



April 12, 2017

PM-602-0143

Policy Memorandum

SUBJECT: *Matter of I- Corp.*, Adopted Decision 2017-02 (AAO Apr. 12, 2017)

This policy memorandum (PM) designates the attached decision of the Administrative Appeals Office (AAO) in *Matter of I- Corp.* as an Adopted Decision. Accordingly, this adopted decision establishes policy guidance that applies to and binds all U.S. Citizenship and Immigration Services (USCIS) employees. USCIS personnel are directed to follow the reasoning in this decision in similar cases.

Matter of I- Corp. clarifies that USCIS cannot approve a visa petition that is based on an illegal or otherwise invalid employment agreement. To prevent a potential conflict with the Fair Labor Standards Act, USCIS must ensure that a beneficiary will not be paid a wage that is less than the minimum required wage under state or Federal law, whichever is higher, before approving an employment-based visa petition.

Use

This PM is intended solely for the guidance of USCIS personnel in the performance of their official duties. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

Contact Information

Questions or suggestions regarding this PM should be addressed through appropriate directorate channels to the AAO.



ADOPTED DECISION

MATTER OF I- CORP.

ADMINISTRATIVE APPEALS OFFICE
U.S. CITIZENSHIP AND IMMIGRATION SERVICES
DEPARTMENT OF HOMELAND SECURITY

April 12, 2017^[1]

- (1) U.S. Citizenship and Immigration Services (USCIS) cannot approve a visa petition that is based on an illegal or otherwise invalid employment agreement.
- (2) To prevent a potential conflict with the Fair Labor Standards Act (FLSA), USCIS must ensure that a beneficiary will not be paid a wage that is less than the minimum required wage under state or Federal law, whichever is higher, before approving an employment-based visa petition.

FOR THE PETITIONER: Juan C. Flamand, Esquire, Phoenix, Arizona

The Petitioner, a semiconductor manufacturing company, seeks to temporarily employ the Beneficiary as a “Failure Analysis Engineer” in Oregon under the L-1B nonimmigrant classification for intracompany transferees. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The L-1B classification allows a corporation or other legal entity (including its affiliate or subsidiary) to transfer a qualifying foreign employee with “specialized knowledge” to work temporarily in the United States.

The Director of the California Service Center denied the petition, concluding that the evidence did not demonstrate that the Beneficiary possesses specialized knowledge or that he has been and will be employed in a capacity requiring specialized knowledge. The matter is now before us on appeal. The Petitioner asserts that it has established eligibility for the benefit sought.

¹ On April 24, 2015, we issued this decision as a non-precedent decision. We have reopened this decision on our own motion under 8 C.F.R. § 103.5(a)(5)(i) for the purpose of making revisions in preparation for USCIS designating it as an Adopted Decision.

Upon *de novo* review, we have identified an antecedent issue that must be further developed and resolved before evaluating whether the position requires, and the Beneficiary possesses, specialized knowledge. On the Form I-129, Petition for a Nonimmigrant Worker, the Petitioner indicated that it would employ the Beneficiary for a 2-year period at a total wage of “43,445 MYR per year.” When converted from Malaysian ringgits (MYR) to U.S. dollars, this proffered salary is the equivalent of \$13,467.95 per year or \$6.47 per hour.² We are unable to approve an employment-based visa petition where the record indicates that a petitioner will not pay its beneficiary the minimum wage required by applicable labor law. We will remand this matter to the Director for further development of the record and entry of a new decision.

I. DISCUSSION

USCIS is primarily responsible for adjudicating immigration benefit requests available under applicable immigration law. To determine eligibility for many immigration benefits, USCIS officers must also take into account other, intersecting areas of law, such as criminal, family, and (as relevant here) labor. The central issue here is whether the Petitioner established that the Beneficiary will be paid a wage that meets or exceeds the required minimum wage as mandated by the FLSA of 1938, Pub. L. No. 75-718, 52 Stat. 1060 (codified as amended at 29 U.S.C. § 201-219). As explained below, we cannot approve an employment-based visa petition that is based on an illegal or otherwise invalid employment agreement.³

The FLSA provides for Federal minimum wage requirements for employers. 29 U.S.C. § 206. When Federal and state minimum wage laws differ, an employer must pay a wage that meets or exceeds the minimum required wage of whichever requirement is higher. *See* 29 U.S.C. § 218(a). The expressed policy of the FLSA is to eliminate labor conditions “detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers,” including that which “constitutes an unfair method of competition in commerce.” 29

² As of December 4, 2013, the date of the petition’s filing, the international exchange rate was 0.31 U.S. dollar per Malaysian ringgit. *See* <http://www.xe.com/currencytables/?from=MYR&date=2013-12-04> (last visited Apr. 13, 2017). Given a total converted annual salary of \$13,467.95, we calculated the hourly wage based on a 52-week year and a 40 hour work week to be \$6.47 per hour. While the Petitioner stated that it also provided “other compensation” in the form of “[h]ousing, travel, and relocation allowances,” it provided no monetary value for these benefits. We considered whether the indicated salary could involve a scrivener’s error, such that the Petitioner intended to state a salary in U.S. dollars rather than Malaysian ringgits. Because Government records indicate that the U.S. Department of State refused to issue the Beneficiary an L-1B visa on two occasions – first on April 8, 2013 and again on May 13, 2013 – based, in part, on the low salary that the Petitioner had offered the Beneficiary, we are remanding this matter to allow the Petitioner an additional opportunity to address this issue.

³ To be clear, the wage requirement we apply today is the legal floor, not any particular level above that. Although rank and salary are among the many factors that may be considered when analyzing the totality of circumstances surrounding a beneficiary’s claimed specialized knowledge, there is currently no requirement that an L-1B beneficiary’s salary be elevated compared to his or her peers within the organization or the particular industry. *See generally*, section 214(c)(2)(B) of the Act (defining specialized knowledge). And unlike the H-1B visa classification, the L-1B classification does not require the petitioning employer to certify that the beneficiary will be paid the “prevailing wage” for the proffered position. *See generally* section 212(n)(1) of the Act; 8 C.F.R. § 214.2(h), (l).

U.S.C. § 202. Such detrimental working conditions include the payment of a wage below that set by the FLSA as the minimum wage. *See* 29 U.S.C. § 206.

The right to a minimum wage under the FLSA cannot be waived by agreement between an employee and his or her employer. *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697 (1945). Contractual understandings or agreements which effectively circumvent or evade the protections of the FLSA are invalid and unenforceable.⁴

With that background in labor law, we note our authority and responsibility to consider these labor provisions in our administration of immigration law. While wage laws are not expressly restated in the Act, it is implied that authorized employment must comply with both the Act and the FLSA.⁵ Only when it sought to exceed FLSA protections has Congress included specific wage-related provisions in the Act.⁶ Longstanding case law requires “careful accommodation of one statutory scheme to another” to achieve congressional objectives.⁷ In granting benefits under our Act, we must take into account the equally important congressional objectives of the FLSA, which in this case are expressed through its minimum wage provisions. *See* 29 U.S.C. §§ 202 and 206.

In the instant matter, we take administrative notice that the Federal minimum wage applicable at the time this petition was filed was \$7.25 per hour.⁸ And, also as of the time of filing, the State of Oregon set a higher minimum wage, mandating \$8.95 per hour.⁹ Because Oregon’s minimum wage is higher than the Federal minimum, the higher Oregon standard applies.¹⁰ If the Petitioner’s offer of employment is indeed \$6.47 per hour, as represented on the Form I-129, the proposed salary would violate the Federal and state minimum wage protections, and thus the offer of employment would be invalid under the FLSA.

⁴ *See Mitchell v. Turner*, 286 F.2d 104, 106 (5th Cir. 1960); *Wood v. Meier*, 218 F.2d 419, 420 (5th Cir. 1955); *Handler v. Thrasher*, 191 F.2d 120, 123 (10th Cir. 1951); *Mitchell v. Greinetz*, 235 F.2d 621, 625 (10th Cir. 1956); *Caserta v. Home Lines Agency, Inc.*, 273 F.2d 943, 946 (2nd Cir. 1959).

⁵ In fact, FLSA wage provisions apply even to foreign nationals hired without work-authorizing immigration status. *Lucas v. Jerusalem Cafe, LLC*, 721 F.3d 927, 936 (8th Cir. 2013) (“[T]he FLSA unambiguously requires that any unauthorized aliens—hired in violation of Federal immigration law—be paid minimum and overtime wages.”).

⁶ *See, e.g.*, section 212(a)(5)(A)(i) (The Secretary of Labor must certify that the employment of an alien subject to a labor certification “will not adversely affect the wages and working conditions of workers in the United States similarly employed.”), (n)(1)(A)(i) (The H-1B wages offered on the labor condition application must meet the actual wage or the prevailing wage, whichever is greater.), (p) (Computation of prevailing wage level).

⁷ *Southern S.S. Co. v. Nat’l Labor Relations Bd.*, 316 U.S. 31, 47 (1942); *see also Morton v. Mancari*, 417 U.S. 535, 551 (1974) (“[W]hen two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.”); *cf. Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 172 (1962) (“The policies of the Interstate Commerce Act and the [National Labor Relations Act] necessarily must be accommodated, one to the other.”).

⁸ *See* 29 U.S.C. § 206(a)(1)(C); *see also* <http://www.dol.gov/whd/minimumwage.htm> (last visited Apr. 13, 2017).

⁹ *See* <http://www.dol.gov/whd/state/stateMinWageHis.htm> (last visited Apr. 13, 2017).

¹⁰ When Federal and state minimum wage laws differ, an employer must pay a wage that meets or exceeds the minimum required wage of whichever requirement is higher. 29 U.S.C. § 218(a).

Accordingly, we decline to address the specialized knowledge issues in the Director's decision. Instead, we will remand this matter to the Director to determine what wage would be paid to the Beneficiary. If the Director decides to request evidence to further develop the record,¹¹ she may ask the Petitioner to confirm whether it will pay the Beneficiary in Malaysian ringgits. The Director may also request additional evidence to include any employment contract or, if the written contract is not available, a summary of the terms of the proposed employment. The Director may also inquire into the means by which the Petitioner would pay the Beneficiary in Malaysian currency, the monetary value of "[h]ousing, travel, and relocation allowances," and such other evidence that the Director may deem necessary. 8 C.F.R. § 214.2(l)(3)(viii). If the Director determines that the Petitioner has not established, by a preponderance of the evidence, that the Beneficiary will be paid the required minimum wage, the petition cannot be approved. If the Director determines that the total compensation¹² offered meets or exceeds the required minimum wage, but that compensation is significantly lower than the Beneficiary's peers or the particular industry, the Director may also consider that fact when re-evaluating the totality of the evidence relating to the Petitioner's specialized knowledge claim.¹³

II. CONCLUSION

The burden of proof in this proceeding rests with the Petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The evidence does not establish that the Petitioner will pay the Beneficiary a wage that meets or exceeds the required minimum wage as mandated by the FLSA.

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

Cite as *Matter of I- Corp.*, Adopted Decision 2017-02 (AAO Apr. 12, 2017)

¹¹ The Director may also decline to request evidence and choose to exercise her authority to deny the petition. 8 C.F.R. § 103.2(b)(8).

¹² For this limited purpose, what constitutes "total compensation" is fact-dependent, but may include, besides wages or salary, other guaranteed forms of payment made to an employee for services to be rendered for the petitioner. Such compensation may be paid in the form of money, a commodity, a service, or a privilege, including food, transportation and housing allowances, as well as guaranteed bonuses. Any such payment, however, must principally be for the convenience or benefit of the employee and be agreed upon by the Petitioner and Beneficiary before the petition is filed. The Petitioner bears the burden of establishing the actual value of any claimed compensation. USCIS Policy Memorandum PM-602-0111, *L-1B Adjudications Policy* 10 (August 17, 2015), <https://www.uscis.gov/laws/policy-memoranda>.

¹³ Evidence that a significant number of employees within the petitioning organization's U.S. operations share the Beneficiary's knowledge, yet the Beneficiary will be paid substantially less than those similarly situated employees, may indicate that the Beneficiary lacks the requisite specialized knowledge. *Id.* at 10-11.