



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

In Re: 24935876

Date: JAN. 24, 2023

Appeal of Nebraska 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 Nebraska Service Center Director denied the Form I-129, Petition for a Nonimmigrant Worker (petition), 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.¹

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)(I). 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).

In the present case, the Petitioner filed the petition with U.S. Citizenship and Immigration Services (USCIS) on June 30, 2022, before DOL certified an LCA for the offered position. The Petitioner was provided a filing window for an H-1B petition between April 1, 2022, and June 30, 2022, based on

¹ We note the initial Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative submitted with the appeal was not properly completed and our office notified the Petitioner we would not recognize them as being represented in these proceedings. The Petitioner subsequently submitted a new Form G-28, but counsel did not date the attorney's signature portion of the newly provided form. As a result, we continue to consider the Petitioner to be self-represented.

their H-1B registration selection for the fiscal year 2023 H-1B numerical cap projections. The Director issued a notice of intent to deny (NOID), 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 and the signature for the Petitioner's represented was on a date that was later than this petition's filing date. The Petitioner further explained difficulties it encountered when attempting to obtain a prevailing wage determination from DOL. Because the LCA was not certified, the Director denied the petition.

The Petitioner 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)(*I*) 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."

Even though we acknowledge the Petitioner's experiences with DOL, it has not identified an authority that would excuse their duty to provide a DOL-certified LCA to USCIS in which the certification date predates the petition filing. Because the Petitioner has not established that it possesses and provided USCIS with an LCA certified with a date that precedes this petition's filing date, we are dismissing the appeal.

ORDER: The appeal is dismissed.