U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 9434207

Date: JULY 24, 2020

Appeal of Vermont Service Center Decision

Form I-129, Petition for Nonimmigrant Worker (H-1B)

The Petitioner, a marketing and advertising organization, seeks to employ the Beneficiary temporarily as a "analyst, digital analytics" under the H-1B nonimmigrant classification for specialty occupations.[1] 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, concluding that the record did not establish that the proffered position qualified as a specialty occupation. The matter is now before us on appeal. The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence.[2] We review the questions in this matter *de novo*.[3]

Upon *de novo* review, we conclude that the preponderance of the evidence satisfies the "specialty occupation" definition at 8 C.F.R. § 214.2(h)(4)(ii) and also the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*) for a particular position whose specific duties are so specialized and complex that their performance requires knowledge usually associated with attainment of a baccalaureate or higher degree in a specific specialty. The Petitioner sufficiently developed the position's duties that it demonstrated a nexus between an established course of study leading to a specialty degree, and how such a curriculum is necessary to perform the proffered position's specialized and highly complex duties. Therefore, the record satisfies the fourth criterion of the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A), and we withdraw the Director's decision.

However, the record appears to support a determination that the prevailing wage rate designated on the Department of Labor (DOL) ETA Form 9035 & 9035E, Labor Condition Application for Nonimmigrant Workers (LCA) was not correctly calculated based on the Petitioner's position

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[1] *See* Immigration and Nationality Act (the Act) section 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b).
[2] Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010).
[3] *See Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015).

requirements.[4] Without knowing the answer to that question, we cannot issue an ultimate eligibility determination 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 as it violates 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 included the correct wage rate on the LCA, and that it therefore corresponds to and supports this H-1B petition. The Petitioner indicated the Beneficiary would present the results of mathematical modeling and data analysis to management or other end users, specify manipulative or computational methods to be applied to models, and study and analyze information about alternative courses of action to determine which plan will offer the best outcomes.

Here, the Petitioner obtained an LCA certified under the Standard Occupational Classification (SOC) code 15-2031, relating to "Operations Research Analysts" at a Level I prevailing wage rate. While it appears the Petitioner selected the most appropriate SOC code, what is unclear from the present record is whether it properly designated the prevailing wage at a Level I wage rate. We question whether the specific skills required for the job are generally encompassed by the Occupational Information Network (O*NET) description for Operations Research Analysts.[5] The Director should take the necessary steps to make this determination.

For instance, we observe three areas the Director may wish to consider. First, the duties in which the Beneficiary would "develop custom databases" in order to assist in making business decisions appears to exceed the responsibilities of the Operations Research Analysts occupational category in the O*NET. While individuals within this occupation rely on and collect information from databases, when we compare the employer's requirements to the O*NET Tasks, Work Activities, Knowledge, and Job Zone Examples for the selected occupation, developing custom databases appears to be beyond that of an entry-level worker. This function may be more in line with the Database Administrators occupational code. The Director should consider the DOL guidance and determine whether this should have resulted in an increase in the prevailing wage rate.

Second, the position would include "[c]rafting custom interactive dashboards and visualizations on Business Intelligence Tools . . . ." This too appears to exceed the responsibilities of the Operations Research Analysts occupational category, and is better aligned under the 15-1199.08 SOC code

[4] 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.

[5] See Step 4 of the 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.

relating to Business Intelligence Analysts. The Director may wish to consider whether the inclusion of this responsibility should have resulted in an increase in the prevailing wage rate.

Finally, the Petitioner indicated the position would encompass measuring the success of media campaigns and providing competitive analysis of their clients' business to recommend business strategies for future campaigns. While this function may entail some elements found under the SOC code designated on the LCA, the Director should consider whether it includes some responsibilities that are atypical or out of the norm for entry level Operations Research Analysts. Some of these functions would appear to akin to those found under the 13-1161 SOC code associated with the Market Research Analysts and Marketing Specialists occupation. For instance, a similar task within the O*NET under that SOC code follows: "Measure the effectiveness of marketing, advertising, and communications programs and strategies."

As the Petitioner was not previously accorded the opportunity to address the above, we will remand the record for further review of these issues. 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.