U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 8870234

Date: JUNE 8, 2020

Appeal of Vermont Service Center Decision

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

The Petitioner, a logistics and supply company, seeks to employ the Beneficiary temporarily as a "logistics service manager II" 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 will dismiss the appeal.

I. ANALYSIS

Upon review of the entire record, for the reasons set out below, we have determined that the Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation. The Director concluded that the Petitioner did not establish that the offered 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 entire record, including the evidence submitted and arguments made on appeal, we adopt and affirm the Director's decision with the comments below.[4]

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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] *See Matter of P. Singh, Attorney*, 26 I&N Dec. 623 (BIA 2015) (citing *Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 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).

We note that even if we were not dismissing the appeal, it would still not be approvable as the record supports 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 requirements.[5] This petition is therefore, one in which the Petitioner would not pay the appropriate wage and it violates section 212(n)(1) of the Act and the intent to protect the wages and working conditions of U.S. workers.

Based on our review of the record, the Petitioner has not established that 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 various aspects such as (1) the amount of experience (2) the amount of education and (3) special skills or other requirements the Petitioner requires to qualify for the proffered position.[6] The correct wage rate appears to be at the Level IV rate.

To illustrate, step two of DOL's five-step process compares the experience described in the Occupational Information Network (O*NET) Job Zone to the Petitioner's requirements.[7] All of the occupational classifications under the SOC code 11-3071 associated with the Transportation, Storage, and Distribution Managers occupations are classified within a Job Zone 4 grouping with a Specialized Vocational Preparation (SVP) rating of "7.0 < 8.0."[8] This SVP rating means that the occupation requires "over 2 years up to and including 4 years" of specific vocational training. If a petitioner requires a bachelor's degree, that expends two years of specific vocational training. That would permit the employer to require up to and including two years of experience as the position's prerequisite before it must increase the wage level. The Petitioner's requirements mandated at least two years of experience in 3PL freight management or three years in the transportation industry. This requirement is greater than the experience and SVP range, which requires a three-increment wage level increase. Any amount more than two years and up to three years of experience would require a one level increase in the prevailing wage rate as it would fall on the low end of the SVP range.

Alternatively, step three of the process for determining the appropriate wage level relates to "Education." Under step three, the DOL guidance concentrates on comparing the Petitioner's minimum education requirement to that contained in Appendix D of the DOL guidance.[9] However,

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[5] 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.

[6] 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.

[7] DOL guidance.

[8] 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."

[9] Appendix D provides a list of professional occupations with their corresponding usual education level.

the Transportation, Storage, and Distribution Managers category is not listed in Appendix D. For occupations that are not listed in Appendix D, the DOL guidance states: "[U]se the education level for what 'most of these occupations' require or 'these occupations usually require' described in the O*NET Job Zone for that occupation." The O*NET entry for Transportation, Storage, and Distribution Managers provides that most of these occupations require a four-year bachelor's degree, while some do not. Within the initial filing, the Petitioner stated that it required a master's degree in supply chain management. This reveals that the Petitioner's requirements were more than what "most occupations require" in O*NET for this occupation, which would result in an increase in the prevailing wage rate by one level.

Moving to step four, the DOL guidance focuses on "Special Skills and Other Requirements." The DOL guidance states that "if it is determined that the requirements are indicators of skills that are beyond those of an entry level worker, consider whether a point should be entered on the worksheet in the Wage Level Column." Although the Petitioner described how a Level I prevailing wage rate was appropriate, it also stated specialized knowledge and expertise elements that appear to go beyond those listed in the O*NET for the Transportation, Storage, and Distribution Managers occupations. We offer two examples. First, the Petitioner required knowledge associated with "inland transportation infrastructure in [a foreign country] to aid in the development of logistics strategies for" customers based out of that country. This is not listed in the O*NET Tasks, Work Activities, Knowledge, and Job Zone Examples for the selected occupation and it warrants in increase in the wage rate by one level.

We observe an additional element under DOL's fourth step. Within its response to the Director's request for evidence, the Petitioner stated the "position requires a cultural and linguistic specialization" in that the Beneficiary would be required to interact with clients in a foreign country. The DOL guidance provides: "A language requirement other than English in an employer's job offer shall generally be considered a special skill for all occupations, with the exception of Foreign Language Teachers and Instructors, Interpreters, and Caption Writers, and a point should be entered on the worksheet." The position within this petition does not meet one of these exceptions. "By its very nature, communicating in more than one language makes a job more complex . . . . Any requirement for proficiency in a foreign language is assessed a special skill point for each foreign language required by the employer."[10] As a result, this additional special skill warrants an increase in the prevailing wage rate by one level. Base on the foregoing elements, it appears the Beneficiary's compensation should be at the Level IV wage rate, rather than at the Level I rate. This would result in a marked difference in his annual pay from the proposed $57,158 to a required salary of $107,557.[11]

Finally, we note that the Petitioner indicated that the Beneficiary must be willing to relocate to an office in a foreign country. If that event would occur at the beginning of the Beneficiary's employment term with the Petitioner, the petitioning organization would fail to meet the definition of a United States employer at 8 C.F.R. § 214.2(h)(4)(ii), as the Petitioner would not engage him to work within the United States.

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[10] *OFLC Frequently Asked Questions and Answers*, Foreign Labor Certification (May 22, 2020), https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm.

[11] For the wage figures, see *FLC Wage Results*, Foreign Labor Certification Data Center Online Wage Library (May 22, 2020), https://www.flcdatacenter.com/OesQuickResults.aspx?code=11-3071&area=[redacted]&year=19&source=1.

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 a petitioner's burden to establish eligibility for the immigration benefit sought. The Petitioner has not met that burden here, and the petition will remain denied.

ORDER: The appeal is dismissed.