U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF V-T-G-, INC.

DATE: DEC. 19, 2018

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, an electronic storage device developer, seeks to temporarily employ the Beneficiary as an "electrical engineer" 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 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 Director of the Nebraska Service Center denied the petition, concluding that the Petitioner did not establish, as required, that the submitted labor condition application (LCA) corresponds with the H-1B petition. More specifically, the Director found that the Petitioner's classification of the proffered position as a Level I wage was incorrect.

On appeal, the Petitioner asserts that the Director erred in the decision. Upon *de novo* review, we will dismiss the appeal.

I. LEGAL FRAMEWORK

The H-1B petition process involves several steps and forms filed with the Department of Labor (DOL) and the Department of Homeland Security's (DHS) U.S. Citizenship and Immigration Services (USCIS). Below, we'll explore the relationship between the labor condition application (LCA) that DOL certifies (and the petitioner then submits to USCIS) and the H-1B petition that USCIS adjudicates.

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."[1] It also serves to protect H-1B workers from wage abuses. A petitioner submits the LCA to DOL to demonstrate that it will

[1] *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).

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. Section 212(n)(1) of the Act; 20 C.F.R. § 655.731(a). While DOL certifies the LCA, USCIS determines whether the LCA's content corresponds with 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,...."). When assessing the wage level indicated on the LCA, 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.

To assess whether the wage indicated on the H-1B petition corresponds with the wage level listed on the LCA, USCIS applies 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 a Level I and may increase up to a 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). Generally, we must first identify whether the O*NET occupation selected by the petitioner 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.[2]

Before we do so, a few more general observations are in order about the relevance of wage levels in the context of H-1B adjudications. A position's wage level designation certainly is relevant, but is not a substitute for a determination of whether a proffered position meets the requirements of section 214(i)(1) of the Act. We assess each case on its merits. There is no inherent inconsistency between an entry-level position and a specialty occupation. For some occupations, the "basic understanding" that warrants 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 doesn't 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.

[2] This approximately summarizes DOL's five step process. First, we determine the correct O*NET occupation, while the next four steps consist of comparing the attributes (such as experience and education) of that O*NET occupation to those indicated by the Petitioner.

II. ANALYSIS

The issue in this matter is whether the Petitioner properly selected a Level I (entry-level) wage on the LCA for the proffered position of electrical engineer. In its LCA, the Petitioner selected the Level I wage as consonant with the job requirements, necessary experience, education, special skills/other requirements, and supervisory duties of the proffered position.[3] The Director determined the Level I wage was inappropriate by comparing the Petitioner-indicated duties directly to DOL's generic definition of a Level I wage.[4]

On appeal, the Petitioner contends that the Director erred in her methodology by comparing the job duties of the position to DOL's definition of a Level I wage. Instead, the Petitioner maintains that the Director should have applied the factors outlined in DOL's guidance. We agree. According to DOL guidance, the proper comparison is between the Petitioner-indicated job attributes and requirements for the proffered position and those associated with the appropriate O*NET occupation, which in this matter is electrical engineers.

To resolve this appeal, we can focus directly on step three of DOL's aforementioned five step process for wage level determinations. The third step involves a comparison of the Petitioner's education requirement to that listed in Appendix D of the DOL guidance.[5] The Petitioner's stated minimum education requirement is a master's degree in electrical engineering. Because the education requirement contained in the Appendix indicates that the usual education level for an electrical engineers is a bachelor's degree, the Petitioner's master's degree requirement warrants a one level increase in the wage. For this reason alone, the Petitioner's designation of the proffered position as a Level I wage was not correct and the petition is not approvable.

We note that in response to the Director's request for evidence (RFE), the Petitioner changed the proffered position's requirement to a bachelor's degree in electrical engineering. However, in response to an RFE, the Petitioner cannot offer a new position to the Beneficiary, or materially change the requirements of the position. The Petitioner must establish that the position offered to

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[3] The Petitioner did not request a prevailing wage determination from the National Prevailing Wage Center (NPWC) prior to filing the LCA with DOL. USCIS will generally accept NPWC's prevailing wage determination and grant the employer a "safe harbor" to rely on both the wage level and the occupational classification, so long as the employer fully and accurately described the proffered position to the NPWC.

[4] DOL's 2009 guidance describes Level I as follows:

> Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

[5] Appendix D of the DOL guidance provides a list of professional occupations with their corresponding usual education level.

the Beneficiary when the petition was filed merits classification for the benefit sought. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

III. PREVAILING WAGE

Moreover, even if the Petitioner overcame the ground for the Director's denial of the petition (which it has not), the petition could not be approved as the Petitioner has not demonstrated that it would pay the Beneficiary an adequate salary for his work, as required, if the petition were granted.

In the H-1B petition, the Petitioner stated that the Beneficiary would be compensated $72,000 per year. However, the proffered wage of $72,000 per year for the occupational category "Electrical Engineers" corresponding to the Standard Occupational Classification code 17-2071 was lower than the prevailing wage in the area of intended employment at the time the LCA was filed. Specifically, the prevailing wage for "Electrical Engineers" in Simi Valley, California was $75,858 per year when the LCA was filed in June 2017.[6] Under the H-1B program, a petitioner must offer the beneficiary wages that are at least the actual wage level paid by the petitioner to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the application. *See* section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A); *Simeio Solutions, LLC*, 26 I&N Dec. at 545-546.

The Petitioner has not demonstrated that it would pay the Beneficiary an adequate salary for his work, as required, if the petition were granted. Accordingly, the petition cannot be approved for this additional reason.

IV. CONCLUSION

For the reasons outlined above, the Petitioner has not established eligibility for the benefit sought.

ORDER: The appeal is dismissed.

Cite as *Matter of V-T-G-, Inc.*, ID# 1758290 (AAO Dec. 19, 2018)

[6] *See* the All Industries database for 7/2016 - 6/2017 for Electrical Engineers at the Foreign Labor Certification Data Center, http://www.flcdatacenter.com/OesQuickResults.aspx?code=17-2071&area=37100&year=17&source=1 (last visited Dec. 19, 2018)