U.S. Citizenship and Immigration Services

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

In Re: 10214409

Date: JULY 2, 2020

Appeal of California Service Center Decision

Form I-129, Petition for a Nonimmigrant Worker

The Petitioner, a Chinese language newspaper, seeks to temporarily employ the Beneficiary as a "news reporter" 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 California Service Center denied the petition, concluding that the record did not establish that the proffered position qualifies 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. 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*. *See Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon *de novo* review, we will dismiss the appeal.

## I. ANALYSIS

Upon review of the entire record,[1] for the reasons set out below, we have determined that the Petitioner has not 1) demonstrated that the proffered position qualifies as a specialty occupation, or 2) submitted a certified labor condition application (LCA) that corresponds to the petition.

### A. Specialty Occupation

The Director concluded that the Petitioner did not establish that the proffered position qualifies as a specialty occupation. In her decision, the Director thoroughly discussed the Petitioner's failure to meet any of the four regulatory criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*) – *(4)*. Upon consideration of the record, we adopt and affirm the Director's decision with the comments below. *See Matter of P. Singh, Attorney*, 26 I&N Dec. 623 (BIA 2015) (citing *Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA

[1] While we may not discuss every document submitted, we have reviewed and considered each one.

1994); *see also Chen v. INS*, 87 F.3d 5, 7-8 (1st Cir. 1996) ("[I]f a reviewing tribunal decides that the facts and evaluative judgments prescinding from them have been adequately confronted and correctly resolved by a trial judge or hearing officer, then the tribunal is free simply to adopt those findings" provided the tribunal's order reflects individualized attention to the case).

Regarding the Director's discussion of the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*), we would add that the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*) states "[m]ost employers prefer workers who have a bachelor's degree in journalism or communications."[2] However, a preference for such a degree does not establish that it is normally the minimum requirement for entry into the particular position. Further, the *Handbook* indicates that some employers may hire applicants who have a degree in a related subject and relevant work experience but does not specify the level of such a degree, or that the degree and relevant work experience must be equivalent to a bachelor's degree in a specific specialty. Therefore, the *Handbook* does not support the Petitioner's assertion regarding the educational requirements required for entry into this occupation.

Regarding the Director's discussion of the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*), we would add the following analysis regarding the job advertisements submitted by the Petitioner. On appeal, the Petitioner focuses on a single job advertisement from a company it claims is a competitor within the industry. While this advertisement states that it requires a bachelor's degree in journalism or mass communications, it does not include sufficient information about the duties and responsibilities for the advertised position. Thus, it is not possible to determine important aspects of the job, such as the complexity of the job duties, supervisory duties (if any), and independent judgment required, or the amount of supervision received. Further, even if all of the job postings in the record indicated that a requirement of a bachelor's degree in a specific specialty is common to the industry in parallel positions among similar organizations (which they do not), the Petitioner has not demonstrated what statistically valid inferences, if any, can be drawn from the advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations.[3] Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large.[4]

Additionally, on appeal, the Petitioner submits new evidence relating to the four criteria.[5] We note that the Director requested this type of material within the RFE, but the Petitioner did not submit it at that time. Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, we will not accept evidence offered for the first time on appeal. *See Matter of Soriano,* 19 I&N Dec. 764, 766 (BIA 1988); *see also Matter of*

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[2] Bureau of Labor Statistics, U.S. Dep't of Labor, *Occupational Outlook Handbook*, Reporters, Correspondents, and Broadcast News Analysts https://www.bls.gov/ooh/media-and-communication/reporters-correspondents-and-broadcast-news-analysts.htm?view_full#tab-4 (last visited June 11, 2020).

[3] *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995).

[4] *See id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

[5] On appeal, the Petitioner submits the first page of a printout from www.study.com titled "News Reporter Education Requirements" and several certified PERM labor applications it claims are for entry-level reporter positions at a different competitor's company.

*Obaigbena,* 19 I&N Dec. 533, 537 (BIA 1988). If the Petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the Director's RFE. *Id.* Under the circumstances, we need not and do not consider the sufficiency of the evidence submitted for the first time on appeal.

B. LCA

We must also address the LCA submitted in support of the H-1B petition. The LCA serves as the critical mechanism for enforcing section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). *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) (indicating that the wage protections in the Act seek "to protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring temporary foreign workers" and that this "process of protecting U.S. workers begins with [the filing of an LCA] with [DOL]."). According to section 212(n)(1)(A) of the Act, an employer must attest that it will pay a holder of an H-1B visa 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.[6]

While DOL is the agency that certifies LCA applications before they are submitted to U.S. Citizenship and Immigration Services (USCIS), DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129, Petition for a Nonimmigrant Worker, actually supports that petition. The regulation at 20 C.F.R. § 655.705(b) states, in pertinent part (emphasis added):

> For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL-certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements for H-1B visa classification.

The Petitioner designated the proffered position under the occupational category "Reporters and Correspondents" corresponding to the Standard Occupational Classification code 27-3022 at a Level I wage. DOL's guidance explains that it is through the wage level that the Petitioner reflects the job requirements, experience, education, special skills/other requirements and supervisory duties.[7] It further provides that "[a] language requirement other than English in an employer's job offer shall

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[6] *See* 20 C.F.R. § 655.731(a); *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.*, No. 07-97, 2009 WL 2371236, at *8 (Dep't of Labor Admin. Rev. Bd. July 30, 2009).

[7] U.S. Dep't of Labor, 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.

generally be considered a special skill for all occupations, with the exception of Foreign Language Teachers and Instructors, Interpreters, and Caption Writers" and requires a one level increase in the wage.[8] The Petitioner indicated that the Beneficiary will not only "[a]nalyze and translate stories from different English mainstream media into Chinese," but also that "[g]ood writing and analyzing skills in Chinese and English are necessary to complete the daily task," thus applying a Chinese language requirement for entry into the proffered position.

The Petitioner, therefore, has not submitted a certified LCA that accurately reflects the Petitioner's foreign language requirement. As a result, even if the Petitioner were to establish that the proffered position is a specialty occupation, the petition is not approvable because the record lacks an LCA which corresponds to the proper wage level. To permit otherwise would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A). In this matter, the Level II prevailing wage for the proffered position at the time of filing in [redacted] CA was $45,219.00 per year, $8,219.00 more per year than the salary offered the Beneficiary.[9]

## II. CONCLUSION

The appeal will be dismissed for the above stated reasons, with each considered an independent and alternative basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. The Petitioner has not met that burden here, and the petition will remain denied.

**ORDER:** The appeal is dismissed.

[8] *Id.*

[9] *See* https://www.flcdatacenter.com/OesQuickResults.aspx?code=27-3022&area=[redacted]&year=19& source =1.