In Re: 22737586   Date: SEPT. 22, 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 record did not establish that the proffered position qualified as a specialty occupation, and the Petitioner filed a timely appeal. The U.S. Court of Appeals for the Ninth Circuit issued its decision in *Innova Sols., Inc. v. Baran*, 983 F.3d 428 (9th Cir. 2020) in December 2020. The Director denied this petition after the Ninth Circuit issued that decision, and it is not apparent from the text of the denial whether they considered *Innova Sols., Inc*. Because the analysis the Director utilized in arriving at the conclusion on the specialty-occupation issue appears that it was impacted by *Innova Sols., Inc.*, we find it appropriate to remand the matter for the Director to consider the question anew, and to adjudicate in the first instance any additional issues as may be necessary and appropriate.

As one of those additional issues, the Director may elect to determine whether the wage level the Petitioner designated on the U.S. Department of Labor (DOL) ETA Form 9035 & 9035E, Labor Condition Application for Nonimmigrant Workers (LCA) was correct considering the position's responsibilities. 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.

U.S. Citizenship and Immigration Services (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 *Matter of Simeio Solutions*, 26 I&N Dec. 542, 546 n.6 (AAO 2015) 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). *Also see* 20 C.F.R. § 655.705(b) ("DHS determines whether the petition is supported by an LCA which corresponds with the petition . . . ."); *Simeio Solutions*, 26 I&N Dec. at 546 n.6.

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.

Although the Petitioner classified the position under the Computer Systems Analysts SOC code, it appears some of the position's requirements are not listed in the Occupational Information Network (O*NET) Tasks, Work Activities, Knowledge, and Job Zone examples for the selected occupation. In those situations, DOL guidance indicates the requirements should be evaluated to determine if they represent special skills. *See* DOL, 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. DOL guidance further provides "if it is determined that the requirements are indicators of skills that are beyond those of an entry level worker, consider whether a point should be entered on the worksheet in the Wage Level Column." Simply because duties or skill sets are not included under an O*NET SOC code doesn't automatically mean a wage level increase is warranted. Instead, the Director should evaluate whether the duties and skills required are generally present in two or more SOC codes. If the duties and skill sets are included in both SOC codes, no increase in the wage level is necessary. But if they are not then they may be atypical to the SOC code listed on the LCA, and may require an increase in the wage level.

There are three of the offered position's responsibilities we question, and each one includes functionality that appears to go beyond a surface level duty that might be encompassed by an entry-level Computer Systems Analyst. The first falls under the position's broader responsibility of development of user stories through test driven development and it states: "Develop new screens using Jetpack Compose, Kotlin and modify existing classes in Java." While Computer Systems Analysts generally work with those who perform this user interface and user experience-related duty, DOL did not appear to craft the Computer Systems Analysts SOC code to include a core function such as building user interface components with Jetpack or programming in the Kotlin language. Those duties or skill sets appear to align with the Web and Digital Interface Designers SOC code (15-1255). The

O*NET position description for Computer Systems Analysts does not encompass such special skills and thus, this would appear to require a minimum of a one level increase in the wage level.

Further, under the broader quality assurance responsibility "[m]erge the code changes into droid master/release branch and monitor integration and functional pipelines," appears to align with the Software Quality Assurance Analysts and Testers SOC code (15-1253). Computer Systems Analysts perform testing to analyze information and trends for the purpose of increasing a system's efficiency. The duty the Petitioner included is performing testing for the purpose of ensuring functionality or resolving functionality issues. That appears to exceed the skill sets of the SOC code the Petitioner designated on the LCA.

Lastly, under pipeline maintenance and release activities "[f]ix pipeline[] failures or notify corresponding team members to update automation scripts," personally correcting issues in the software pipeline is seemingly too "in the weeds" for the Computer Systems Analysts SOC code and appears to more properly align with the Software Developers SOC code (15-1252). The Director should determine if each of these instances would appear to require an increase in the wage level specified on the LCA.

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