U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 21340578

Date: MAY 12, 2022

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, concluding that the record did not establish that the proffered position qualified as a specialty occupation and that the Beneficiary did not possess the qualifications to occupy the position. 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 conduct *de novo* review on appeal, and we note that, in this matter, whether the Department of Labor (DOL) ETA Form 9035 & 9035E, Labor Condition Application for Nonimmigrant Workers (LCA), properly corresponds with and supports the petition is a threshold issue compared to the issues the Director raised in the petition denial. Accordingly, we will remand the matter to the Director for further review of the record and issuance of a new decision.

I. LEGAL FRAMEWORK

Before filing a petition for H-1B classification, the regulation requires petitioners to obtain certification from the DOL that the 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*). The purpose of DOL's LCA wage requirement is "to protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring temporary foreign workers." *See* Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H-1B Visas in Specialty 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). *See also Aleutian Cap. Partners, LLC v. Scalia*, 975 F.3d 220, 231 (2d Cir. 2020) (quoting 20 C.F.R. § 655.0(a)(1) and finding that a primary goal of U.S. non-immigrant foreign worker programs

like the H-1B Program is to ensure that "the employment of the foreign worker in the job opportunity will not adversely affect the wages or working conditions of similarly employed U.S. workers.").

The LCA also serves to protect 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). *See also Venkatraman v. REI Sys., Inc.*, 417 F.3d 418, 422 & n.3 (4th Cir. 2005); *Patel v. Boghra*, 369 F. App'x 722, 723 (7th Cir. 2010); *Michal Vojtisek-Lom & Adm'r Wage & Hour Div. v. Clean Air Tech. Int'l, Inc.*, 2009 WL 2371236, at *8 (Dep't of Labor Admin. Rev. Bd. July 30, 2009).

Furthermore, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(*2*) provides that a petitioner must state that it will comply with the terms of the LCA. While DOL certifies the LCA, U.S. Citizenship and Immigration Services (USCIS) "determines whether the petition is supported by an LCA which corresponds with the petition, whether the occupation named in the labor condition application is a specialty occupation . . . , and whether the qualifications of the nonimmigrant meet the statutory requirements for H-1B visa classification." 20 C.F.R. § 655.705(b). *See also Matter of Simeio Solutions*, 26 I&N Dec. 542, 546 n.6 (AAO 2015).

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 *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) (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).

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.

"In construing a statute or regulation, we begin by inspecting its language for plain meaning." *Sullivan v. McDonald*, 815 F.3d 786, 790 (Fed. Cir. 2016) (quoting *Meeks v. West,* 216 F.3d 1363, 1366 (Fed.Cir.2000)). "[W]e attempt to give full effect to all words contained within that statute or regulation, thereby rendering superfluous as little of the statutory or regulatory language as possible." *Sullivan*, 815 F.3d at 790 (quoting *Glover v. West,* 185 F.3d 1328, 1332 (Fed.Cir.1999)). The most

basic canon of statutory—as well as regulatory—construction consists of interpreting a law or rule by examining the literal and plain language. *See Carbon Fuel Co. v. USX Corp.*, 100 F.3d 1124, 1133 (4th Cir. 1996). The inquiry ends with the plain language as well, unless the language is ambiguous. *United States v. Pressley*, 359 F.3d 347, 349 (4th Cir. 2004).

Here, the plain language of the regulation is dispositive: USCIS is authorized to determine the corollary nature of the proffered position's elements as represented in an LCA when compared with those same elements as represented on the Form I-129, as well as the Petitioner's actual position requirements. And to clarify, USCIS does not purport to exercise any authority over the LCA. Instead, we are ensuring that the claims made on the LCA sufficiently align to those made within the H-1B petition.

Furthermore, the Act prescribes DOL's limited role in reviewing LCAs stating that "[u]nless the [DOL] Secretary finds that the application is incomplete or obviously inaccurate, the Secretary shall provide the certification . . . ." Section 212(n)(1)(G)(ii) of the Act. USCIS precedent also states:

> DOL reviews LCAs "for completeness and obvious inaccuracies" and will certify the LCA absent a determination that the application is incomplete or obviously inaccurate. Section 212(n)(1)(G)(ii) of the Act. In contrast, USCIS must determine whether the attestations and content of an LCA correspond to and support the H-1B visa petition.

Simeio Solutions, 26 I&N Dec. at 546 n.6. It is unclear how USCIS is to carry out its responsibilities to determine whether the LCA corresponds with and supports the H-1B petition without performing such a review. To illustrate, by simply submitting the LCA to DOL without also obtaining a prevailing wage determination, a petitioner has only received DOL's certification that the form is complete and does not contain obvious inaccuracies. *Id.*[1] In fact, DOL "is not generally permitted to investigate the veracity of the employer's attestations on the LCA prior to certification." *Aleutian Cap. Partners, LLC*, 975 F.3d at 225–26 (quoting *Cyberworld Enter. Techs., Inc. v. Napolitano*, 602 F.3d 189, 193 (3d Cir. 2010)).

Further, 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.

In order to determine whether the "attestations and content" (e.g., the SOC code and the wage level) as represented on the LCA corresponds with the information pertaining to the proffered position as represented on the Form I-129, we follow DOL's guidance, which provides a five-step process for determining the appropriate SOC code and wage level. *See* U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev.

[1] Employers my obtain a prevailing wage determination by taking the additional step of submitting Form ETA-9141 (Application for Prevailing Wage Determination) to DOL's National Prevailing Wage Center.

Nov. 2009) (DOL guidance), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

An employer "reaffirms its acceptance of all of the attestation obligations by submitting the LCA to [USCIS] in support of the Petition for Nonimmigrant Worker, Form I-129, for an H-1B nonimmigrant." 20 C.F.R. § 655.705(c)(1). When comparing the 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.

Additionally, it is important for USCIS to ensure the employer has selected the SOC code on the LCA that most closely matches the proffered position for reasons that affect H-1B statutory and regulatory requirements. First, the wrong SOC code can direct USCIS to evaluate an inapplicable occupational title or occupation. It is the occupation itself that we evaluate to decide if it requires a "theoretical and practical application of a body of highly specialized knowledge," and "attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." Section 214(i)(1) of the Act. Therefore, an incorrect SOC code could mean we would not be able to properly evaluate whether a petitioner has satisfied the statute's definition of a specialty occupation.

Second, we also cannot provide a proper analysis under two H-1B regulatory requirements. Those requirements fall under the regulations at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(*1*) and (*2*). 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*) requires a petitioner to demonstrate that a baccalaureate or higher degree—or its equivalent—is normally the minimum requirement for entry into the particular position. Because education requirements may differ markedly from one occupational classification to the next, the incorrect SOC code (e.g., occupational classification) can skew the analysis. Also, 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*) requires that the degree requirement is common to the industry in parallel positions among similar organizations. Because the degree requirement that is considered common to the industry for one occupation may also be distinct in comparison to others, USCIS must ensure the SOC code specified on the LCA is the one that most closely matches the position in the petition.

It is also important to ensure the correct wage level is specified on the LCA because even if an employer designates the correct SOC code and satisfies the H-1B related requirements, if the wage level is lower than the position's requirements warrant, USCIS still cannot approve the H-1B petition because employers are required to compensate H-1B workers at *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). Stated differently, were USCIS to allow an employer to compensate an H-1B worker at a wage level that is lower than the position's requirements warrant, it would not be compensating that individual at the necessary prevailing wage, nor the actual wage it pays to similarly situated employees.

In summary, when filing an LCA and an H-1B petition, a petitioner subjects itself to two authorities: (1) to DOL through the certification process, or through a prevailing wage determination, and (2) to USCIS by way of our authority to ensure that the LCA corresponds with and supports the petition.

II. ANALYSIS

The Director denied the petition on two bases: (1) the Petitioner did not demonstrate the position qualified as a specialty occupation as it relates to satisfying the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A); and (2) they did not establish that the Beneficiary is qualified to perform the duties of the offered position.

Here, the Petitioner obtained an LCA certified under the SOC code, 13-1111 relating to "Management Analysts" and identified the position's title as Lead Assistant Manager. When it filed the petition, the Petitioner provided the position's description and expanded on those duties in its response to the Director's request for evidence. Only 10–15 percent of the duties the Petitioner provided were consistent with the Occupational Information Network (O*NET) tasks for the Management Analysts SOC code the Petitioner identified on the LCA, while the remainder of the position's responsibilities fell outside that occupational category. The O*NET provides the following definition for the Management Analysts occupation: "Conduct organizational studies and evaluations, design systems and procedures, conduct work simplification and measurement studies, and prepare operations and procedures manuals to assist management in operating more efficiently and effectively. Includes program analysts and management consultants."

For the position's duties that do not appear consistent with the Management Analysts occupational category, they were heavily focused on creating and maintaining information technology solutions or the use of predictive modeling, and a small percentage focused on building business relationships (e.g., Statisticians (15-2041), Operations Research Analysts (15-2031), or Marketing Managers (11-2021)). Those duties include the following:

Duties that are not consistent with the Management Analysts SOC code on the LCA:

- Use [redacted]'s analytical frameworks and methodologies to perform data extraction, data processing, data analysis and statistical model development. Utilize analytics tools like Python and SQL to perform statistical analysis for 20% of work time;
- Utilize statistical classification techniques to cluster healthcare members into buckets that can be used for generalization of result in case of inconclusive data for 10% of work time;
- Evaluate models to help select the best model that represents the input data. Perform the evaluation for regression and classification models for 10% of work time;
- Deploy quantitative models to forecast customer rating patterns so that interventions can be planned accordingly for 10% of work time;
- Build automated reports and dashboards to measure performance and business Key Performance Indicators. Audit data sets, visualizations, dashboards and tools end-to-end in identifying and prioritizing key issues and opportunities for improvement for 10% of work time;
- Build analytical capabilities for [redacted] that can be pitched across clients for 10% of work time;
- Build actionable and insights driven data products for a variety of strategic business initiatives, stakeholder goals and user needs. Navigate through ambiguity to define clear product vision. Perform inquisitive analysis to find drivers of fluctuations in customer enrollments, revenue and assets. Identify patterns and trends in data to highlight opportunities and problem areas for

15% of work time; and

- Develop and nurture existing client relationships to achieve client and [redacted] goals. Identify potential client partnerships to expand [redacted]s retail and financial services practice for 5% of work time.

Duties that are consistent with the Management Analysts SOC code on the LCA:

- Break down business challenges for clients in healthcare insurance services to deliver solutions around Analytics and Data Science for 5% of work time; and
- Present results, insights, and recommendations to senior leadership. Identify consumption opportunities and engage with business stake holders on implementation of solutions. Ensure solutions delivered are consumed and tangible business impact is created for 5% of work time.

As it stands, the record of proceeding is not sufficiently developed to allow us to determine whether the proffered position is actually located within the occupational category for which the LCA was certified. While DOL certifies the LCA, 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); *Simeio Solutions*, 26 I&N Dec. at 546 n.6.

The DOL guidance explains that a job's SOC code is identified by selecting the O*NET job description "that most closely matches the employer's request" from a list of similar occupations. DOL's Board of Alien Labor Certification Appeals has interpreted this guidance to instruct employers to select the occupation that best corresponds to the employer's job offer. *See* the Board of Alien Labor Certification Appeals decisions: *Maestro Soccer, LLC*, 2018-PWD-00001, at 3 (Dec. 21, 2017); *Gen. Anesthesia Specialists P'ship Med. Grp. (GASP)*, 2013-PWD-00005, at 6 (Jan. 28, 2014); *Emory Univ.*, 2011-PWD-00001, at 6–7 (Feb. 27, 2012). The DOL guidance further states:

> The selection of the O*NET-SOC code should not be based solely on the title of the employer's job offer. The NPWHC should consider the particulars of the employer's job offer and compare the full description to the tasks, knowledge, and work activities generally associated with an O*NET-SOC occupation to [ensure] the most relevant occupational code has been selected.

Therefore, the selection of the correct SOC code should be based more on the position requirements and how those compare with the identified areas of the O*NET than they are on any job title. According to the DOL guidance: "If the employer's job opportunity has worker requirements described in a combination of O*NET occupations, the [choice of which SOC code to be selected] should default directly to the relevant O*NET/SOC occupational code for the highest paying occupation." *See also Maestro Soccer, LLC*, 2018-PWD-00001, at 3 (Dec. 21, 2017). It appears that the Petitioner devised a position consisting of multiple SOC codes but it did not select the SOC code that best corresponds to its job offer. Additionally, the record is not sufficiently developed for us to determine whether the Petitioner selected the SOC code associated with the highest paying occupation because it utilized a private wage survey that is not part of the record.

As noted above, the wrong SOC code can direct USCIS to evaluate the incorrect occupational title or occupation. It is the occupation itself that we evaluate to decide if it requires a "theoretical and practical application of a body of highly specialized knowledge," and "attainment of a bachelor's or

higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." Section 214(i)(1) of the Act. Therefore, an incorrect SOC code could mean we would not be able to properly evaluate whether a petitioner has satisfied the statute's definition of a specialty occupation.

Additionally, we cannot provide a proper analysis under multiple H-1B regulatory requirements when a petitioner identifies the wrong SOC code on the LCA (i.e., the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*), (*2*)). Because the degree requirement that is considered common to the industry for one occupation may also be distinct in comparison to others, the incorrect SOC code on the LCA adversely affects our ability to evaluate the regulatory requirements. In summary, the Petitioner appears to have selected the incorrect SOC code on the LCA, but because the Director did not address this issue, we will not rely on it as a basis to make a final determination on this appeal. We are therefore precluded from deciding that the proffered position is a specialty occupation.

The Director should first determine whether (1) the Petitioner obtained a certification from DOL that it filed an LCA in the occupational specialty in which the Beneficiary would be employed; and (2) the LCA was certified for the appropriate occupational category, and therefore corresponds to and supports this H-1B petition. *See* 8 C.F.R. § 214.2(h)(4)(i)(B)(*1*); *Simeio Solutions*, 26 I&N Dec. at 546 n.6; 20 C.F.R. § 655.705(b). If the Director's determination on that issue is adverse to the Petitioner, no further action should be necessary. However, if the Director decides in the Petitioner's favor on the first issue, it should then determine whether the organization would compensate the Beneficiary at the appropriate wage in accordance with the DOL guidance for "Wage Determination Using Employer-Provided Wage Surveys." *See* DOL guidance at 14–16 and Appendix F. Section 212(n)(1) of the Act; 20 C.F.R. § 655.731(a).

III. BENEFICIARY QUALIFICATIONS

As the above issues are dispositive of the Petitioner's appeal, we decline to reach and hereby reserve the arguments that the Beneficiary is qualified to perform services in a specialty occupation. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) ("courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach"); *see also Matter of M-F-O-*, 28 I&N Dec. 408, 417 n.14 (BIA 2021) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

IV. CONCLUSION

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 further proceedings consistent with the foregoing opinion and for the entry of a new decision.