U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 9111339

Date: JULY 1, 2020

Appeal of Vermont Service Center Decision

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

The Petitioner, a private-label securitization and asset management firm, seeks to employ the Beneficiary temporarily as a "junior developer/associate" 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]

As noted, the Director concluded that the proffered position is not a specialty occupation. However, 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 Department of Labor (DOL) ETA Form 9035 & 9035E, Labor Condition Application for Nonimmigrant Workers (LCA) was certified.[4, 5] Without knowing the answer to that question, we cannot determine the actual, substantive

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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).

[4] While Department of Labor (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] Before filing a petition for H-1B classification, the regulation requires petitioners to obtain certification from 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*).

nature of the position. This means that we cannot make a determination on the specialty-occupation question based on the current record. 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 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.[6]

It is unclear from the record whether the Petitioner established that the proffered position's duties actually correspond with those of positions located within SOC code 13-2099.01, corresponding to the occupational title "Financial Quantitative Analysts"; the SOC code the Petitioner indicated was the correct code within its response to the Director's request for evidence (RFE). The Petitioner included duties that appear atypical to that SOC code. Specifically, we observe the duties appear properly classified under SOC code 15-1132.00 relating to the Software Developers, Applications occupational classification. For instance, reviewing the Petitioner's more detailed job description in the RFE response, the position consists primarily of building, maintaining, and manipulating computer software applications. This position appears to belong under the Software Developers, Applications SOC code, with some functions relating to the Financial Quantitative Analysts occupation.

On the issue of whether we can provide relevant analysis of a position as a specialty occupation, a petitioner's selection of the incorrect SOC code on the LCA may preclude such an evaluation. The initial issue concerns the statutory and regulatory definitions of a specialty occupation and how these focus on the broader occupation as a whole, and the use of an incorrect occupational code may result in an erroneous outcome, or one that does not properly assess the actual nature of the occupation in which the Beneficiary would engage.

A subordinate concern relates to the education requirements we consider under the regulatory criteria and how these may differ markedly from one occupational classification to the next. It would not be a valuable use of USCIS resources to analyze the position requirements under an incorrect SOC code. For instance, under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*), degree requirements to enter an occupation are not the same for all positions in a particular field of endeavor. Likewise, when considering 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*), a degree requirement considered common to the industry for one occupation may also be distinct in comparison to others.

Additionally, the Software Developers, Applications occupational classification demands a higher paying wage than the SOC code designated on the LCA.[7] The Director may also wish to consider whether the Level I wage rate designated on the LCA sufficiently represents the correct wage level based on DOL's five-step process contained within the DOL guidance evaluating the atypical duties

[6] *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).

[7] For examples, see the *Online Wage Library - FLC Wage Search Wizard*, Foreign Labor Certification Data Center (June 15, 2020), for Software Developers, Applications at https://www.flcdatacenter.com/OesQuickResults.aspx?code=15-1132&area=[redacted]&year=19&source=1, and for Financial Specialists, All Other at https://www.flcdatacenter.com/OesQuickResults.aspx?code=13-2099&area=[redacted]&year=19&source=1.

across the various SOC codes.[8] The correct wage rate appears to be at least at the Level II designation, which if true would require an annual wage increase of $21,366 to at least $96,366.

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.

[8] DOL, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009) (DOL guidance), available at http://flcdatacenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf.