

could continue to employ him in its Process Analyst position. PerformLaw is a Louisiana Limited Liability Company that provides services to law firms, including advising them on marketing, establishing and achieving goals, and strategic planning.

2. The H-1B visa classification allows highly skilled and educated foreign workers to work for U.S. employers in “specialty occupations”—that is, positions requiring the theoretical and practical application of a body of highly specialized knowledge, for which a bachelor’s or higher degree in a specific specialty is required.

3. PerformLaw’s Process Analyst position is within the market research analyst occupation. The position has two primary responsibilities: 1) building the marketing performance of PerformLaw’s clients; and 2) building PerformLaw’s own marketing capacity. As to the first, the Process Analyst must collect and format market research data to extract information; interpret the information to develop attorney and law firm marketing plans, workflows and processes for improving a law firm’s market performance; and recommend procedures to implement the plans and processes he develops. As to the second, the Process Analyst must conduct business analyses and develop marketing plans for PerformLaw to expand domestically and into the European market. PerformLaw requires that this employee have at least a bachelor’s degree in business administration with a marketing concentration because the job duties require the knowledge and application of marketing concepts, models and theories taught in the marketing classes that are part of the degree program.

4. In support of its petition, PerformLaw submitted a detailed job description, including specific duties and time-allocation percentages, and supporting evidence consisting of examples of articles the Process Analyst wrote, work product the Process Analyst prepared, and

three letters from professors with extensive academic and experiential expertise with market research analysis.

5. In denying PerformLaw's H-1B petition, Defendants disregarded substantial probative evidence detailing the job duties, their complexity and the correlation between the duties and PerformLaw's requirement that its Process Analyst hold at least a bachelor's degree in business administration with a marketing concentration.

6. Defendants acted in an arbitrary and capricious manner and contrary to law in denying PerformLaw's H-1B petition. As such, the Court should vacate the denial and approve the H-1B petition.

JURISDICTION

7. This case arises under the INA, 8 U.S.C. § 1101 *et seq.* and the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.* This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction). This Court also has authority to grant declaratory relief under 28 U.S.C. §§ 2201-02, and relief under the APA. There exists between the parties an actual and justiciable controversy over which Plaintiff seeks declaratory and other nonmonetary relief to protect its legal rights. The United States has waived its sovereign immunity under 5 U.S.C. § 702.

VENUE

8. Venue in this judicial district is proper under 28 U.S.C. § 1391(e)(1)(A), because this is a civil action in which the Defendants, respectively, are an agency of the United States and an officer of the United States acting in his official capacity, and they reside in this District.

EXHAUSTION OF REMEDIES

9. Defendant U.S. Citizenship and Immigration Services' (USCIS) November 23, 2018 denial of Plaintiff PerformLaw's H-1B petition constitutes final agency action under the APA. *See* 5 U.S.C. §§ 551(13); 701(b)(2); 704. Neither the INA nor implementing regulations at 8 C.F.R. § 103.3(a) require an administrative appeal of the denial. Accordingly, Plaintiff has no administrative remedies to exhaust.

PARTIES

10. Plaintiff PerformLaw, a limited liability company established in 2003, helps small- and mid-sized law firms improve their operations in order to build market share. PerformLaw's consulting approach includes analyzing and developing or revising operational processes such as marketing and business development, financial management and accounting, attorney development, and transition planning.

11. Defendant USCIS is a component of the Department of Homeland Security, 6 U.S.C. § 271, and an "agency" within the meaning of the APA, 5 U.S.C. § 551(1). USCIS is responsible for the adjudication of immigration benefits, including nonimmigrant visa petitions. USCIS denied the H-1B petition at issue here.

12. Defendant L. Francis Cissna is the Director of USCIS. In this role, he oversees the adjudication of immigration benefits, and establishes and implements governing policies. He has ultimate responsibility for the adjudication of Plaintiff PerformLaw's H-1B petition and is sued in his official capacity.

LEGAL BACKGROUND

H-1B Petition Process

13. Section 101(a)(15)(H)(i)(b) of the INA provides for the admission into the United States of temporary workers sought by petitioning U.S. employers to perform services in a specialty occupation. 8 U.S.C. § 1101(a)(15)(H)(i)(b). This nonimmigrant classification is commonly referred to as “H-1B.”

14. A “specialty occupation” is one that requires the “(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.” 8 U.S.C. § 1184(i).

15. The H-1B classification has several prerequisites a U.S. employer must meet before filing a nonimmigrant visa petition with USCIS. Relevant here, the statute requires that the employer file a Labor Condition Application (LCA) for certification by the U.S. Department of Labor (DOL). 8 U.S.C. § 1182(n)(1). The employer makes certain attestations in the LCA which are intended to ensure that the employment of an H-1B worker will not have an adverse effect on the wages and working conditions of similarly-situated U.S. workers. *See* 8 U.S.C. §§ 1182(n)(1)(A)-(D).

16. To demonstrate to DOL that it will pay the higher of the prevailing or actual wage (the required wage) for its job, the employer may obtain a prevailing wage from a DOL online wage library, using a Standard Occupational Classification (SOC) for the job, the job location and one of four wage levels depending on the employer’s education and experience requirements. For its Process Analyst job, PerformLaw selected SOC 13-1161, which is the occupational classification for market research analysts and marketing specialists.

17. When a U.S. employer files an H-1B nonimmigrant visa petition with USCIS on behalf of a foreign national, the employer must include the DOL-certified LCA. If the foreign national is already in the United States in a different nonimmigrant visa status—such as Mr. Sander, who was in “F-1” student status (8 U.S.C. 1101(a)(15)(F)(i))—the petitioning employer may designate in the petition that the foreign national is requesting a change of status to H-1B and an extension of his stay in the United States.

H-1B Lottery

18. Congress established a “cap” of 65,000 regular H-1B visa numbers per fiscal year (FY). *See* 8 U.S.C. § 1184(g)(1). An additional 20,000 H-1B visa numbers are available each FY without regard to the regular 65,000 cap if the beneficiary has a master’s or higher degree from a U.S. university. *See* 8 U.S.C. § 1184(g)(5)(C). USCIS has characterized the 20,000 additional visa numbers as the H-1B “master’s exemption.”

19. The filing period for H-1B petitions subject to the cap begins on the first business day of April each fiscal year. The petitions submitted at that time are for employment that will begin the following October 1 (the first day of the next FY). If, within the first five business days of April, USCIS determines that it has received more than enough H-1B petitions to meet the “master’s exemption” and the statutory cap, it uses a computer-generated random selection process (lottery) to select which of the submitted H-1B petitions it will adjudicate.

H-1B Requirements

20. For an H-1B classification, USCIS determines whether the petitioning employer’s job qualifies as a specialty occupation and whether the beneficiary is qualified to perform the job duties required by the specialty occupation. *See* 8 C.F.R. §§ 214.2(h)(4)(i)(A)(1), (h)(4)(iii)(B)(3).

21. The agency regulation provides:

(A) Standards for specialty occupation position. To qualify as a specialty occupation, the 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 are [*sic*] 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)(1)-(4).

FACTUAL ALLEGATIONS

Plaintiff PerformLaw

22. Plaintiff PerformLaw has been advising small- and medium-sized U.S. law firms since 2003. In addition to strategy consulting, PerformLaw offers tactical-level consulting to establish productive firm operations. PerformLaw develops applications to automate tactical processes, like implementing marketing plans and profitability analyses, to give a law firm a foundation for success in implementing strategies. By helping firms develop processes, such as a firm marketing plan and system, PerformLaw provides them with sustainable business systems. PerformLaw plans to expand its services domestically and to law firms in Europe.

Sander's Employment with PerformLaw

23. Mr. Sander, the beneficiary of PerformLaw's H-1B petition, is a highly-educated German citizen, who earned undergraduate and advanced degrees in the United States. He received a Bachelor of Science degree in Business Administration, with a major in International

Business, in May 2015 from Elon University, in North Carolina. He received his MBA, with a concentration in Marketing in May 2017 from the University of New Orleans.

24. Mr. Sander began working for PerformLaw as a Process Analyst in January 2018, while he was in F-1 student status with employment authorization that USCIS approved for “post-completion” optional practical training (referring to Mr. Sander’s completion of his MBA degree). Mr. Sander’s work authorization in F-1 student status continued through September 30, 2018, at which point he ceased working for PerformLaw in the United States. Mr. Sander intends to resume his employment in the United States as a Process Analyst with PerformLaw if USCIS approves PerformLaw’s H-1B petition.

PerformLaw’s H-1B Petition

25. In April 2018, PerformLaw properly submitted its H-1B petition for consideration as a “master’s exemption” petition. Included with this petition was a request to change Mr. Sander’s status from F-1 student to H-1B and to extend his stay in the United States. PerformLaw filed the H-1B petition because it had made an investment in Mr. Sander and wanted to continue benefiting from his contributions to PerformLaw’s operations. Pursuant to its lottery, USCIS randomly selected PerformLaw’s petition and, on or about April 12, 2018, accepted PerformLaw’s H-1B petition for filing.

26. In support of its H-1B petition, PerformLaw included, among other evidence, a March 30, 2018 letter that described the Process Analyst job duties in detail and Mr. Sander’s educational credentials (diplomas and transcripts).

27. On July 2, 2018, Defendant USCIS issued a request for evidence (“RFE”). USCIS claimed that PerformLaw had not met any of the regulatory criteria to qualify for a specialty

occupation. The RFE included suggestions as to the type of evidence that PerformLaw could include to establish each of the regulatory criteria.

28. PerformLaw's timely RFE response demonstrated that the Process Analyst position fell within a specialty occupation. Relevant here, PerformLaw demonstrated that its position: 1) normally requires at least a bachelor's degree in business administration with a marketing concentration at the entry level; 2) has a degree requirement common to the industry in parallel positions among firms that provide marketing consulting services to law firms; 3) is so complex that it can be performed only by an individual with at least a bachelor's degree in business administration with a marketing concentration or focus; and 4) requires specific duties, the nature of which is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a bachelor's or higher degree. PerformLaw thus demonstrated that the position was within a specialty occupation pursuant to 8 C.F.R. §§ 214.(h)(4)(iii)(A)(1), (2) (both prongs), and (4). Any of these, standing alone, demonstrated that the position is a specialty occupation.

29. PerformLaw included in its response to the RFE a 16-page expanded description of the 14 job duties—many of which included several subparts—identified in its initial letter, including percentages of time for various duties, and connected the components of the job duties to specific marketing courses and the respective theories, concepts, and methods applied to perform the duties. PerformLaw also included, examples of the Process Analyst's work product generated as part of each duty.

30. As an example of the level of complexity involved in the various job duties, the first, constituting 20 percent of the Process Analyst's time, is: "Analyze marketing performance, present marketing insights and develop strategic individual and organizational marketing plans

for clients.” PerformLaw then provided 11 specific components of this duty, connecting each component to the application of theories, concepts and methods acquired in marketing courses.

Examples of two of the 11 specific components are:

- Analysis of marketing performance of individual attorneys and law firms based on metrics like client acquisition and retention cost, Customer Lifetime Value, Marketing Originated Revenue & Clients, Marketing Influenced Client, Leads generated & converted
 - The nature of this duty requires the understanding of various marketing performance metrics and key performance indicators, which are methods that are taught in classes such as Marketing Principles and Strategic Marketing Management (Bachelor of Business Administration or MBA program with a Marketing Concentration) while marketing data acquisition is taught in Marketing Research Methods (Bachelor of Business Administration or MBA program with a Marketing Concentration).
- Determination of marketing time and financial investment necessary to successfully implement the attorney’s or law firm’s marketing mix and allocation of hours and cost to individual activities according to budget codes.
 - The ability to calculate and estimate time and financial marketing investments necessary requires a comprehensive understanding of marketing budget development, the marketing mix strategy as well as qualitative and quantitative marketing research which are concepts taught as part of both Bachelor’s and Master’s in Business Administration programs in classes including marketing management, marketing principles and business strategy.

All 14 job duties, their subparts, and their components were similarly detailed.

31. PerformLaw submitted letters from three experts: Kyeong Sam Min, Ph.D., Sidney Baron Professor of Marketing, College of Business Administration, University of New Orleans, Lawrence L. Garber, Jr., Ph.D., Associate Professor of Marketing, Elon University, and Pamela A. Kennett-Hensel, Ph.D., Professor of Marketing and Chair, Department of Management and Marketing, University of New Orleans. Each submitted an extensive curriculum vitae, establishing their qualifications both academically and experientially, a syllabus for one or more marketing courses they taught, and a detailed description of the bases

for their opinions. Each letter discusses the marketing concepts, models and theories that the Process Analyst applies and the marketing and related coursework that prepares the Process Analyst to carry out the job duties. Two opine that a bachelor's degree is necessary to perform the job, while the third believes a masters' degree is required. Together, these opinions demonstrate that a bachelor's or higher degree in business administration, with a marketing concentration is required.

32. PerformLaw also illustrated how its Process Analyst applies the marketing concepts, methods, models and theories depicted in the experts' letters by including nine articles written by the Process Analyst. For eight of the articles, PerformLaw also excerpted salient points from the experts' letters that describe how the particular concept is applied in PerformLaw's consulting work with law firms.

33. PerformLaw also included numerous examples of documents prepared by the Process Analyst for PerformLaw's clients that specifically demonstrate the use of marketing concepts, methods, models and/or theories acquired through a bachelor's or higher degree in business administration with a marketing concentration. For a number of these, PerformLaw explained how the work product illustrated a point made by the experts.

34. Through its extensive and detailed evidence, PerformLaw demonstrated that the position of Process Analyst met the first, second (both prongs) and fourth regulatory tests for establishing that the position fell within a specialty occupation. 8 C.F.R.

§§ 214.2(h)(4)(iii)(A)(1), (2), and (4).

USCIS' Denial of PerformLaw's H-1B Petition

35. On November 23, 2018, Defendant USCIS denied PerformLaw's H-1B petition. *See* Exh. A.¹ The decision makes fundamental factual errors by ignoring ample record evidence and is based upon clear errors of law.

36. USCIS misrepresented PerformLaw's degree requirement as a "degree in Business Administration without further specialization or explanation." Exh. A at 4. USCIS ignored the detailed evidence showing that PerformLaw required at least a bachelor's degree in business administration *with a marketing concentration*, and that PerformLaw demonstrated the close correlation between the theories, concepts, and models acquired in college or post-graduate marketing courses and their application to the duties of the Process Analyst position. In its expanded job description submitted in response to the RFE, PerformLaw repeatedly referred to its marketing concentration requirement, including explaining the theoretical and practical application of the knowledge obtained through a business administration degree program with a marketing concentration.

37. USCIS misinterpreted and misapplied the regulatory test for determining whether the position fell within a specialty occupation, thus erroneously denying the petition under 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), and (4).

38. USCIS erred in finding that PerformLaw did not satisfy the first regulatory criterion, 8 C.F.R. § 214.2(h)(4)(iii)(A)(1). USCIS misinterpreted the Department of Labor (DOL) Occupational Outlook Handbook (OOH) entry for Marketing Research Analyst, erroneously concluding that it did not establish that the position "normally require a minimum of a bachelor's degree in a specific specialty." This conclusion ignores the OOH's clear

¹ This document contains redactions of personally identifiable information.

pronouncement that market research analysts “typically need a bachelor’s degree in market research or a related field”—exactly the requirement for the Process Analyst position. Exh. A at 5.

39. USCIS erred in finding that PerformLaw did not satisfy the second regulatory criterion, first prong, 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) (first prong). USCIS ignored substantial evidence that the degree requirement is common to the industry in parallel positions among similar organizations. First, USCIS discounted evidence from the Chief Executive Officer (CEO) of another firm that, like PerformLaw, provides marketing consulting services to law firms. After establishing his credentials, Jan Roos, CEO of CaseFuel, explained why small- and mid-sized law firms hire management consulting companies for their marketing expertise, and why market research analyst jobs at companies like PerformLaw require at least a bachelor’s degree in business administration with a marketing concentration. Second, USCIS ignored entirely letters from PerformLaw’s law firm clients explaining why they require the services of law firm management consultants like PerformLaw, and why market research analysts in these consulting companies require at least a bachelor’s degree in business administration with a marketing concentration. Third, USCIS erroneously disregarded substantial evidence as to the expert qualifications of three professors who submitted letters and ignored that the letters demonstrate why PerformLaw’s job duties require at least a bachelor’s degree in business administration with a marketing concentration.

40. USCIS erred in finding that PerformLaw did not satisfy the second regulatory criterion, second prong, 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) (second prong). First, USCIS misrepresented PerformLaw’s description of the job duties when it found that PerformLaw did “not sufficiently identify any tasks that are so complex or unique or provide sufficient explanation of why only an individual with a degree in a specific specialty could perform them.” Exh. A at 6.

Second, USCIS ignored the detailed supporting evidence documenting the complex nature of the job when it stated that PerformLaw failed to provide any further supporting evidence.

41. Third, USCIS erroneously imposed a nonexistent requirement, i.e., that PerformLaw demonstrate that its job is more complex or unique than other positions within the market research analyst occupation. Exh. A at 6. PerformLaw satisfied the regulation by showing that the “particular position is so complex or unique that it can be performed only by an individual with a degree.” 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

42. USCIS erred in finding that PerformLaw did not satisfy the fourth regulatory criterion, 8 C.F.R. § 214.2(h)(4)(iii)(A)(4). First, USCIS imposed a requirement not found in the regulation, namely, that PerformLaw had to demonstrate how the job duties “are more specialized and complex than those of other Market Research Analyst positions that are not usually associated with at least a bachelor’s degree in a specific specialty, or its equivalent.” Exh. A at 8. PerformLaw satisfied this criterion when it demonstrated “that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty.” *Id.*

43. Second, USCIS erred in finding that PerformLaw’s job description was insufficiently detailed to satisfy this criterion. USCIS ignored PerformLaw’s detailed description of the job duties and how the knowledge acquired through a bachelor’s or higher degree in business administration with a marketing concentration is applied to perform the duties. USCIS also ignored PerformLaw’s supporting evidence including examples of the Process Analyst’s work product and articles written by the Process Analyst and the three expert letters.

44. Under 5 U.S.C. §§ 702 and 704, Plaintiff PerformLaw has suffered a “legal wrong” and has been “adversely affected or aggrieved” by agency action for which there is no other adequate remedy of law.

45. Plaintiff PerformLaw has been deprived of Mr. Sander’s practical application of the theoretical knowledge he acquired in his course of study culminating in his MBA degree with a marketing concentration and his experience as its Process Analyst.

COUNT ONE

**Violation of the Administrative Procedure Act, 5 U.S.C. § 701, et seq.,
the Immigration and Nationality Act and its Implementing Regulations**

46. Plaintiff re-alleges and incorporates by reference, as if fully set forth herein, the allegations in paragraphs 1-45 above.

47. Plaintiff is entitled to review by this Court pursuant to 5 U.S.C. §§ 701-706.

48. A reviewing court shall “hold unlawful and set aside agency action . . . found to be—arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

49. Defendants denied Plaintiff PerformLaw’s H-1B petition solely on the ground that the evidence in the record was insufficient to establish that its Process Analyst position is a specialty occupation.

50. Plaintiff PerformLaw submitted evidence demonstrating that the position satisfied the statutory definition of a specialty occupation, 8 U.S.C. § 1184(i)(1)(A)-(B) and at least four of the regulatory criteria for demonstrating a specialty occupation where the plain language of the regulation requires only one to be met. 8 C.F.R. § 214.2(h)(4)(iii)(A)(1); (A)(2) (both prongs); (A)(4).

51. Defendants failed to properly consider all record evidence; reached factual conclusions as to these four regulatory criteria unsupported by any evidence in the record; misconstrued the applicable regulations; impermissibly imposed evidentiary requirements beyond those required by Congress; and erroneously concluded that Plaintiff PerformLaw had not demonstrated that the Process Analyst position fell within a specialty occupation.

52. Defendants' errors, singly and in combination, were arbitrary, capricious and in violation of the law. Consequently, Defendants acted arbitrarily, capriciously, and contrary to the law in violation of the APA, the INA, and the immigration regulations by denying Plaintiff PerformLaw's H-1B petition.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff requests that this Court:

1. Declare that Defendants' determination that Plaintiff PerformLaw had not established that the Process Analyst position is in a specialty occupation was arbitrary and capricious and not in accordance with law in violation of the APA, 5 U.S.C. § 706(2)(A), the INA and the regulations;
2. Vacate the denial of PerformLaw's H-1B petition and remand this matter to Defendants with instructions that, within ten days of the date of the Court's Order, they approve the Form I-129, Petition for Nonimmigrant Worker filed by Plaintiff PerformLaw, valid until and including September 15, 2021;
3. Award reasonable attorneys' fees and costs pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(d), 5 U.S.C. § 504, or any other applicable law; and

4. Grant such other relief as the Court deems just, equitable and proper.

Dated: May 16, 2019

Respectfully submitted,

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