U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 20509948

Date: AUG. 5, 2022

Appeal of Nebraska Service Center Decision

Form I-129, Petition for a Nonimmigrant Worker (H-1B)

The Petitioner, a retail pharmacy, seeks to temporarily employ the Beneficiary as a "regulatory and compliance analyst" under the H-1B nonimmigrant classification for specialty occupations. 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 Nebraska Service Center denied the petition, concluding that the record did not establish that the labor condition application (LCA) corresponds to and supports the petition. On appeal, the Petitioner asserts that the Director's decision was in error.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). We review this matter *de novo*. *See Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon *de novo* review, we will dismiss the appeal.

I. POST-FILING MATERIAL CHANGE

Before addressing the basis upon which the Director denied the petition – her determination that the LCA does not correspond to and support the position – we will first address a more foundational deficiency that also precludes approval of this petition. Specifically, we conclude that the Petitioner's attempt at reclassifying the position under a different occupational category constitutes a post-filing material change, which is not permissible.

The Petitioner designated the proffered position on the LCA under the occupational category "Compliance Officers," corresponding to the Standard Occupational Classification (SOC) code 13-1041. According to the Department of Labor (DOL), this is a JobZone 3 occupation, requiring "medium preparation." DOL states that most JobZone 3 occupations require training in vocational schools, related on-the-job training, or an associate's degree. Emp't & Training Admin., U.S. Dep't

of Labor, Occupational Information Network (O*NET), Compliance Officers (2022), https://www.onetonline.org/link/summary/13-1041.00.

However, in response to the Director's request for additional evidence (RFE), the Petitioner stated that the proffered position aligns more closely with positions located within the "Regulatory Affairs Specialists" occupational category, corresponding to SOC code 13-1041.07. *Id.* at https://www.onetonline.org/link/summary/13-1041.07. This is a JobZone 4 occupation. *Id.* In contrast to JobZone 3 occupations, DOL states that most JobZone 4 occupations require a four-year bachelor's degree. *Id.*

Even if we were to accept for the sake of argument the Petitioner's assertion that the new occupational category is merely a subcategory of the original one, we would not be able to overlook the fact that the new occupational category is located within a higher JobZone. The Petitioner's attempt at relocating the proffered position from a JobZone 3 occupational category into a JobZone 4 occupational category, post-filing, was not permissible. Doing so was not a mere clarification of the position's nature. It was instead an attempt to materially alter the nature of the position, which is not permitted in the H-1B program.

The purpose of an RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to an RFE, the Petitioner cannot offer a new position to the Beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, its associated job responsibilities, or the requirements of the position. The Petitioner must establish that the position offered to the Beneficiary when the petition was filed merits classification for the benefit sought. *See Matter of Michelin Tire Corp.*, l7 I&N Dec. 248, 249 (Reg'l Comm'r 1978). If significant changes are made to the initial request for approval, the Petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the Petitioner in its response to the Director's RFE did not clarify or provide more specificity to the original duties of the position, but rather changed it from a JobZone 3 position to a JobZone 4 position. This is not permissible, and the petition will be denied on this basis alone.

Having made this initial determination, we will now turn to the basis upon which the Director denied the petition: her conclusion that the record is not sufficient to establish that the LCA corresponds to and supports the H-1B petition.

II. THE LCA

As noted, the Director concluded that the record did not establish that the LCA corresponds to and supports the petition. The purpose of the LCA wage requirement is "to protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring temporary foreign workers." *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 "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).

A petitioner submits the LCA to the Department of Labor (DOL) to demonstrate 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 duties, experience, and qualifications. Section 212(n)(1) of the Act; 20 C.F.R. § 655.731(a). While DOL certifies the LCA, U.S. Citizenship and Immigration Services (USCIS) determines whether the LCA's content corresponds to the H-1B petition. *See* 20 C.F.R. § 655.705(b); *Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542, 546 n.6 (AAO 2015); *ITServe Alliance, Inc. v. Dep't of Homeland Sec.*, --- F Supp. 3d. ---, 22 WL 493081, at *10 (D.D.C. Feb. 17, 2022).

The Petitioner's attempt at a post-filing relocation of the proffered position from a JobZone 3 occupational category into JobZone 4 was discussed above. The Director denied the petition, concluding that the LCA did not correspond to and support the petition because "the LCA submitted with this petition is certified by the Department of Labor for SOC 13-1041.00 and not subset 13-1041.07." On appeal, the Petitioner argues that the Director erred because the prevailing wage for both compliance officers and regulatory affairs specialists is the same. The Petitioner further argues that because regulatory affairs specialists are a subcategory of compliance officers, the LCA still corresponds to and supports the petition.

We will first address the Petitioner's argument that the two occupational categories share a prevailing wage. While that is ostensibly true, that broad assertion ignores the nuanced interplay between prevailing wage levels, JobZone designations, and the minimum requirements of the H-1B program. In other words, we do not agree that the prevailing wages for the two occupational categories are *de facto* the same for purposes of the H-1B petition before us.

The minimum requirements of JobZone 3 and JobZone 4 occupations were discussed above, and DOL set forth the mechanism for determining LCA prevailing wage levels in a 2009 document. *See generally* Emp't & Training Admin., U.S. Dep't of Labor, *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009) (providing a process by which to determine a position's wage level). That document provides a 5-step process by which to determine a position's wage level, and part of that process is to consider an occupational category's minimum requirements as set forth in O*NET.

In order to qualify for classification as a specialty occupation, a position must require, at a minimum, a bachelor's degree in a specific specialty. Section 214(i) of the Act, 8 U.S.C. § 1184(i). As noted, JobZone 3 occupations do not carry that minimum entry qualification. JobZone 4 occupations, on the other hand, do. When it comes to selecting wage levels, application of the DOL guidance referenced above differs depending upon the JobZone. Consequently, even if the two categories carry the same prevailing wage overall, the wage levels of the specific *positions* would likely differ. The Petitioner

has resolved none of this. The record as currently constituted does not establish that the LCA corresponds to and supports the H-1B petition, and the Director's decision will stand.

III. ADDITIONAL ISSUES

Because each of the two issues identified above independently mandates denial of this petition, we will not explore in detail the additional issues we have identified on appeal. However, we will briefly address them here so that the Petitioner will be prepared to address them in any future H-1B filings.

First, the record as currently constituted does not establish the substantive nature of the position, which means we cannot determine whether it is a specialty occupation. We discussed the Petitioner's pivot from JobZone 3 to JobZone 4 above, which alone calls into question the actual, substantive nature of the position. However, we would have questions regarding the nature of the position even if we were to set that foundational deficiency aside.

The record does not establish that the proffered position's duties are in fact those of a regulatory affairs specialist. The Petitioner describes itself as a retail pharmacy with 3 employees, one of whom is the Beneficiary. We note that the Petitioner filed this petition as an amended petition, requesting an extension of the Beneficiary's H-1B status. USCIS records indicate that the Beneficiary's prior H-1B petition indicated she would provide the services of a regulatory and compliance officer, and that the Petitioner filed a corresponding LCA using the SOC code for pharmacists. According to DOL, the prevailing wage for pharmacists is approximately double that of a regulatory affairs specialist. Furthermore, government records indicate that the Petitioner filed a subsequent H-1B petition (which remains pending), and that the LCA associated with that petition uses the SOC code for positions located within the "Management Analysts," occupational category, and it designates the position at a wage level 1. Such positions carry a higher prevailing wage than either of the occupational categories the Petitioner has alternatively identified as appropriate here. The conflicting and varying use of different occupational categories filed on behalf of this Beneficiary raises significant credibility concerns. More importantly, the information creates ambiguity about the substantive nature of the proffered position because the job duties associated with these various occupational categories vary greatly.

Moreover, given the Petitioner's relatively small size – three employees – we have questions regarding the Beneficiary's chain of command, both upward and downward. Some of the occupational categories designated by the Petitioner require supervision, while others entail the Beneficiary supervising others. The record as currently constituted is unclear as to who the Beneficiary would supervise, or by whom she would be supervised. This ambiguity raises additional questions as to the position's actual, substantive nature. Again, this makes it impossible for us to determine whether the position is a specialty occupation. It also raises yet more questions as to the appropriate wage.

As we have previously stated, to determine whether the Beneficiary will be employed in a specialty occupation, we look to the record to ascertain the services the Beneficiary will perform and whether such services require the theoretical and practical application of a body of highly specialized knowledge attained through at least a bachelor's degree or higher in a specific specialty or its equivalent. Without sufficient evidence regarding the duties the Beneficiary will perform, we are unable to determine whether the Beneficiary will be employed in an occupation that meets the statutory

and regulatory definitions of a specialty occupation and a position that also satisfies at least one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). The services the Beneficiary will perform in the position determine: (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. 8 C.F.R. § 214.2(h)(4)(iii)(A).

Next, if the Petitioner were ever able to successfully establish the substantive nature of the position, and that it is indeed a specialty occupation requiring the attainment of a bachelor's degree (or its equivalent) in a specific specialty, there would be questions as to how the Beneficiary's foreign degree (equated to a U.S. bachelor's degree in pharmaceutical sciences) would qualify her to perform the work described in the petition. The Beneficiary's transcript does not contain a single course on regulatory or compliance management or U.S. health care privacy laws, which appear to be a major aspect of the proffered positions duties. However, the Beneficiary's qualifications to perform the position's duties will become relevant only if and when the position is found to be a specialty occupation. *Matter of Michael Hertz Assocs.*, 19 I&N Dec. 558, 560 (Comm'r 1988) ("The facts of a beneficiary's background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation].").

Finally, we point out that USCIS's recent policy change concerning deference to prior approved petitions is not applicable here because the policy concerns extension requests for petitions filed with the same facts as the original petition. 2 *USCIS Policy Manual* A.4(B)(1), https://www.uscis.gov/policymanual; *see also* USCIS Policy Alert, PA-2021-05, *Deference to Prior Determinations of Eligibility in Requests for Extensions of Petition Validity* (Apr. 27, 2021), https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20210427-Deference.pdf. That is certainly not the case here; the Petitioner has elected to file this request as an amended petition. Because this is not such a petition, there is no prior approval to which we could defer.

IV. CONCLUSION

The Petitioner has not established that it is more likely than not that the LCA corresponds to and supports the H-1B petition, and the appeal must therefore be dismissed. The Petitioner's attempt to materially alter the petition after its filing further mandates the petition's denial. We have also identified shortcomings which, while not grounds for denial here, should be resolved in any future H- 1B filings.

Accordingly, 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. The Petitioner has not met that burden under section 214(i)(1) of the act or under any of the four criteria found in 8 C.F.R. § 214.2(h)(4)(iii)(A).

ORDER: The appeal is dismissed.