U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 23136414

Date: OCT. 31, 2022

Appeal of California 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 California Service Center Director denied the Form I-129, Petition for a Nonimmigrant Worker, concluding that the Petitioner did not establish the proffered position qualified as a specialty occupation. The Director separately denied the petition because the Petitioner did not show the Beneficiary was qualified to perform the duties of the offered position. 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 conclude that a remand is warranted in this case.

I. LABOR CONDITION APPLICATION

A. Legal Framework

The purpose of U.S. Department of Labor's (DOL) ETA Form 9035 & 9035E, Labor Condition Application for Nonimmigrant Workers (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.").

It also serves to protect H-1B workers from wage abuses. A petitioner submits the LCA to the 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); *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).

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*). While DOL certifies the LCA, U.S. Citizenship and Immigration Services (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) ("DHS determines whether the petition is supported by an LCA which corresponds with the petition . . . ."). *See also Matter of Simeio Solutions*, 26 I&N Dec. 542, 546 n.6 (AAO 2015). 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 standard occupation classification (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.

The regulation at 20 C.F.R. § 655.705(b) was amended by 65 Fed. Reg. 80,110, 80,210 (proposed Dec. 20, 2000). The plain language of the regulation clearly states: "In [accepting an employer's petition with the DOL-certified LCA attached], the DHS 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." *See also Parzenn Partners, LLC v. Baran*, No. 19-CV-11515-ADB, 2020 WL 5803143, at *8–9 (D. Mass. Sept. 29, 2020).

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).

"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. 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, 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 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.

As specified within the Act, 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.* 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)). In 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 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. 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.

The DOL guidance contains the same publicly available procedure an employer, or their representative, should follow to not only find the correct SOC code (i.e., utilizing the Occupational Information Network (O*NET)), but also to calculate the appropriate wage level. We note this is the same process the DOL utilizes to issue a Prevailing Wage Determination (PWD). Absent a PWD from DOL, we will not automatically accept the presumption that the Petitioner provided DOL with the full spectrum of information relating to the proffered position's requirements when it filed the LCA, which could affect the appropriate wage level for the position in this petition.[1]

B. Analysis

As noted, the Director concluded the proffered position is not a specialty occupation. However, the record appears to support a determination that the prevailing wage rate designated on the LCA was not correctly calculated based on the Petitioner's position requirements. Without knowing whether the Petitioner designated the correct wage level, we cannot issue an ultimate eligibility determination because a position that satisfies the statutory and regulatory requirements of a specialty occupation—but is one in which the organization would not pay the appropriate wage—cannot be approved.

Those conditions violate section 212(n)(1) of the Act and the intent to protect the wages and working conditions of U.S. workers. We therefore are withdrawing the Director's decision and remanding the matter for further review of the record and issuance of a new decision. Specifically, the Director should first make a determination on whether the Petitioner included the correct wage rate on the LCA, and that it therefore corresponds to and supports this H-1B petition.

The Petitioner stated in the initial filing that it requires "a master's degree in Business Administration Management or related." Although the Petitioner did not submit job postings for this position, it stated in response to the Director's request for evidence that two of their affiliate organizations filed immigrant petitions for other foreign nationals, and the parent organization has a history of requiring a baccalaureate degree or higher for any executive management position that reports directly to the organization's owner. They also provide context for those immigrant petitions: (1) for a General Manager position they required a "Master's in Business Administration or equivalent"; and (2) for the General and Operations Manager under the same SOC code they used on the LCA in this case, they also required a "Master's in Business Administration or equivalent."

The Petitioner specified this position was located within the "General and Operations Managers" occupational category, corresponding to the SOC code 11-1021. The Petitioner further indicated the appropriate wage level on the LCA was a Level I, which was associated with a prevailing wage at $56,680 per year. The Petitioner stated on the LCA and in the petition that it would compensate the

[1] A petitioner may file Form ETA-9141, Application for Prevailing Wage Determination with DOL. USCIS will accept PWDs as sufficient, provided the Petitioner establishes that it fully disclosed to DOL all of the proffered position's relevant requirements relating to the five-step process for determining an appropriate wage level, as outlined in the DOL guidance.

Beneficiary with $56,680 per year, the least possible salary it could pay any foreign national under this SOC code.

Returning to why the wage level is an issue here, it appears this position's education prerequisites mandate a higher wage level designation. The DOL guidance provides a five-step process to determine whether the wage level was appropriate. Step three relates to education, where the DOL guidance concentrates on comparing the Petitioner's minimum education requirement to that contained in Appendix D of the same DOL guidance. Appendix D provides a list of professional occupations with their corresponding usual education level.

Appendix D of the DOL guidance designates occupations such as the one in this petition with an Education and Training Category Code of four. The entry for code four provides the position prerequisites as: "Work experience, plus a bachelor's or higher degree. Most occupations in this category are managerial occupations that require experience in a related non-managerial position." Appendix D reflects the usual education associated with this occupation is a bachelor's degree plus some work experience. We further note a master's degree requirement surpasses the O*NET's Job Zone 4 grouping that indicates: "Most of these occupations require a four-year bachelor's degree, but some do not."

As a result, the Petitioner's stated preference for a master's degree exceeds the education requirement listed in both Appendix D of the DOL guidance, as well as the O*NET Job Zone 4 grouping. Education requirements that exceed either of these sources, generally should result in an increase in the wage level by at least one. *See* the DOL guidance. Therefore, the Petitioner's requirement for a master's degree would result in an increase in the wage by one level increment. Because the Petitioner's requirements were "more than the usual education contained in Appendix D," it appears its wage level designation was incorrect. This would result in a difference in annual compensation of $38,834 when comparing a Level I and a Level II wage rate.

II. 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. If the Director determines it is necessary, they may request any additional evidence considered pertinent to the new determination.

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