



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

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

MATTER OF E-C-O-T-

DATE: MAY 31, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, an online charter school, seeks to temporarily employ the Beneficiary as a “financial reporting specialist” 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 proffered position is not a specialty occupation.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the Director erred in finding that the proffered position is not a specialty occupation.

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). U.S. Citizenship and Immigration Services (USCIS) has 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 (5th Cir. 2000).

#### B. 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 contains unresolved inconsistencies that undermine the Petitioner’s claims regarding the nature and scope of the proffered position.<sup>1</sup>

The Petitioner listed the job title on the Form I-129, Petition for a Nonimmigrant Worker, as a “financial reporting specialist.” The labor condition application (LCA) submitted with the petition classified the proffered position under SOC code 43-3031, which is the occupational code for “Bookkeeping, Accounting, and Auditing Clerks.”<sup>2</sup>

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<sup>1</sup> The Petitioner submitted documentation to support 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.

<sup>2</sup> The Petitioner classified the proffered position at a Level II wage (the second 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 the DOL provides a description of the wage levels. A Level II wage rate is generally appropriate for positions for which the Petitioner expects the Beneficiary to have a good understanding of the occupation. This wage rate indicates that the Beneficiary will perform moderately complex tasks that require limited judgment. U.S. Dep’t of Labor, Emp’t & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://fldatacenter.com/download/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://fldatacenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf). A

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However, the proffered duties and minimum requirements for the position are not consistent throughout the record. For example, in its support letter dated March 27, 2015, the Petitioner describes the Beneficiary's day-to-day responsibilities as follows:

- Takes the lead in preparation of studies, reports, and analysis of budgets, forecasts, financial plans, governmental requirements, statistical reports, cash flow projects, and business forecasts for federal funds;
- Prepares financial reports that provide senior management with information on primarily a monthly basis but could be requested at other times as well, such as the balances by grant;
- Keeps supervisor and senior management aware of financial issues that could affect [the Petitioner] and provide financial data that illustrates the challenges;
- Works with the accounting department to correct any discrepancies, changes, or errors that are discovered when analyzing financial data;
- Provides assistance with the creation of Purchasing Request Forms and reimbursements with federal funds;
- Assists in the reconciliation of accounts, i.e. purchase order issued and checks paid;
- Assists in providing proper USAS coding to [the Petitioner's] employees and purchases when requested;
- Assists the Director of Federal Programs in the completion of grant applications, such as the CCIP, as needed;
- Assists the Director of Federal Programs in identifying cost savings; and
- Performs other financial analysis work as directed by the Director of Federal Programs.

In response to the request for evidence (RFE), the Petitioner expanded the duties and stated as follows:

[a]s indicated in the foregoing job description and discussion, after the filing of [this] H-1B petition, we increased the position's scope of responsibilities to include forecasting, monitoring, and analysis of not just federal "title" funds, but also of [REDACTED]. No other position [with the Petitioner] performs the same job duties at the same level as does the Financial Reporting Specialist.

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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.*

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Additionally, on appeal, the Petitioner submits a position description for the proffered position that changes the title from “financial reporting specialist” to “financial and compliance specialist” and describes the proffered duties as follows:

- Intermediate math functions, sometimes supporting outputs with written equations;
- Transfer mathematical understanding to Excel or similar worksheet presentations for analysis and to communicate complex information clearly;
- Study financial statements, monthly transactions and other data;
- Be able to perform funding and expense forecasts and create budgets based on those forecasts, such as salary and benefit budgeting; develop Excel models to keep track of business metrics, monitor and predict business growth, cash flow position and use of money;
- Find, understand, and apply laws that govern educational reporting outputs often gained through reading the Ohio Revised Code and state and federal guidelines surrounding financial and educational reports;
- Analyze large amounts of financial data that require knowing where to start with the analysis and being able to decipher what is pertinent versus what is noise;
- Present financial and business findings in summary format where the presentation involves making large amounts of data meaningful in a few bullet points.

On appeal, the Petitioner also submits an expert opinion letter from [REDACTED] at the [REDACTED] describes the proffered position as being principally responsible “for conducting financial analytics, financial reporting, forecasting and budgeting, and process improvements.” He also writes, “[t]he position should be viewed as a specialty occupation in the larger field of financial analysis, specializing in the particular sub-disciplines of financial reporting, budgeting, and accounting” and concludes that a “[b]achelor’s [d]egree is thus a standard minimum educational requirement for most financial and accounting analyst positions, such as the Financial Reporting Specialist at [the Petitioner].” In other words, [REDACTED] states that the proffered position is one of financial and accounting analyst positions.

It therefore appears that the proffered position has changed from the time of filing. As further evidence that the position no longer resembles the position initially proffered in this petition, we note that the advertisements submitted in support of the Petitioner’s claims that the advertised positions are similar to the one proffered here, are for “budget analysts” and “financial analysts.” The Petitioner, therefore, appears to assert on appeal that the proffered position should actually be classified as a financial or budget analyst, rather than a bookkeeping, accounting, and auditing clerk, as was indicated on the LCA.

If the Petitioner wants to revise the proffered position so that it is classified as a financial or business analyst, then it must file a new H-1B petition with a corresponding LCA. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. Further, on appeal, a petitioner cannot offer a new position to the beneficiary, or

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materially change a position's title, its level of authority within the organizational hierarchy, the associated job responsibilities, or the requirements of the position. See 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the Petitioner or Beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

Further, the Petitioner asserts throughout the record that the Beneficiary would have high-level, complex responsibilities, which appear inconsistent with the Level II (qualified) wage-level selected here. For example, the Petitioner claims that the Beneficiary will "take the lead in preparation of studies, reports, and analysis." In response to the RFE, the Petitioner stated that the financial reporting specialist "performs complex, specialized duties" "that are critical to its continued success." On appeal, [REDACTED] states that the position is a "financial management position." However, in designating the proffered position at a Level II wage level, the Beneficiary is only expected to perform moderately complex tasks that require limited judgment. The Petitioner's designation of the proffered position as a Level II position is inconsistent with these and other stated duties and responsibilities, and raises questions regarding the substantive nature of the proffered position.<sup>3</sup>

There are other discrepancies throughout the petition. Specifically, the Petitioner has provided inconsistent information regarding the minimum educational requirement for the proffered position. For example, on appeal, the Petitioner's revised position description states "a bachelor's degree in Finance, Economics, or Statistics is highly preferred and necessary to adequately perform the job duties." However, the letter from [REDACTED] states that a bachelor's degree in finance or accounting is a standard minimum requirement. We note that the Petitioner has added statistics to the degree fields relevant for this position and stated a "preference" rather than a "requirement" for a specific degree. No explanation for the variances was provided by the Petitioner. With the conflicting information provided regarding the minimum requirements, we cannot determine whether the proffered position requires at least a bachelor's degree in a specific specialty.

Based on all of the above reasons, including the changes in position title, duties, and minimum requirements, we find that the evidence of record is insufficient to establish the substantive nature of the work to be performed by the Beneficiary. The inability to establish the substantive nature of the work to be performed by the Beneficiary, which should be consistent from the time the petition was

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<sup>3</sup> The issue here is that the Petitioner's designation of this position as a Level II position undermines its claim that the position is relatively higher than other positions *within the same occupation*. Nevertheless, it is important to note that a Level II wage-designation does not preclude a proffered position from classification as a specialty occupation. In certain occupations (doctors or lawyers, for example), an entry-level position would still require a minimum of a bachelor's degree in a specific specialty, or its equivalent, for entry. Similarly, however, a Level IV wage-designation would not reflect that an occupation qualifies as a specialty occupation if that higher-level position does not have an entry requirement of at least a bachelor's degree in a specific specialty or its equivalent. That is, a position's wage level designation may be a consideration but is not a substitute for a determination of whether a proffered position meets the requirements of section 214(i)(1) of the Act.

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filed throughout the adjudication process, consequently 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 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.

## II. LCA DOES NOT CORRESPOND TO THE 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 issue should be addressed in any future proceedings.<sup>4</sup>

We find that the Petitioner has not submitted an LCA which corresponds to the petition. The LCA provided at the time of filing was certified for (1) a financial reporting specialist, (2) pursuant to SOC code 43-3031 for "Bookkeeping, Accounting, and Auditing Clerks," (3) within the ██████████ metropolitan statistical area (MSA) in Ohio, and (4) at a Level II prevailing wage of \$35,651 per year.

However, if the proffered position is in fact a financial analyst position, the prevailing wage for SOC code 13-2051, "Financial Analysts," within the ██████████ MSA, at a Level II is \$63,918 per year. Although the LCA was certified for the proper MSA, it does not appear correspond to the Petitioner's claimed proffered position of a financial analyst.

The LCA serves as the critical mechanism for enforcing section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). See *Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H-1B Visas in Specialty Occupations and as Fashion Models; Labor Certification Process for Permanent Employment of Aliens in the United States*, 65 Fed. Reg. 80,110, 80,110-11 (proposed Dec. 20, 2000) (to be codified at 20 C.F.R. pts. 655-56) (indicating that the wage protections in the Act seek "to protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring temporary foreign workers" and that this "process of protecting U.S. workers begins with [the filing of an LCA] with [DOL]."). According to section 212(n)(1)(A) of the Act, an employer must attest that it will pay a holder of an H-1B visa the higher of the prevailing wage in the

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<sup>4</sup> In reviewing a matter *de novo*, we may identify additional issues not addressed below in the Director's decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003) ("The AAO may deny an application or petition on a ground not identified by the Service Center.").

“area of employment” or the amount paid to other employees with similar experience and qualifications who are performing the same services. *See* 20 C.F.R. § 655.731(a); *Venkatraman v. REI Sys., Inc.*, 417 F.3d 418, 422 & n.3 (4th Cir. 2005); *Patel v. Boghra*, 369 F. App’x 722, 723 (7th Cir. 2010); *Michal Vojtisek-Lom & Adm’r Wage & Hour Div. v. Clean Air Tech. Int’l, Inc.*, No. 07-97, 2009 WL 2371236, at \*8 (Dep’t of Labor Admin. Rev. Bd. July 30, 2009). To permit otherwise may result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A), by allowing that petitioner to submit an LCA for a different occupation and at a lower prevailing wage than the one being petitioned for.

In this matter, the LCA certified for a Level II prevailing wage of \$35,651 per year for a bookkeeping, accounting, and auditing clerk when a certified LCA should have been submitted for a financial analyst position with a Level II prevailing wage at that time of \$63,918 per year. As such, the attested wage rate of \$40,000 per year on the Form I-129 is below the prevailing wage required for the proffered position.

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

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. Here, the Petitioner has not submitted a valid LCA that has been certified for the proper occupational classification, and the petition cannot be approved for this additional reason.

### III. CONCLUSION

As discussed, the evidence of record does not demonstrate: (1) that the proffered position is a specialty occupation; and (2) that the LCA corresponds to the petition. Consequently, the appeal will be dismissed.

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). Here, that burden has not been met.

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**ORDER:** The appeal is dismissed.

Cite as *Matter of E-C-O-T-*, ID# 17111 (AAO May 31, 2016)