U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28710907

Date: NOV. 14, 2023

Appeal of Vermont Service Center Decision

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

The Petitioner seeks to temporarily employ the Beneficiary 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 nonimmigrant 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 petition, concluding the record did not establish that the petition was filed with a corresponding labor condition application. The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *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. THE PROCEEDINGS BELOW

The Petitioner is offering the Beneficiary the position of construction project estimator. The petition included a certified LCA for a position located within the "Construction Managers" occupational category corresponding to the Petitioner's self-categorization within the Standard Occupational Classification (SOC) Occupational Information Network (O*NET) code 11-9021.00. The Petitioner attested that it would protect workers from wage abuse by paying a required wage no lower than the higher of the actual or prevailing wage at Level I for the occupational classification in the area of intended employment to employees with similar duties, experience, and qualifications. But according to the Petitioner, the proffered job requires a minimum of a master's degree or its equivalent in construction engineering or a related field.

The Director issued a request for evidence (RFE) advising the Petitioner that they noted concerns with the Petitioner's attestation relating to the selection of a Level I wage on the accompanying LCA such

that it may not correspond to the proffered job. The Director's RFE did not question nor did the Director request evidence to establish the proffered position's status as a specialty occupation.

In its RFE response, the Petitioner submitted a brief supported by an ETA Form 9141, Application for Prevailing Wage, endorsed with a wage determined by the Department of Labor (DOL) National Prevailing Wage Center (NPC) in connection with a different proffered job.[1] The Petitioner, in an apparent misunderstanding of the eligibility concerns the Director's RFE raised, asserted at length that the Petitioner's proffered job was a specialty occupation under sections 101(a)(15)(H)(i)(b), 214(i)(1) of the Act, 8 C.F.R. § 214.2(h)(4)(i)(A)(1), 8 C.F.R. § 214.2(h)(4)(ii) and (iii)(A). The Petitioner discussed in detail the "doctrine of agency deference" as explained in *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984) and *Auer v. Robbins*, 519 U.S. 452 (1997) and its progeny. The Director noted the specialty occupation nature of the Petitioner's proffered job and denied the petition because the Petitioner assertions and accompanying documents did not establish that the certified LCA accompanying the H-1B petition corresponded to its proffered position. The Petitioner's appeal largely renews the contentions it made in its RFE response.

II. SPECIALTY OCCUPATION

A stated above, a substantial portion of the Petitioner's appeal discussed the "doctrine of agency deference" under *Chevron* and *Auer* in the context of the Petitioner's assertion that the Petitioner's proffered job is a specialty occupation. But the Petitioner's lengthy discussion of agency deference in this context is misplaced. The Director determined that the Petitioner's proffered position of construction project estimator is a specialty occupation in accordance with the statute and applicable regulations and we see no error in that conclusion. The evidence in the record established that the Petitioner's proffered construction project estimator position qualifies for classification as a specialty occupation as the term is defined at section 214(i)(l) of the Act and 8 C.F.R. § 214.2(h)(4)(ii) as it requires the theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor's or higher degree in the specific specialty or its equivalent. Specifically, the record contained the Petitioner's proffered job's description which reflected the proffered job duties were sufficiently complex or unique such that they necessitated performance only by an individual with a bachelor's degree in a specific specialty, or the equivalent, and it therefore also satisfies 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*). So we concur with the Director's conclusion that the Petitioner's proffered position is a specialty occupation. And the record reflected that the Beneficiary possessed a U.S. master's degree in a field related to construction engineering, so they are qualified to perform the duties of this specialty occupation. Although the Director made no specific conclusions in their decision, we also conclude that the Petitioner's evidence supports its contention that the occupational classification listed in the LCA corresponds to the proffered job. But the LCA is nevertheless discordant with the petition and we must dismiss the appeal for the below reasons.

III. NON-CORRESPONDING LABOR CONDITION APPLICATION

The H-1B petition process involves several steps and forms filed with the Department of Labor (DOL) and United States Citizenship and Immigration Services (USCIS). A petitioner seeking to file an

[1] Whilst the ETA Form 9141 the Petitioner submitted is for a job corresponding to the same SOC code as the job contained in the petition, it reflects a different job title, educational and experiential requirements, and job description. Accordingly it is inapplicable to the matter before us and we will disregard it.

H-1B petition must submit a certified LCA. Section 212(n)(1) of the Act; 8 U.S.C. § 1182(n)(1). A DOL certified LCA memorializes the attestations a petitioner makes regarding the employment of the noncitizen in H-1B status. *See* 20 C.F.R. § 655.734(d)(1)-(6). One of the attestations a petitioner makes relates to the protection of U.S. workers in the matter of their wages and preventing wage abuse. *See* 20 C.F.R. § 655.731. 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 the employer pays other employees with similar duties, experience, and qualifications. 20 C.F.R. § 655.731(a). Whilst DOL is responsible for certifying that a petitioner has made the required LCA attestations, USCIS evaluates whether the submitted LCA corresponds with a petitioner's H-1B petition. 20 C.F.R. § 655.705(b). 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). *See also ITServe Alliance, Inc. v. DHS*, 590 F. Supp. 3d 27, 40 (D.D.C. 2022), *aff'd sub nom ITServe Alliance, Inc. v. DHS*, 71 F. 4th 1028 (D.C. Cir. 2023) (noting that 20 C.F.R. § 655.705 requires USCIS "to check that the [H-1B] petition matches the LCA"); *see also United States v. Narang*, No. 19-4850, 2021 WL 3484683, at *1 (4th Cir. Aug. 9, 2021)(per curiam)("[USCIS] adjudicators look for whether [the] employment [listed in the H-1B petition] will conform to the wage and location specifications in the LCA").

When examining the wage level indicated on the LCA, USCIS does not purport to supplant DOL's responsibility with respect to wage determinations. But to assess whether the wage indicated on the H-1B petition corresponds with the wage level listed on the LCA, USCIS will apply DOL's guidance, which provides a five-step process for determining the appropriate wage level. U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009). The wage level begins at Level I and may increase to Level IV based on a comparison of the duties and requirements for the employer's proffered position to the general duties and requirements for the most similar occupation as provided by the Occupational Information Network (O*NET). So, an adjudicator must determine whether the O*NET occupation selected by the petition is correct and then compare the experience, education, special skills and other requirements, and supervisory duties described in the O*NET entry to those required by the employer for the proffered position.

Whilst relevant, a position's wage level is not a substitute for a determination of whether a proffered position meets the requirements for section 214(i)(l) of the Act, 8 U.S.C. 1184(i)(1). There is no patent inconsistency between an entry-level position and a specialty occupation. For example, in some occupations, a "basic understanding" warranting a Level I wage may require years of study, duly recognized upon the attainment of a bachelor's degree in a specific specialty. Most professionals start their careers in what are deemed entry-level positions. That does not preclude us from identifying a specialty occupation. And likewise, at the other end of the spectrum, a Level IV wage would not necessarily reflect that an occupation qualifies as a specialty occupation if that higher-level position does not have an entry requirement of at least a bachelor's degree in a specific specialty or its equivalent. Wage levels are relevant, and we will assess them to ensure the LCA "corresponds with" the H-1B petition. But wage is only one factor and does not by itself define or change the character of the occupation.

Most importantly here, the Petitioner attested in the LCA that they would protect workers from wage abuse by paying a required wage no lower than the higher of the actual or prevailing wage at Level I for the occupational classification in the area of intended employment to employees with similar duties, experience, and qualifications. The DOL guidance provides a five-step process for determining the appropriate wage level out of the four distinct DOL wage levels (I to IV) based on the duties and requirements for the employer's proffered position to the general duties and requirements for most similar occupations as provided by O*NET. The correct wage level is determined by evaluating whether the wage indicated on the H-1B petition corresponds with the wage level on the LCA using DOL's guidance at U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance* (rev. Nov. 2009), available at https://www.flcdatacenter.com/download/npwhc_guidance_revised_11_2009.pdf. DOL's guidance requires selecting the correct O*NET occupational classification and then comparing the experience, education, special skills and other requirements, and supervisory duties described in the O*NET entry to those required by the employer for the proffered position.[2] A point is assigned for each instance of the petitioner's requirements exceeding the experience, education, special skills and other requirements contained in the O*NET standard. The number of points corresponds to the assigned wage level. Accumulation of more than four points defaults to the Level IV wage level.[3]

The Petitioner here improperly designated the proffered position with a Level I wage. The Petitioner selected wage Level I on the LCA, but the record of proceeding reflects that the petition requires "a master's degree in construction engineering" as a minimum educational requirement for entry into the proffered position. Appendix D of the DOL guidance lists a minimum education requirement of a bachelor's degree for the construction manager category based on categorization in Education and Training Category Code four. Education and Training Category Code four provides minimum prerequisites not in excess of a bachelor's or higher degree with work experience. Code four groupings are typically managerial in nature and require experience in a related non-managerial position. So, the job for which the LCA was certified consequently warrants a one-level increase in the wage from the default Level I to Level II due to the Petitioner's enhanced educational requirement. The Level I wage obligation is $31,887 less than the Level II wage obligation, representing an underpayment by 26%.

As the LCA in the record was certified with a Level I wage, it is not in correspondence with the proffered position. An H-1B petition cannot be approved without a corresponding LCA. *See* section 212(n)(1) of the Act; 20 C.F.R. § 655.731(a). So the petition is unapprovable as filed despite the fact the proffered job is a specialty occupation under section 214(i)(1) of the Act and the regulations at 8 C.F.R. § 214.2(h)(4)(ii).

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[2] A wage level is relevant in the context of H-1B petition adjudication because we must evaluate whether an LCA corresponds to the H-1B petition with which it is submitted. A wage level is not dispositive to a determination of whether a proffered position is a specialty occupation under section 214(i)(1) of the Act. A position with an entry-level, or Level I wage is not per se disqualified from being considered a specialty occupation.

[3] The Petitioner contends that their assignment of a Level I wage for their proffered position is "commensurate with industry standards." The DOL guidance does not make any accommodations for "industry standards" when determining the appropriate wage level for a proffered job. If the Petitioner considered the OES wage data inaccurate, the regulations permitted them to use a private or alternate wage survey to justify the applicable prevailing wage for their proffered job. *See* 20 C.F.R. § 655.731(a)(2)((ii)(A) and 20 C.F.R. § 655.40.

IV. CONCLUSION

The certified LCA in the record is not in correspondence with the proffered position. Thus the petition is unapprovable as filed. See section 212(n)(1) of the Act; 20 C.F.R. § 655.731(a). So the appeal must be and is hereby dismissed.

ORDER: The appeal is dismissed.