U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 22737970

Date: SEPT. 13, 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 provide a certified U.S. Department of Labor (DOL) ETA Form 9035 & 9035E, Labor Condition Application for Nonimmigrant Workers (LCA). 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 dismiss the appeal.

I. LEGAL FRAMEWORK

Before filing a petition for H-1B classification, the regulation requires petitioners to obtain certification from the DOL that the petitioning 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*). 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).

II. ANALYSIS

In the present case, the Petitioner filed the petition with USCIS in December 2021 before DOL certified an LCA for the offered position. The Director issued a request for evidence, in part seeking an LCA that DOL had certified on a date before the Petitioner filed the H-1B petition. In response, the Petitioner provided an LCA it had filled out; however, it was not certified by DOL. Because the

LCA was not certified, the Director denied the petition in January 2022. In February 2022, the Petitioner filed an LCA with DOL, and that agency certified the LCA on February 11, 2022. Accompanying this appeal, the Petitioner submits the February 2022, DOL-certified LCA.

While we recognize the Petitioner's efforts to comply with the H-1B requirements, it has not provided an LCA that DOL certified prior to this H-1B petition's filing. That requirement is found in the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(*1*) that states:

> Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

Because the Petitioner has not established that it possesses an LCA certified with a date that precedes this petition's filing date, we are dismissing the appeal.

ORDER: The appeal is dismissed.