



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

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

MATTER OF B-C-, INC.

DATE: JAN. 25, 2018

APPEAL OF VERMONT SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, a geotechnical and geophysical engineering consulting firm, seeks to temporarily employ the Beneficiary in Texas as a geotechnical engineer-in-training 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 Director of the Vermont Service Center denied the petition, concluding that the Petitioner did not establish, as required, that the submitted labor condition application (LCA) corresponds with the H-1B petition. More specifically, the Director found that the Petitioner's classification of the proffered position as a Level I wage was incorrect.

On appeal, the Petitioner asserts that the proffered position is entry-level and, therefore, a Level I wage is appropriate.

Upon *de novo* review, we will sustain the appeal.

I. LEGAL AND PROCEDURAL FRAMEWORK

The H-1B petition process involves several steps and forms filed with the Department of Labor (DOL) and the Department of Homeland Security's (DHS) U.S. Citizenship and Immigration Services (USCIS). Below, we'll explore the relationship between the labor condition application (LCA) that DOL certifies (and the petitioner then submits to USCIS) and the H-1B petition that USCIS adjudicates.

The purpose of the LCA wage requirement is "to protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring temporary foreign workers."¹ It also serves to protect

¹ *See* Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H-1B Visas in Specialty

H-1B workers from wage abuses. 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). While DOL certifies the LCA, USCIS determines whether the LCA's content corresponds with 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,..."). When assessing the wage level indicated on the LCA, 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.

To assess whether the wage indicated on the H-1B petition corresponds with the wage level listed on the LCA, USCIS applies DOL's guidance, which provides a five step process for determining the appropriate wage level. U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009). The wage level begins at a Level I and may increase up to a Level IV based on a comparison of the duties and requirements for the employer's proffered position to the general duties and requirements for the most similar occupation as provided by the Occupational Information Network (O*NET). To resolve this appeal, we must first identify whether the O*NET occupation selected by the petitioner is correct and then compare the experience, education, special skills and other requirements, and supervisory duties described in the O*NET entry to those required by the employer for the proffered position.²

Before we do so, a few more general observations are in order about the relevance of wage levels in the context of H-1B adjudications. A position's wage level designation certainly is relevant, but is not a substitute for a determination of whether a proffered position meets the requirements of section 214(i)(1) of the Act. We assess each case on its merits. There is no inherent inconsistency between an entry-level position and a specialty occupation. For some occupations, the "basic understanding" that warrants a Level I wage may require years of study, duly recognized upon the attainment of a bachelor's degree in a specific specialty. Most professionals start their careers in what are deemed entry-level positions. That doesn't preclude us from identifying a specialty occupation. And likewise, at the other end of the spectrum, a Level IV wage would not necessarily reflect that an occupation qualifies as a specialty occupation if that higher-level position does not have an entry requirement of at least a bachelor's degree in a specific specialty or its equivalent. Wage levels are relevant, and we will assess them to ensure the LCA "corresponds with" the H-1B petition. But wage is only one factor and does not by itself define or change the character of the occupation.

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).

² This approximately summarizes DOL's five step process. First, we determine the correct O*NET occupation, while the next four steps consist of comparing the attributes (such as experience and education) of that O*NET occupation to those indicated by the Petitioner.

II. ANALYSIS

The sole issue in this matter is whether the Petitioner properly selected a Level I (entry-level) wage on the LCA for the proffered position of geotechnical engineer-in-training (EIT).³ In its LCA, the Petitioner selected the Level I wage as consonant with the job requirements, necessary experience, education, special skills/other requirements, and supervisory duties of the proffered position.⁴ The Director determined the Level I wage was inappropriate by comparing the Petitioner-indicated duties directly with DOL's generic definition of a Level I wage.⁵ According to DOL guidance, that is not the correct comparison. The proper comparison is between the Petitioner-indicated job attributes and requirements and those associated with the appropriate O*NET occupation.

On appeal, the Petitioner contends that, by its very definition, an EIT is entry-level and, therefore, the Level I wage is appropriate. The Petitioner submitted information from the Texas Board of Professional Engineers (TBPE), which defines a certified EIT in relevant part as “a graduate of an engineering program or related science curriculum approved by the Board” who “passed the National Council of Examiners for Engineering and Surveying (NCEES) eight-hour Fundamentals of Engineering (FE) Examination.”⁶ TBPE's Director of Licensing explained in a letter, “[u]sually EIT is an entry level engineer position that is training to be a P[rofessional] E[ngineer].”⁷ By its very terms, an EIT position would appear to be entry-level, but a cursory review is insufficient. We follow DOL's guidance to assess the propriety of the wage level selected on the LCA.

³ In concluding that the Level I wage was insufficient for the proffered position, the Director observed that the job duties “reflect sophisticated disciplines associated with higher degrees of education....” Though the Director did not proceed to address whether the proffered position is classifiable as an H-1B specialty occupation, we believe, based on those observations, the Director would agree with us that the record establishes that an EIT is a specialty occupation.

⁴ The Petitioner did not request a prevailing wage determination from the National Prevailing Wage Center (NPWC) prior to filing the LCA with DOL. USCIS will generally accept NPWC's prevailing wage determination and grant the employer a “safe harbor” to rely on both the wage level and the occupational classification, so long as the employer fully and accurately described the proffered position to the NPWC.

⁵ DOL's 2009 guidance describes Level I as follows:

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

⁶ https://engineers.texas.gov/lic_eit_exinfo.htm (last visited Jan. 23, 2018).

⁷ By comparison, “only duly licensed persons may legally perform, or offer to perform engineering services for the public. Furthermore, public works must be designed and constructed under the direct supervision of a licensed professional engineer. The terms ‘engineer’ or ‘professional engineer’ can only be used by persons who are currently licensed.” In order “[t]o be eligible for a professional engineering license, engineers must have achieved certain professional milestones. They must have earned an engineering education, performed certain levels of engineering work experience, and passed specific examinations.” For additional information, please visit <http://engineers.texas.gov/lic.htm>.

First we must assess whether the Petitioner selected the most relevant standard occupational classification (SOC) code. The Petitioner provided the SOC code for civil engineers on the LCA.⁸ O*NET states that civil engineers “[p]erform engineering duties in planning, designing, and overseeing construction and maintenance of building structures, and facilities, such as roads, railroads, airports, bridges, harbors, channels, dams, irrigation projects, pipelines, power plants, and water and sewage systems.” In addition, it provides a list of 17 “tasks” and 18 “detailed work activities” for civil engineers, including the following:⁹

- Inspect project sites to monitor progress and ensure conformance to design specifications and safety or sanitation standards
- Direct or participate in surveying to lay out installations or establish reference points, grades, or elevations to guide construction
- Analyze survey reports, maps, drawings, blueprints, aerial photography, or other topographical or geologic data
- Test characteristics of materials or structures
- Manage and direct the construction, operations, or maintenance activities at project site
- Compute load and grade requirements, water flow rates, or material stress factors to determine design specifications
- Analyze operational data to evaluate operations, processes or products
- Plan and design transportation or hydraulic systems or structures using computer assisted design or drawing tools

The Petitioner provided the following duties (and approximate percentage of time dedicated) for the proffered position:

- Numerical modelling of soil-structure interaction phenomena (30%)
- Constitutive property evaluation (20%)
- Field instrumentation and observation of soil-structure systems including; 1) foundations, 2) retaining walls, 3) reinforced slopes, 4) tunnels, 5) earthwork and embankments (20%)
- Design and analysis of same systems mentioned directly above under the supervision of a Professional Engineer (20%)
- Geophysical modelling and testing (10%)

In addition, the offer letter listed the following “tasks and responsibilities”: performing field observations/measurements; engineering analyses and calculations; geophysical and geotechnical field work testing; supervision of drilling activities in the field; laboratory testing and preparation; review of engineering reports; CAD deliverables; and other tasks as necessary.

⁸ O*NET does not have a separate SOC code for EITs.

⁹ <https://www.onetonline.org/link/summary/17-2051.00> (last visited Jan. 23, 2018).

Upon comparing the Petitioner's duties to those provided in O*NET, we find the Petitioner selected the appropriate SOC code for the proffered position. The proffered duties generally coincide with those described in O*NET.

For the second step, we look to the Petitioner's experience requirements. As it does not require any experience for this position, the wage level does not increase. For step three, we compare the Petitioner's minimum education requirement of a bachelor's degree in civil engineering or a related field to the education requirement contained in Appendix D of the DOL guidance.¹⁰ Because the Appendix indicates that the usual education level for a civil engineer is a bachelor's degree, there is no increase in the wage level. Fourth, we compare the provided job duties to O*NET and find they are generally encompassed by the O*NET description. As the position does not require any special skills or other requirements beyond those listed in O*NET, the wage level does not increase as a result of the fourth step.

Finally, in step five, we assess whether any supervisory duties warrant a higher wage level. The Director found that "supervisory and review duties are a regular part of the beneficiary's work," placing the job outside of the appropriate boundaries of a Level I position. The position's supervisory duties, such as "supervision of drilling activities in the field" and "review of engineering reports," are part of the inherent job duties provided for in O*NET, however, and correspond to "manage and direct the construction, operations, or maintenance activities at project site" and "analyze survey reports" as listed above. Accordingly, these supervisory duties do not require an increase in the wage level.

III. CONCLUSION

As the proffered position does not require experience, education, special skills or supervisory duties beyond those listed in the related O*NET occupation, it is properly classified as a Level I wage. The Petitioner has demonstrated that the submitted LCA corresponds to the petition.

ORDER: The appeal is sustained.

Cite as *Matter of B-C-, Inc.*, ID# 1139516 (AAO Jan. 25, 2018)

¹⁰ Appendix D of the DOL guidance provides a list of professional occupations with their corresponding usual education level.