U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 4536505

Date: JULY 21, 2020

Appeal of Vermont Service Center Decision

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

The Petitioner, an IT solutions provider business, seeks to employ the Beneficiary temporarily as a "software applications engineer" 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 Form I-129, Petition for a Nonimmigrant Worker, concluding that the Petitioner did not establish that it had specialty occupation work available for the Beneficiary to perform at the time the petition was filed, or that the proffered position itself is a specialty occupation. Further, the Director determined that the Petitioner did not demonstrate that the required employer-employee relationship would be maintained between itself and the Beneficiary throughout the period of requested employment.

While this appeal was pending, the U.S. District Court for the District of Columbia issued a decision in *Itserve Alliance, Inc. v. Cissna*, --- F.Supp.3d ---, 2020 WL 1150186 (D.D.C. 2020). Subsequently, U.S. Citizenship and Immigration Services (USCIS) rescinded previously issued policy guidance and directed its officers to apply the existing regulatory definition at 8 C.F.R. § 214.2(h)(4)(ii) to assess whether a petitioner and a beneficiary have an employer-employee relationship. USCIS Policy Memorandum PM-602-0114, *Rescission of Policy Memoranda* at 2 (June 17, 2020), http://www.uscis.gov/legal-resources/policy-memoranda. The matter will therefore be remanded so that the Director may consider these issues anew.

Beyond the bases upon which the Director denied the petition, we also question whether the labor condition application (LCA) corresponds to and supports the H-1B petition, as required. The Director may wish to further explore this issue as well.

I. LEGAL FRAMEWORK

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 H-1B workers from wage abuses. A petitioner submits the LCA to the 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.[2] 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.[3] 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."[4]

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.

The plain language of the regulation at 20 C.F.R. § 655.705(b) clearly states: "In [accepting an employer's petition with the DOL-certified LCA attached], the DHS 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."

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 . . . ."[5] 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.

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[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].").

[2] Section 212(n)(1) of the Act; 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).

[3] *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).

[4] 20 C.F.R. § 655.705.

[5] Section 212(n)(1)(G)(ii) of the Act.

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.[6]

It is unclear how USCIS could carry out its responsibilities to determine whether the LCA corresponds with and supports the H-1B petition without performing such a review. To illustrate, when DOL certifies an LCA, it does not perform any meritorious review of an employer's claims to ensure the information is true.[7] In summary, when filing an LCA and an H-1B petition, a petitioner subjects itself to two authorities as it relates to the LCA: (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. As specified within the Act, by simply submitting the LCA to DOL without also obtaining a prevailing wage determination, the Petitioner has only received DOL's certification that the form is complete and does not contain obvious inaccuracies.[8] In other words it did 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.[9]

II. ANALYSIS

The Petitioner initially provided the position's description and prerequisite requirements, and provided additional details relating to the position in response to the Director's request for evidence (RFE). For the sake of brevity here, we will not quote the duties; however, we note that we have closely reviewed and considered them.

Upon review of the record, we have determined that the Petitioner has not demonstrated eligibility under the H-1B program. Specifically, we observe that the Petitioner will not compensate the Beneficiary at a sufficient wage level. We therefore conclude that the Petitioner has not established that the LCA corresponds with and supports the petition.

The Petitioner specified the proffered position as located within the "Software Developers, Applications" occupational category, corresponding to the SOC code 15-1132.[10] The Petitioner

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[6] *Simeio Solutions*, 26 I&N Dec. at 546 n.6.

[7] DOL's Office of Inspector General, 06-03-007-03-321, *Overview and Assessment of Vulnerabilities in the Department of Labor's Alien Labor Certification Programs* 1 (2003).

[8] *Id.*

[9] U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009) (DOL guidance), *available at* http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_ Guidance_Revised_11_2009.pdf.

[10] The Petitioner is required to submit a certified LCA to USCIS to demonstrate that it will pay the Beneficiary 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 experience and qualifications who are performing the same services. Section 212(n)(1) of the Act; *see also Simeio Solutions, LLC*, 26 I&N Dec. at 545-546.

further indicated the proposed employment would be in [redacted] Maryland, which was associated with a Level II prevailing wage of $93,309 per year.

DOL's five-step process compares the experience described in the Occupational Information Network Job Zone to the Petitioner's requirements. "Software Developers, Applications" are classified within Job Zone 4 with a Specialized Vocational Preparation (SVP) rating of "7.0 < 8.0."[11] This SVP rating means that the occupation requires "several years of work-related experience, on-the-job training, and/or vocational training."

- If more than two years and up to three years of work experience is required (the low end of the experience and SVP range), a one level increase is required.
- If more than three years and up to four years of work experience is required (the high end of the experience and SVP range), a two level increase is required.
- If more than four years of work experience is required (greater than the experience and SVP range) a three level increase is required.[12]

The record of proceeding contains a letter dated September 6, 2018 from the identified Primary Vendor [redacted] which states, in pertinent part: [redacted], has entered into an agreement with [redacted] to provide IT services in support of their internal project, the [redacted] Project. Under the terms of our agreement with [redacted] has requested the services of a Software Applications Engineer/Senior Applications Engineer (JAVA Developer) for the [redacted] Project. The Labor Category ("LCAT") for the Software Applications Engineer/Senior Applications Engineer (JAVA Developer) requires a Bachelor of Science Degree and eight (8) years of experience."

The Petitioner is required to submit a certified LCA to USCIS 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 experience and qualifications who are performing the same services.[13] Based on the aforementioned letter, which states that eight (8) years of experience is required by the end-client for the Beneficiary's position, it appears the Petitioner should have designated the proffered position at a higher level than merely a Level II on the LCA. Doing so would have resulted in a higher wage than the $93,309. It therefore does not appear as though the LCA corresponds to and supports the H-1B petition, as required. The Director may wish to explore this issue further.

[11] Appendix E of the DOL guidance provides that SVP is the amount of time for an individual to achieve average performance in a specific job-worker situation. The DOL guidance states: "This training may be acquired in a school, work, military, institutional, or vocational environment. Specific vocational training includes: vocational education, apprenticeship training, in-plant training, on-the-job training, and essential experience in other jobs."

[12] *See* the DOL guidance.

[13] Section 212(n)(1) of the Act; 20 C.F.R. § 655.731(a); *Simeio Solutions, LLC*, 26 I&N Dec. at 545-546.

III. CONCLUSION

Because this case is affected by the new policy guidance, we find it appropriate to remand the matter for the Director to consider the question anew and to adjudicate in the first instance any additional issues as may be necessary and appropriate. Accordingly, the following order shall be issued.

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