U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 21181471

Date: MAY 5, 2022

Appeal of Vermont Service Center Decision

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

The Petitioner seeks to extend the Beneficiary's temporary employment 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 Vermont Service Center Director denied the Form I-129, Petition for a Nonimmigrant Worker on the following bases: (1) the offered position did not qualify as a specialty occupation; (2) the position was not supported by a U.S. Department of Labor (DOL) ETA Form 9035 & 9035E, Labor Condition Application for Nonimmigrant Workers (LCA) that corresponds with the entry-level position; and (3) the Beneficiary did not maintain her nonimmigrant status.[1] 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*. *Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon *de novo* review, we will remand the matter to the Director for further review of the record and issuance of a new decision.

I. LEGAL FRAMEWORK

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*). The purpose of 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

[1] The Director's denial decision addressed the Beneficiary's maintenance of status. However, there is no provision in the regulations for an appeal from a denial of a change of status and extension of stay request. *See* 8 C.F.R. §§ 214.1(c)(5), 248.3(g); *see also* DHS Delegation Number 0150.1 (effective March 1, 2003); 8 C.F.R. § 2.1 (2003). We therefore have no jurisdiction over that portion of this appeal and consequently will address neither (1) the Director's determination regarding the Beneficiary's status.

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). *See also Aleutian Cap. Partners, LLC v. Scalia*, 975 F.3d 220, 231 (2d Cir. 2020) (quoting 20 C.F.R. § 655.0(a)(1) 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). *See also 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.*, 2009 WL 2371236, at *8 (Dep't of Labor Admin. Rev. Bd. July 30, 2009).

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, U.S. Citizenship and Immigration Services (USCIS) "determines whether the petition is supported by an LCA which corresponds with the petition, whether the occupation named in the labor condition application is a specialty occupation . . . , and whether the qualifications of the nonimmigrant meet the statutory requirements for H-1B visa classification." 20 C.F.R. § 655.705(b). *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) ; *ITServe All., Inc. v. Dep't of Homeland Sec.*, No. 1:20-CV-03855 (TNM), 2022 WL 493081, at *10 (D.D.C. Feb. 17, 2022) (citing *Simeio Solutions*, 26 I&N Dec. at 546 n.6 and 20 C.F.R. § 655.705(b)); *United States v. Narang*, No. 19-4850, 2021 WL 3484683, at *1 (4th Cir. Aug. 9, 2021) (finding that USCIS adjudicators evaluate whether the employment proposed in an H-1B petition will conform to the wage and location specifications in the LCA); *Parzenn Partners, LLC v. Baran*, No. 19-CV-11515-ADB, 2020 WL 5803143, at *8–9 (D. Mass. Sept. 29, 2020) (finding that USCIS operates within its authority when it either considers or evaluates DOL's wage level regulation when determining if an LCA corresponds with and supports an H-1B petition).

In a similar vein, USCIS possesses the authority to evaluate whether the proffered position's duties are in accordance with the occupational classification on the LCA, and if not, to determine under which occupational titles the responsibilities correspond. *See GCCG Inc v. Holder*, 999 F. Supp. 2d 1161, 1167–68 (N.D. Cal. 2013) (in which the court agreed with USCIS that a large portion of the beneficiary's duties were most similar to those found within the Bookkeeping, Accounting, and Auditing Clerks occupation, rather than within the Accountants Standard Occupational Classificational (SOC) code.) Effectively, this reiterates the USCIS' ability to determine whether the LCA corresponds with and supports the petition.

"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).

Here, the plain language of the regulation is dispositive: USCIS is authorized to determine the corollary nature of the proffered position's elements as represented in an LCA when compared with those same elements as represented on the Form I-129, as well as the Petitioner's actual position requirements. And to clarify, USCIS does not purport to exercise any authority over the LCA. Instead, we are ensuring that the claims made on the LCA sufficiently align to those made within the H-1B petition.

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. *Id.*[2] In fact, 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 other words, employers do not receive an evaluative determination from DOL on whether the LCA's content and the specifics were appropriate and accurate.

[2] Employers my obtain a prevailing wage determination by taking the additional step of submitting Form ETA-9141 (Application for Prevailing Wage Determination) to DOL's National Prevailing Wage Center.

In order to determine whether the "attestations and content" (e.g., the 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.

Additionally, it is important for USCIS to ensure the employer has selected the SOC code on the LCA that most closely matches the proffered position for reasons that affect H-1B statutory and regulatory requirements. First, the wrong SOC code can direct USCIS to evaluate an inapplicable occupational title or occupation. It is the occupation itself that we evaluate to decide if it requires a "theoretical and practical application of a body of highly specialized knowledge," and "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." Section 214(i)(1) of the Act. Therefore, an incorrect SOC code could mean we would not be able to properly evaluate whether a petitioner has satisfied the statute's definition of a specialty occupation.

Second, we also cannot provide a proper analysis under two H-1B regulatory requirements. Those requirements fall under the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*), (*2*). 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*) requires a petitioner to demonstrate that a baccalaureate or higher degree—or its equivalent—is normally the minimum requirement for entry into the particular position. Because education requirements may differ markedly from one occupational classification to the next, the incorrect SOC code (e.g., occupational classification) can skew the analysis. Also, 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*) requires that the degree requirement is common to the industry in parallel positions among similar organizations. Because the degree requirement that is considered common to the industry for one occupation may also be distinct in comparison to others, USCIS must ensure the SOC code specified on the LCA is the one that most closely matches the position in the petition.

It is also important to ensure the correct wage level is specified on the LCA because even if an employer designates the correct SOC code and satisfies the H-1B related requirements, if the wage level is lower than the position's requirements warrant, USCIS still cannot approve the H-1B petition because employers are required to compensate H-1B workers at *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). Stated differently, were USCIS to allow an employer to compensate an H-1B worker at a wage level that is lower than the position's requirements warrant, it would not be

compensating that individual at the necessary prevailing wage, nor the actual wage it pays to similarly situated employees.

In summary, when filing an LCA and an H-1B petition, a petitioner subjects itself to two authorities: (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

While we conduct *de novo* review on appeal, we conclude that a remand is warranted in this case because the Director's decision appears insufficient for review. As noted above, the Director concluded that the Petitioner did not demonstrate that the proffered position qualifies as a specialty occupation, issues existed in its selection of the wage level on the LCA, and it did not establish that the Beneficiary maintained her previously accorded nonimmigrant status. We therefore are withdrawing the Director's decision and remanding the matter for further review of the record and issuance of a new decision.

A. LCA

Here, the Petitioner obtained an LCA certified under the SOC code, 23-1011 relating to "Lawyers." The DOL guidance states that "[t]he [Occupational Information Network (O*NET)] description that corresponds to the employer's job offer shall be used to identify the appropriate occupational classification" for determining the prevailing wage for the LCA. The O*NET reflects that the Lawyers occupation is classified in Job Zone 5 with a Specialized Vocational Preparation range of "8.0 and above" meaning that the occupation requires "[o]ver 4 years of preparation." The O*NET reflects that extensive preparation is needed under a Job Zone 5 classification and states that "[m]ost of these occupations require graduate school. For example, they may require a master's degree, and some require a Ph.D., M.D., or J.D. (law degree)." As the third step within DOL's five-step process we mentioned above, the DOL guidance describes the education generally associated with each professional occupation. Lawyers are assigned an education and training category relating to the "first professional degree" and the DOL guidance states: "Completion of the academic program usually requires at least 6 years of full-time equivalent academic study, including college study prior to entering the professional degree program."

When it filed the petition, the Petitioner indicated that the position required "at least a[] U.S. baccalaureate degree or its equivalent in Law or in a related field" for candidates to qualify as a lawyer for their organization. The Petitioner did not identify a U.S. institution of higher learning where candidates can earn a "baccalaureate degree or its equivalent in Law." They also made no mention of whether they require candidates to pass a state bar exam in order to practice law for their organization. The Director should determine whether the Petitioner's minimum acceptable position requirements are in line with those of the Lawyers occupation as described by the O*NET and whether the offered position can qualify for the SOC code designated on the LCA.

B. Specialty Occupation

When it filed the petition, the Petitioner provided the position's description and maintained that same description when it responded to the Director's request for evidence. Those duties consisted of the following:

> [P]repare affidavits or other documents, such as legal correspondence, and organize and maintain documents in paper or electronic filing system; prepare legal documents, including briefs, pleadings, appeals, wills, contracts, legal memorandums and closing statements; prepare for trials by performing tasks such as organizing exhibits; investigate facts and law of cases and search pertinent sources, such as public records and internet sources, to determine Causes of action and to prepare cases; meet with clients and other professionals to discuss details of case; prepare and file pleadings with court clerk; gather and analyze research data, such as statutes, decisions, and legal articles, codes, and documents, including foreign statutes; direct and coordinate law office activity, including preparation of evidentiary exhibits; and prepare witnesses to testify at hearing or court.

We note that this job description is identical to the tasks listed in the O*NET for SOC code 23-2011 relating to "Paralegals and Legal Assistants." First, the Director should determine whether the fact that the proffered position's duties are copied directly from the O*NET undermines the Petitioner's claims relating to the substantive nature of the position and whether their description sufficiently communicates: (1) the actual work that the Beneficiary would perform; (2) the complexity, uniqueness and/or specialization of the tasks; and/or (3) the correlation between that work and a need for a particular level of knowledge in a specific specialty.

Second, the Director may wish to address what effect the Petitioner's claim has on this case that the position consists of duties associated with the Paralegals and Legal Assistants occupation—an occupation that is classified under Job Zone 3—that only requires medium preparation and according to the O*NET, "[m]ost occupations in this zone require training in vocational schools, related on-the-job experience, or an associate's degree." The Director may wish to address whether such a position can qualify under the H-1B requirements and whether the LCA corresponds to and supports this H-1B petition. *See* 8 C.F.R. § 214.2(h)(4)(i)(B)(*1*); *Simeio Solutions*, 26 I&N Dec. at 546 n.6; 20 C.F.R. § 655.705(b).

C. Beneficiary Qualifications

The statutory and regulatory framework that we must apply in our consideration of the evidence of the Beneficiary's qualification to serve in a specialty occupation is governed by section 214(i)(2) of the Act. In implementing section 214(i)(2), the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C) provides the means by which a beneficiary may demonstrate that they are qualified to perform services in a specialty occupation. As the Beneficiary's education consists of foreign degrees, the Petitioner must demonstrate that she holds "a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university . . . ." 8 C.F.R. § 214.2(h)(4)(iii)(C)(*2*). In order to equate this Beneficiary's credentials to

a U.S. baccalaureate or higher degree, the Petitioner must satisfy at least one of the provisions at 8 C.F.R. § 214.2(h)(4)(iii)(D). However, we note the record lacks any such evidence. As a result, the Director should evaluate whether the Petitioner has demonstrated that the Beneficiary is qualified to occupy the proffered position in accordance with the regulation.

III. CONCLUSION

Accordingly, the matter will be remanded to the Director to issue a new decision. The Director may request any additional evidence considered pertinent to the new determination and any other issue. As such, we express no 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.