



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

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

In Re: 10771689

Date: SEPT. 28, 2020

Appeal of California Service Center Decision

Form I-129, Petition for Nonimmigrant Worker

The Petitioner seeks to temporarily 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 California Service Center Director denied the petition, concluding that the proffered position was not a specialty occupation, and we dismissed the Petitioner's appeal as moot. We have since reopened the matter in order to consider the merits of the appeal. Accordingly, we will reinstate the appeal in order to consider the Petitioner's brief and evidence.

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). While we conduct *de novo* review on appeal,<sup>1</sup> a remand is warranted in this case because the Director's decision appears insufficient for review.

As noted, the Director concluded that the proffered position is not a specialty occupation. However, the record of proceedings is not sufficiently developed to allow us to determine whether the proffered position is actually located within the occupational category for which the Department of Labor (DOL) ETA Form 9035 & 9035E, Labor Condition Application for Nonimmigrant Workers (LCA) was certified.<sup>2</sup> Without knowing the answer to that question, we cannot determine the actual, substantive nature of the position. This means that we cannot make a determination on the specialty occupation question based on the current record.

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<sup>1</sup> *See Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015).

<sup>2</sup> 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 occupation 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.

As presently constituted, the record does not appear sufficient to establish that the LCA corresponds with and supports the petition.<sup>3</sup> It is unclear from the record whether the Petitioner established that the proffered position's duties actually correspond with those of positions located within Standard Occupational Classification (SOC) code 19-1029, corresponding to the occupational title "Biological Scientists, All Other" as designated by the Petitioner on the LCA.

DOL requires the U.S. employer to select the SOC code with the higher of the prevailing wage in the "area of employment" or the amount paid to other employees with similar experience and qualifications who are performing the same services. Stated plainly, the employer must compare the proffered position's stated duties with the overall information found in Occupational Information Network's (O\*NET) and select the occupation that most closely matches the employer's duties. If the employer's duties include requirements described in a combination of O\*NET occupations, the DOL guidance instructs employers to default to the relevant SOC code for the highest paying occupation. It does not appear that the Petitioner followed the DOL guidance when it selected the O\*NET occupation for the LCA. The majority of the proffered position's duties appear laden towards those found in the O\*NET entries for "Financial Analysts," classified under SOC code 13-2051, or "Investment Fund Managers," classified under SOC code 13-9199.03.<sup>4</sup>

Specifically, we note that the Petitioner, a venture capital company, seeks to employ the Beneficiary in the position of "biotechnical investment analyst." According to its description of the duties to be performed, the Beneficiary will "help source and evaluate international investments." She will spend 60% of her time sourcing and conducting due diligence of investment opportunities, which includes collating potential investment opportunities and presenting them to the directors of the company. The remaining 40% of her time will be devoted to supporting of portfolio companies, which the Petitioner states requires developing a business plan and budget, setting up operations and hiring managers. Overall, the Beneficiary's duties appear focused on recommending and identifying investments for the Petitioner and monitoring developments in the biotechnology, medical, and educational technology sectors to help identify the best prospects for investment for the Petitioner's portfolio companies. It does not appear that the Beneficiary will be primarily performing the duties of a scientist, although the Petitioner states that her scientific background will assist her in performing her duties.

For the above reasons, the Petitioner's selection of the "Biological Scientists, All Other" occupational category does not appear to have been correct, and the Director should first determine whether this LCA corresponds with and supports the petition.<sup>5</sup>

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<sup>3</sup> See 20 C.F.R. § 655.705(b); *Simeio Solutions*, 26 I&N Dec. at 546 n.6.

<sup>4</sup> For additional information, see O\*NET OnLine, available at <https://www.onetonline.org/link/summary/15-1199.10> (last visited Sept. 22, 2020).

<sup>5</sup> We further note that the compensation for Financial Analysts and Investment Fund Managers for the same location and timeframe is significantly higher than the wage the Petitioner indicated it would pay to the Beneficiary. Compare the wages for Biological Scientists with those for Financial Analysts and Investment Fund Managers, respectively, on the Foreign Labor Certification Data Center, Online Wage Library - FLC Wage Search Wizard at [https://www.flcdatcenter.com/OesQuickResults.aspx?code=19-1029&area=\[redacted\]&year=18&source=1](https://www.flcdatcenter.com/OesQuickResults.aspx?code=19-1029&area=[redacted]&year=18&source=1) (SOC 19-1029); [https://www.flcdatcenter.com/OesQuickResults.aspx?code=13-2051&area=\[redacted\]&year=18&source=1](https://www.flcdatcenter.com/OesQuickResults.aspx?code=13-2051&area=[redacted]&year=18&source=1) (SOC 13-2051); and [https://www.flcdatcenter.com/OesQuickResults.aspx?code=11-9199&area=\[redacted\]&year=18&source=1](https://www.flcdatcenter.com/OesQuickResults.aspx?code=11-9199&area=[redacted]&year=18&source=1) (SOC 11-9199.03) (last visited Sept. 22, 2020).

Accordingly, the matter will be remanded to the Director to consider the LCA issue and enter a new decision. The Director may request any additional evidence considered pertinent to the new determination and any other issue. As such, we express no opinion regarding the ultimate resolution of this case on remand.

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