U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 9097706

Date: JUNE 30, 2020

Appeal of Vermont Service Center Decision

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

The Petitioner, an information technology outsourcing firm, seeks to employ the Beneficiary temporarily as a "software development engineer in test" 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]

While we conduct *de novo* review on appeal, we conclude that a remand is warranted in this case because the Director's decision appears insufficient for review.[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]

---

[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) (relating to our *de novo* authority).

[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] 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*).

Without knowing the answer to that question, we cannot determine the actual, substantive 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 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]

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."[7] It also serves to protect H-1B workers from wage abuses. A petitioner submits the LCA to 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[8]

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.[9] Furthermore, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(*2*) provides that a petitioner must state that it will comply with the terms of the LCA. While DOL certifies the LCA, USCIS determines whether the LCA's attestations and content corresponds with and supports the H-1B petition.[10] 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."[11]

When comparing the 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

---

[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] *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].").

[8] Section 212(n)(1) of the Act; 20 C.F.R. § 655.731(a). *See also 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.*, 2009 WL 2371236, at *8 (Dep't of Labor Admin. Rev. Bd. July 30, 2009).

[9] 8 C.F.R. § 214.2(h)(4)(i)(B)(*1*).

[10] *See* 20 C.F.R. § 655.705(b) (clearly stating, "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."). *See also Simeio Solutions*, 26 I&N Dec. at 546 n.6.

[11] 20 C.F.R. § 655.705.

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 regulation at 20 C.F.R. § 655.705(b) was amended by 65 Fed. Reg. 80,110, 80,210 (proposed Dec. 20, 2000). The plain language of the regulation 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."[12, 13] Here, the plain language of the regulation is dispositive: USCIS is authorized to determine the corollary nature of the proffered position's elements as represented in an LCA when compared with those same elements as represented on the Form I-129, as well as the Petitioner's actual position requirements.

The Act further 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 . . . ."[14] 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. 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.[15]

It is unclear how USCIS is to 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.[16] 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, a petitioner has only received

---

[12] USCIS may consider DOL regulations when adjudicating H-1B petitions. *See Int'l Internship Programs v. Napolitano*, 853 F. Supp. 2d 86, 98 (D.D.C. 2012), *aff'd sub nom. Int'l Internship Program v. Napolitano*, 718 F.3d 986 (D.C. Cir. 2013).

[13] "In construing a statute or regulation, we begin by inspecting its language for plain meaning." *Sullivan v. McDonald*, 815 F.3d 786, 790 (Fed. Cir. 2016) (quoting *Meeks v. West,* 216 F.3d 1363, 1366 (Fed.Cir.2000)). "[W]e attempt to give full effect to all words contained within that statute or regulation, thereby rendering superfluous as little of the statutory or regulatory language as possible." *Sullivan*, 815 F.3d at 790 (quoting *Glover v. West,* 185 F.3d 1328, 1332 (Fed.Cir.1999)). The most basic canon of statutory—as well as regulatory—construction consists of interpreting a law or rule by examining the literal and plain language. *See Carbon Fuel Co. v. USX Corp.*, 100 F.3d 1124, 1133 (4th Cir. 1996). The inquiry ends with the plain language as well, unless the language is ambiguous. *United States v. Pressley*, 359 F.3d 347, 349 (4th Cir. 2004).

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

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

[16] 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).

DOL's certification that the form is complete and does not contain obvious inaccuracies.[17] 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—as well as other indicators of the actual position requirements—we follow DOL's guidance, which provides a five-step process for determining the appropriate SOC code and wage level.[18] The appropriate wage level is determined only after selecting the most relevant occupational category. The DOL guidance states that "[t]he [Occupational Information Network (O*NET)] description that corresponds to the employer's job offer shall be used to identify the appropriate occupational classification" for determining the prevailing wage for the LCA.

The DOL guidance contains the same publicly available procedure an employer, or their representative, should follow to not only find the correct SOC code (i.e., utilizing the O*NET), but also to calculate the appropriate wage level. We note this is the same process the DOL utilizes to issue a Prevailing Wage Determination (PWD). Absent a PWD from the DOL, we will not automatically accept the presumption that the Petitioner provided DOL with the full spectrum of information relating to the proffered position's requirements when it filed the LCA, which could affect the appropriate wage level for the position in this petition.[19]

Stated more simply, DOL clearly explains the proper methodology, and based on USCIS' authority to determine whether an LCA corresponds with and supports an H-1B petition, the agency evaluates both the appropriateness of the SOC code as well as the wage level.

II. ANALYSIS

Here, the Petitioner obtained an LCA certified under the SOC code, 15-1133 relating to "Software Developers, Systems Software." On the petition, the Petitioner identified the position as a "software development engineer in test." When it filed the petition, the Petitioner provided the position's description with 18 bullet points, and a letter from the client containing 24 bullets. In its response to the Director's request for evidence, the Petitioner expanded on its initial duties. A significant number of the duties from both entities were identical.

Based upon the provided duties from both entities, it does not appear that the Petitioner selected the correct occupational classification on the LCA. The O*NET defines the Software Developers, Systems Software occupational title as:

---

[17] *Id.*

[18] 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.

[19] A petitioner may file Form ETA-9141, Application for Prevailing Wage Determination with DOL. USCIS will accept PWDs as sufficient, provided the Petitioner establishes that it fully disclosed to DOL all of the proffered position's relevant requirements relating to the five-step process for determining an appropriate wage level, as outlined in the DOL guidance.

> Research, design, develop, and test operating systems-level software, compilers, and network distribution software for medical, industrial, military, communications, aerospace, business, scientific, and general computing applications. Set operational specifications and formulate and analyze software requirements. May design embedded systems software. Apply principles and techniques of computer science, engineering, and mathematical analysis.

Although testing software at the operating system level is included within this definition, it is only a small portion of that SOC codes responsibilities. Based on our review of all the duties within the record, it appears the most appropriate SOC code is 15-1199.01 - Software Quality Assurance Engineers and Testers. The O*NET defines the Software Quality Assurance Engineers and Testers occupation as: "Develop and execute software test plans in order to identify software problems and their causes." We note that more than 70 percent of both the Petitioner-provided duties and those from the end-client are heavily related to testing. The DOL guidance explains that a job's SOC code is identified by selecting the O*NET job description "that most closely matches the employer's request" from a list of similar occupations. DOL's Board of Alien Labor Certification Appeals has interpreted this guidance to instruct employers to select the occupation that best corresponds to the employer's job offer.[20]

If the Petitioner's LCA does not properly correspond with and support the petition, we cannot make a determination on the specialty-occupation question based on the current record. Specifically, USCIS cannot provide an accurate specialty-occupation analysis for the proffered position under the SOC code 15-1133 corresponding to the occupational title Software Developers, Systems Software if the duties more closely relate to a different SOC code.

We offer several examples. First, the statutory and regulatory definitions of a specialty occupation focus on the broader occupation as a whole, and the use of an incorrect occupational code may result in an erroneous decision, or one that does not properly assess the actual nature of the occupation in which a beneficiary would engage. Second, the education requirements we consider under the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*) may differ markedly from one occupational classification to the next. Likewise, under 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. Third, the requisite prevailing wage rate differs from one SOC code to the next, and an incorrect code could result in a petitioner compensating a foreign worker at a lower than required wage rate. It would not be a valuable use of USCIS resources to analyze the position requirements under an incorrect SOC code. These factors alone, that hinder USCIS' ability to provide a salient analysis, preclude this petition's approval.

As a result, the Director should first determine whether the proffered position is better associated with the Software Quality Assurance Engineers and Testers occupational category.

Even if the Director determines that the Software Quality Assurance Engineers and Testers is not the most appropriate occupation, she should evaluate whether the Petitioner selected the correct software developer SOC code (i.e., Software Developers, Systems Software versus Software Developers,

[20] See the Board of Alien Labor Certification Appeals decisions: *Gen. Anesthesia Specialists P'ship Med. Grp. (GASP)*, 2013-PWD-00005, at 6 (Jan. 28, 2014); *Emory Univ.*, 2011-PWD-00001, at 6-7 (Feb. 27, 2012).

Software Developer, Applications). We note that Software Developers, Systems Software associate with systems-level components and architecture (e.g., Microsoft Windows, macOS, Linux, etc.) while Software Developer, Applications focus more on general computer applications software (e.g., Microsoft Word, Pandora, Instagram, etc.). DOL's *Occupational Outlook Handbook* offers an informative difference between these two occupational categories stating:

> ***Applications software developers*** design computer applications, such as word processors and games, for consumers. They may create custom software for a specific customer or commercial software to be sold to the general public. Some applications software developers create complex databases for organizations. They also create programs that people use over the Internet and within a company's intranet.
>
> ***Systems software developers*** create the systems that keep computers functioning properly. These could be operating systems for computers that the general public buys or systems built specifically for an organization. Often, systems software developers also build the system's interface, which is what allows users to interact with the computer. Systems software developers create the operating systems that control most of the consumer electronics in use today, including those used by cell phones and cars.

Some examples of the proffered position's duties associated with general computer applications were point of sale, online, and other similar applications.

As a final note, we observe that the Petitioner's client indicated within its letter that this position not only required a bachelor's degree, but it also stated that work experience was an important prerequisite for the successful performance of the associated duties. The Petitioner failed to mention any experiential requirements. As a result, the Director should consider whether the Petitioner has offered conflicting information that is material and could have an adverse effect on its eligibility.

Furthermore, a job advertisement on the petitioning organization's website required a "Bachelor's degree in Computer Science or Related with 5 years of experience." That combination of a degree and experience would mandate a Level IV wage rate, rather than the Level II rate the Petitioner designated on the LCA. Therefore, the Director should also determine whether the Petitioner specified the correct wage level on the LCA.

III. CONCLUSION

Accordingly, the matter will be remanded to the Director to consider the LCA issues 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.