In Re: 24154179   Date: JAN. 3, 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 (petition), concluding the record did not establish that the offered position qualified as a specialty occupation. On appeal, the Petitioner submits additional evidence and asserts that the Director erred in denying the petition. 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). As we discuss below, the Department of Labor (DOL) ETA Form 9035 & 9035E, Labor Condition Application for Nonimmigrant Workers (LCA) that the Petitioner submitted, does not correspond with and support the petition. Upon *de novo* review, we conclude that a remand is warranted in this case.

As noted, the Director concluded that the offered 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 responsibilities. 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).

When comparing the standard occupational 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. 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.*, 590 F. Supp. 3d 27, 39 (D.D.C. 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), *cert. denied*, 142 S. Ct. 1360 (2022) (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).

Without knowing whether the LCA was correctly completed, we cannot issue an ultimate eligibility determination. In other words, even if we decided in the Petitioner's favor on the specialty occupation issue, the petition would still not be approvable 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 selected the correct SOC code for this position's duties, and if so, whether it included the correct wage rate on the LCA, and whether the LCA corresponds with and supports this H-1B petition.

It is unclear from the record whether the Petitioner established that the Level I wage rate designated on the LCA sufficiently represents the correct wage level based on DOL's five-step process contained within the DOL guidance evaluating various aspects such as any atypical duties across SOC codes or other special skills or other requirements the Petitioner requires to perform in the offered position. DOL, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://flcdatacenter.com/download/NPWHC_Guidance_ Revised_11_2009.pdf. The correct wage rate appears to be within the Level II or Level III range.

We explain. Approximately 75 percent of the offered position's responsibilities appears to fall outside the typical responsibilities of the "General and Operations Managers" SOC the Petitioner designated on the LCA, as follows:

This Position's Duties	Seemingly Correct O*NET SOC Code
Analyze and execute digital advertisement campaigns and analyze data for optimization comprising 20 percent of the position's time.	This duty does not appear to relate to the responsibilities listed in the Occupational Information Network (O*NET) for the selected SOC code and instead appears to align with the following task listed for the Market Research Analysts and Marketing Specialists SOC code: "Measure the effectiveness of marketing, advertising, and communications programs and strategies."

Capture consumer trends and analyze online shopping behavior data comprising 20 percent of the position's time.	This appears to be more closely related to the following task for the Market Research Analysts and Marketing Specialists code: "Forecast and track marketing and sales trends, analyzing collected data."
Analyze competitor marketing, selection, and pricing strategies making up ten percent of the position's time.	This also seemingly is closely associated with the following task for the Market Research Analysts and Marketing Specialists code: "Gather data on competitors and analyze their prices, sales, and method of marketing and distribution."
Create analytical reports and dashboards for business decision making comprising five percent of the position's time.	While General and Operations Managers review reports according to the O*NET, this resource does not seem to support the idea that they will create analytical reports and dashboards. That type of activity appears to fit better within the Market Research Analysts and Marketing Specialists or the Business Intelligence Analysts SOC codes.
Review, analyze, and evaluate new products via online retailers making up ten percent of the position's time.	This appears to align with the following task for the Market Research Analysts and Marketing Specialists SOC code: "Gather data on competitors and analyze their prices, sales, and method of marketing and distribution."
Analyze and evaluate relationship with overseas vendors and develop new suppliers for Company to negotiate for reliable and quality supply of goods comprising five percent of the position's work time.	This duty ostensibly falls under the Supply Chain Managers SOC code for the following task: "Negotiate prices and terms with suppliers, vendors, or freight forwarders."
Evaluate and analyze as well as manage product promotions through online channels in the U.S., E.U., Japan, etc. making up five percent of the position's time.	This responsibility does not appear to fall under the selected SOC code and instead may more properly align with the Advertising and Promotions Managers code.

We also note on the petition, the Petitioner indicated it has two employees, but in response to the Director's request for evidence it indicated the Beneficiary would "[w]ork with international ecommerce team to improve their online campaigns model." Not only does this appear to fall outside the selected SOC code and to fit more appropriately within the Advertising and Promotions Managers code, but also the Petitioner did not explain what or who comprises its "international ecommerce team" when it only has two employees.

Based on the above, it appears the Petitioner should have at least specified the position at a Level II wage rate, if not a Level III, for duties that fall outside of the selected SOC code. Here, the Petitioner

proposed to pay the Beneficiary the least possible amount, and at the lowest level at $72,342 annually. Alternatively, a Level II wage rate would have resulted in an annual salary of $112,278, and a Level III rate would have resulted in $152,194. Because of the small number of personnel the Petitioner employs, it appears the Beneficiary might be required to perform several functions outside the selected SOC code. The position's final responsibility of "[p]erform other relevant business analysis duties for Company's growth and development" further supports this position that the Beneficiary might perform several functions outside of the SOC code the Petitioner selected on the LCA.[1]

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.

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[1] Although an individual's responsibilities vary from one employer to the next, we note that the Beneficiary's previous employer filed multiple LCAs designating the SOC code as Market Research Analysts and Marketing Specialists.