Petitioner stated that the duties of the proffered position “require substantial technical

expertise, which would normally be acquired only by completion of university studies in an applicable tech-related major, or by equivalent combination of education and experience.” In addition, in the same letter, the Petitioner stated that the position “requires a high degree of sophistication in Computer/Information Technology, generally associated with attainment of a Bachelor’s degree or equivalent in Computer Science, Information Technology or a related discipline[.]” No explanation for these inconsistencies was provided.

“[I]t is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence.” *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the Petitioner submits competent objective evidence pointing to where the truth lies. *Id.* at 591-92

Furthermore, the Petitioner stated on the Labor Condition Application (LCA) that the proffered position falls under the “Marketing Research Analysts and Marketing Specialists” occupational category – SOC (ONET/OES) code 13-1161. In response to the RFE, the Petitioner claimed that “although the job duties on the whole are most akin to Market Research Analyst, they are also akin to the job title of Sales Engineer.” On appeal, the Petitioner states that “the position in this case defies easy categorization or compartmentalization, and bears similarities to the position of Sales Engineer, O*NET/SOC Code 41-9031.00.”²

While these occupational categories may have some general duties in common, they are distinct and separate occupational categories. When the duties of the proffered position involve more than one occupational category, the U.S. Department of Labor (DOL) provides guidance for selecting the most relevant Occupational Information Network (O*NET) code classification. The “Prevailing Wage Determination Policy Guidance” by DOL states the following:

In determining the *nature of the job offer*, the first order is to review the requirements of the employer’s job offer and determine the appropriate occupational classification. The O*NET description that corresponds to the employer’s job offer shall be used to identify the appropriate occupational classification If the employer’s job opportunity has worker requirements described in a combination of O*NET occupations, the NPWHC should default directly to the relevant O*NET-SOC occupational code for the highest paying occupation. For example, if the employer’s job offer is for an engineer-pilot, the NPWHC shall use the education, skill and experience levels for the higher paying occupation when making the wage level determination.

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.

² On appeal, the Petitioner submitted unpublished decisions in support of its claim that the position of “Sales Engineer” is a specialty occupation.

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Thus, if the Petitioner believed its position was described as a combination of occupations, then according to DOL guidance, the Petitioner should have chosen the relevant occupational code for the highest paying occupation. The Level 2 prevailing wage for “Market Research Analysts and Marketing Specialists” is significantly lower than the Level 2 prevailing wage for “Sales Engineers.” For instance, at the time the Petitioner’s LCA was certified, the Level 2 prevailing wage for “Sales Engineers” in [REDACTED] Minnesota) was \$37.94 per hour and for [REDACTED] California) was \$44.10 per hour, while the Level 2 prevailing wage for “Marketing Research Analysts and Marketing Specialists” in [REDACTED] Minnesota) was \$26.52 per hour and for [REDACTED] California) was \$26.99 per hour. Moreover, it is important to note that the offered wage of at least \$27.00 per hour to the Beneficiary is less than the prevailing wages of \$30.39 per hour and \$34.40 per hour for the “Sales Engineer” occupational category.

Under the H-1B program, a petitioner must offer a beneficiary wages that are at least the actual wage level paid by the Petitioner to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the application. *See* section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A).

As such, the Petitioner has not established (1) that it submitted a certified LCA that properly corresponds to the claimed occupation and duties of the proffered position; and (2) that it would pay the Beneficiary an adequate salary for his work, as required under the Act, if the petition were granted. These issues preclude the approval of the petition.

Moreover, the Petitioner claims that the proffered position falls within two occupational categories, but has not selected the occupational category with the highest prevailing wage in accordance with DOL guidance. Therefore, we cannot conclude that the petition and LCA accurately reflect the substantive nature of the work to be performed by the Beneficiary. We are therefore 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.

Accordingly, 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 as a specialty occupation.

III. BENEFICIARY QUALIFICATIONS

The Director also found that the Beneficiary would not be qualified to perform the duties of the proffered position if the job had been determined to be a specialty occupation. However, a beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the proffered position does not require a baccalaureate or higher degree in a specific specialty, or its equivalent. Therefore, we need not and will not address the Beneficiary's qualifications further, except to note that, if the proffered position did require a bachelor's or higher degree in a specific specialty closely related to its duties, the Petitioner has not demonstrated how the Beneficiary's education, which according to the educational evaluation submitted by the Petitioner is the foreign equivalent to a U.S. bachelor's degree in electrical engineering, would qualify him to perform its duties of the proffered position.

IV. CONCLUSION AND ORDER

In visa petition proceedings, it is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013) (citing *Matter of Brantigan*, 11 I&N Dec. 493, 495 (BIA 1966)). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of G-E-, Inc.*, ID# 15817 (AAO Mar. 18, 2016)