U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 20583575

Date: FEB. 16, 2022

Appeal of Nebraska Service Center Decision

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

The Petitioner seeks to employ the Beneficiary 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 Nebraska Service Center Director denied the Form I-129, Petition for a Nonimmigrant Worker, concluding that the record did not establish that the U.S. Department of Labor's (DOL) ETA Form 9035 & 9035E, Labor Condition Application for Nonimmigrant Workers (LCA) corresponded with and supported the H-1B petition. The matter is now before us on appeal. 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 the questions in 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 conclude that a remand is warranted in this case.

I. LEGAL FRAMEWORK

The purpose of the DOL's 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]."). *See also Aleutian Cap. Partners, LLC v. Scalia*, 975 F.3d 220, 231 (2d Cir. 2020) (quoting 20 C.F.R. § 655.0 and finding that a primary goal of U.S. non-immigrant foreign worker programs like the H-1B Program is to ensure that "the employment of the foreign worker in the job opportunity will not adversely affect the wages or working conditions of similarly employed U.S. workers.").

The LCA also serves to protect H-1B workers from wage abuses. A petitioner submits the LCA to DOL 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 duties, experience, and qualifications. Section 212(n)(1) of the Act; 20 C.F.R. § 655.731(a).

Before filing a petition for H-1B classification, the regulation requires petitioners to obtain certification from DOL that the organization has filed an LCA in the occupational specialty in which its foreign national personnel will be employed. 8 C.F.R. § 214.2(h)(4)(i)(B)(*1*). Furthermore, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(*2*) provides that a petitioner must state that it will comply with the terms of the LCA. While DOL certifies the LCA, USCIS determines whether the LCA's attestations and content corresponds with and supports the H-1B petition. *See* 20 C.F.R. § 655.705(b).[1] *See also Matter of Simeio Solutions*, 26 I&N Dec. 542, 546 n.6 (AAO 2015). USCIS may consider DOL regulations when adjudicating H-1B petitions. *See Int'l Internship Programs v. Napolitano*, 853 F. Supp. 2d 86, 98 (D.D.C. 2012), *aff'd sub nom. Int'l Internship Program v. Napolitano*, 718 F.3d 986 (D.C. Cir. 2013).

Furthermore, the Act prescribes DOL's limited role in reviewing LCAs stating that "[u]nless the [DOL] Secretary finds that the application is incomplete or obviously inaccurate, the Secretary shall provide the certification . . . ." Section 212(n)(1)(G)(ii) of the Act. USCIS precedent also states:

> DOL reviews LCAs "for completeness and obvious inaccuracies" and will certify the LCA absent a determination that the application is incomplete or obviously inaccurate. Section 212(n)(1)(G)(ii) of the Act. In contrast, USCIS must determine whether the attestations and content of an LCA correspond to and support the H-1B visa petition.

Simeio Solutions, 26 I&N Dec. at 546 n.6. It is unclear how USCIS is to carry out its responsibilities to determine whether the LCA corresponds with and supports the H-1B petition without performing such a review. To illustrate, by simply submitting the LCA to DOL without also obtaining a prevailing wage determination, a petitioner has only received DOL's certification that the form is complete and does not contain obvious inaccuracies. *Simeio Solutions*, 26 I&N Dec. at 546 n.6. In fact, the DOL "is not generally permitted to investigate the veracity of the employer's attestations on the LCA prior to certification." *Aleutian Cap. Partners, LLC*, 975 F.3d at 225–26 (quoting *Cyberworld Enter. Techs., Inc. v. Napolitano*, 602 F.3d 189, 193 (3d Cir. 2010)). Further, when DOL certifies an LCA, it does not perform any meritorious review of an employer's claims to ensure the information is true. DOL's Office of Inspector General, 06-21-001-03-321, *Overview of Vulnerabilities and Challenges in Foreign Labor Certification Programs* 11 (2020) (describing the DOL Employment and Training Administration's role as "simply rubber-stamping during the application certification process"). In

[1] "In construing a statute or regulation, we begin by inspecting its language for plain meaning." *Sullivan v. McDonald*, 815 F.3d 786, 790 (Fed. Cir. 2016) (quoting *Meeks v. West,* 216 F.3d 1363, 1366 (Fed.Cir.2000)). "[W]e attempt to give full effect to all words contained within that statute or regulation, thereby rendering superfluous as little of the statutory or regulatory language as possible." *Sullivan*, 815 F.3d at 790 (quoting *Glover v. West,* 185 F.3d 1328, 1332 (Fed.Cir.1999)). The most basic canon of statutory—as well as regulatory—construction consists of interpreting a law or rule by examining the literal and plain language. *See Carbon Fuel Co. v. USX Corp.*, 100 F.3d 1124, 1133 (4th Cir. 1996). The inquiry ends with the plain language as well, unless the language is ambiguous. *United States v. Pressley*, 359 F.3d 347, 349 (4th Cir. 2004).

other words, it did not receive an evaluative determination from DOL on whether the LCA's content and the specifics were appropriate and accurate.

In order to determine whether the "attestations and content" (e.g., the standard occupation classification (SOC) code and the wage level) as represented on the LCA corresponds with the information pertaining to the proffered position as represented on the Form I-129, we follow DOL's guidance, which provides a five-step process for determining the appropriate SOC code and wage level. See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009) (DOL guidance), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_ Guidance_Revised_11_2009.pdf. An employer "reaffirms its acceptance of all of the attestation obligations by submitting the LCA to [USCIS] in support of the Petition for Nonimmigrant Worker, Form I-129, for an H-1B nonimmigrant." 20 C.F.R. § 655.705(c)(1). When comparing the SOC code or the wage level indicated on the LCA to the claims associated with the petition, USCIS does not purport to supplant DOL's responsibility with respect to wage determinations. There may be some overlap in considerations, but USCIS' responsibility at its stage of adjudication is to ensure that the content of the DOL-certified LCA "corresponds with" the content of the H-1B petition.

In summary, when filing an LCA and an H-1B petition, a petitioner subjects itself to two authorities as it relates to the LCA: (1) to DOL through the certification process, or through a prevailing wage determination, and (2) to USCIS by way of our authority to ensure that the LCA corresponds with and supports the petition.

II. ANALYSIS

The Petitioner initially offered the position's description with eight bullet points and provided additional details relating to each duty in response to the Director's request for evidence. For the sake of brevity, we will not quote all of the duties; however, we note that we have closely reviewed and considered them.

The DOL provides guidance explaining that a job's SOC code is identified by selecting the Occupational Information Network (O*NET) job description "that most closely matches the employer's request" from a list of similar occupations. The DOL guidance further provides that the selection of the SOC code should not be based solely on the title of the employer's job offer, but instead what should be considered are the particulars of the employer's job offer in a comparison of the full description to the tasks, knowledge, and work activities generally associated with an SOC occupation to ensure the most relevant occupational code has been selected. Therefore, the selection of the correct SOC code should be based on the position requirements and how those compare with the identified areas of the O*NET. Upon review of the record, we have determined that the majority of the duties align with the SOC code the Petitioner selected when it filed the LCA with DOL. Therefore, we remand the matter to the Director to consider any remaining eligibility requirements.

One eligibility requirement the Director may wish to address is whether the Petitioner specified the correct wage level on the LCA. In particular, we note that the Petitioner included duties requiring specialized knowledge and expertise elements that appear to go beyond those listed in the O*NET for the Business Intelligence Analysts occupation. As the Director noted, those included special knowledge that were

more akin to Software Developers under the SOC code 15-1252. Step four of the DOL guidance provides that when an employer's requirements are not listed in the O*NET for the selected SOC code, then the requirements should be evaluated to determine if they represent special skills. If the specific skills the employer requires are generally encompassed by the O*NET description, increasing the wage level may not be necessary. However, if the requirements are indicators of skills that are beyond those of an entry level worker, for the specified SOC code, this may necessitate adding a point to the worksheet thereby elevating the wage level by one increment.

Additionally, the Office of Foreign Labor Certification's (OFLC) Frequently Asked Questions and Answers—under question nine—provide additional guidance associated with skills that are atypical to an occupation stating: "Any required skills in addition to those listed in O*NET are considered atypical for the occupation and . . . will raise the wage level by one level either because it contains a combination of occupations or because it contains job requirements not normal to the occupation." *OFLC Frequently Asked Questions and Answers*, United States Department of Labor Employment & Training Administration (Feb. 16, 2022), https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm.

Because the Petitioner's raised the issue on appeal that the duties in question were not identified within the Director's decision to deny the petition, we will discuss them below. The following three position duties are seemingly atypical to the Business Intelligence Analysts occupation and align with the Software Developers SOC code, which would require increasing the wage rate to a Level II:

- Apply knowledge of software development and a variety of programming languages to build database traffic with suppliers' inventory systems to allow management to view current and historical information on the corporation's internal website in order to make informed strategic decisions;
- Utilize software development and a variety of programming languages to build real time and interactive hourly, daily, device, web traffic, Path Analysis, etc. dashboard to visualize performance and provide data driven insights to better understand customer; and
- Build high quality SQL database to house and analyze sales and marketing data, conduct thorough database testing to ensure robustness, troubleshoot system errors, and optimize performance.

The Petitioner designated a Level II wage rate on the LCA, which would account for these three duties. However, one additional duty that the Petitioner specified may be atypical to both the Business Intelligence Analysts and the Software Developers SOC codes. The Petitioner described that duty as:

- Utilize web development knowledge such as search engine optimization (SEO) and Google Analytics to create new web traffic rules, tags, and configurations to thoroughly track customer journey, customer retention, e-commerce, KPIs, trends, anomalies, and opportunities.

This skill apparently aligns with Search Marketing Strategists under the 13-1161.01 SOC code. If the Petitioner seemingly included responsibilities from two additional SOC codes beyond the code listed on the LCA, it may have been required to raise the wage level by two increments to a Level III. The Petitioner selected a Level II wage rate and indicated it would compensate the Beneficiary at an hourly rate of $55.00 or $114,400 annually. If the Director agrees that the above analysis is correct, the Petitioner should have designated the wage rate at a Level III, which would require compensation at the $66.04 hourly rate or $137,363 annually. That would result in an approximate $23,000 annual deficiency, which

would be contrary to the purpose of the LCA wage requirement (1) to protect U.S. worker's wages and eliminate any economic incentive or advantage in hiring temporary foreign workers, and (2) to protect H-1B workers from wage abuses. If the Director agrees with our above analysis, they should determine whether any opinion letters in the record that contain contrary conclusions should garner sufficient evidentiary value.

In summary, the Director should evaluate our foregoing analysis when considering whether the Petitioner satisfied the remaining eligibility requirements.

III. CONCLUSION

As the Petitioner was not previously accorded the opportunity to address the above, we will remand the record for further review of these issues. The Director may request any additional evidence considered pertinent to the new determination, and we do not express an opinion regarding the ultimate resolution of this case on remand.

ORDER: The decision of the Director is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis