U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: APR 24 2015 FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The record will be remanded to the director for further development of the record and entry of a new decision.

The petitioner filed the Petition for a Nonimmigrant Worker (Form I-129) seeking to classify the beneficiary as an L-1B nonimmigrant intracompany transferee with specialized knowledge, pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the INA), 8 U.S.C. § 1101(a)(15)(L). The petitioner stated on the Form I-129 that it is a manufacturer with a gross annual income of $53.3 billion. It is the parent entity to in Malaysia, the beneficiary's employer abroad.

The petitioner now seeks to employ the beneficiary as a failure analysis engineer in Oregon. The record indicates that the beneficiary possesses a foreign bachelor's degree in engineering (with honors) and approximately two years of experience. The director denied the petition, concluding that the petitioner provided insufficient evidence to establish that the beneficiary possesses specialized knowledge or that he has been and will be employed in a capacity requiring specialized knowledge.

On appeal, the petitioner asserts that the director overlooked relevant evidence of the beneficiary's specialized knowledge and contends that the petitioner's product and tests developed for that product are proprietary and unique to the petitioner, thus requiring an individual with specialized knowledge to conduct failure analysis at the beneficiary's level of expertise. The petitioner maintains that the beneficiary is, and will be, employed in a specialized knowledge capacity.

We conduct *de novo* review on appeal, but a threshold matter must be resolved before we address the merits of the petitioner's visa petition. 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. On the current Form I-129, in Part 5 relating to "Basic Information About the Proposed Employment and Employer," the petitioner indicated that it would employ the beneficiary in Oregon for a two-year period and pay the beneficiary 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.[1]

[1] As of December 4, 2013, the date of the petition's filing, the international exchange rate provided for 0.31 U.S. Dollar per Malaysian Ringgit. *See* http://www.xe.com/currencytables/?from=MYR&date=2013-12-04 (viewed April 23, 2015). Given a total converted salary of $13,467.95, we calculate 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 previous visa refusals based on low wages, we will remand to allow the petitioner an opportunity to resolve the incongruity.

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 no requirement that the beneficiary's salary be elevated compared to his or her peers within the organization or the particular industry. *See generally*, INA § 214(c)(2)(B) (defining specialized knowledge). Furthermore, in contrast with the H-1B visa classification, the INA provisions governing the L-1B visa classification do not require the employer to certify that the alien will be paid the "prevailing wage" for the occupational classification in the area of employment. *See generally* section 212(n)(1) of the INA, 8 U.S.C. § 1182(n)(1); 8 C.F.R. § 214.2(h), (l).

However, the INA is not the only relevant statute. The expressed policy of the Fair Labor Standards Act of 1938 (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. *See* Fair Labor Standards Act of 1938, § 2(b), 52 Stat. 1060 (June 25, 1938), *codified as amended at* 29 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* FLSA at § 6, 29 U.S.C. § 206.[2]

We take administrative notice that the federal minimum wage has remained at $7.25 per hour since July 24, 2009. *See* 29 U.S.C. § 206(a)(1)(C); *see also* http://www.dol.gov/whd/minimumwage.htm (last accessed April 7, 2015). The state of Oregon imposes a higher minimum wage, mandating $8.95 per hour at the time of filing. *See* http://www.dol.gov/whd/state/stateMinWageHis.htm (last accessed April 7, 2015). Where state law requires a higher minimum wage than the federal minimum wage, that higher standard applies. 29 U.S.C. § 218(a).

The right to a minimum wage under the FLSA cannot be waived by agreement between an employee and his employer. *Brooklyn Bank v. O'Neil*, 324 U.S. 697 (1956). Further, contractual understandings or agreements which effectively circumvent or evade the protections of the FLSA are invalid and unenforceable. *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). If the petitioner's offer of employment proves to be $6.47 per hour, as represented on the Form I-129, the salary would violate the minimum wage protections and the offer of employment would be invalid under the FLSA.

The entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and U.S. Citizenship and Immigration Services (USCIS) may not effectuate the policies of the INA in such a way that it may ignore these other and equally important Congressional objectives. *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) ("when 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.").

[2] There was no need to write federal minimum wage laws into the INA; that would be duplicative. Instead, it is implied that all authorized employment must be in accordance with and otherwise abide by both the INA and the FLSA. It is only where Congress specifically sought to exceed these standard FLSA protections that it became necessary to include them in the INA. *See, e.g.*, INA § 212(a)(5)(A)(i), (n)(1)(A)(i), (p).

Following these *Southern S.S. Co.* line of cases, the Supreme Court in *Hoffman Plastic Compounds, Inc. v. Nat'l Labor Relations Bd.*, 535 U.S. 137 (2002), held that "federal immigration policy, as expressed by Congress in the Immigration Reform and Control Act of 1986 (IRCA), foreclosed the [National Labor Relations Board (NLRB)] from awarding backpay to [an] undocumented alien who had never been legally authorized to work in the United States." Likewise, in granting benefits under the INA, we are obliged to take into account the equally important Congressional objectives of the FLSA, which in this case are its minimum wage provisions and its stated policy to, in part, maintain living standards and protect against unfair competition. *See* 8 U.S.C. §§ 202 and 206; *cf. Hoffman Plastic Compounds, Inc.*, 535 U.S. at 145 (citing *Southern S.S. Co.*, 316 U.S. at 31, for this general principal and finding the NLRB's authority was limited by federal immigration policy).

Therefore, in administering the immigration laws, USCIS must accommodate the policies of both the INA and the FLSA. USCIS may not approve a visa petition that is based on an invalid or illegal employment agreement. Such an approval would not only trivialize the FLSA, it would also condone and encourage future violations. *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 150; *cf. 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.").

To avoid a potential conflict with the FLSA in this matter, any approval of employment authorization under the INA must be conditioned upon sufficient evidence that the nonimmigrant worker will be paid a wage that meets the minimum required wage under state or federal law, whichever is higher. *See* 29 U.S.C. § 218(a).

Accordingly, we decline to reach the merits of the director's decision and reserve any determination on whether the petitioner has established eligibility. On remand, the director should afford the petitioner an opportunity to submit additional evidence and legal argument. Specifically, the director should ask the petitioner to confirm whether it will pay the beneficiary in Malaysian Ringgits. The director should also request additional evidence to include any employment contract or, if the written contract is not available, a summary of the terms. 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. *See* 8 C.F.R. § 214.2(l)(3)(viii). If the Director determines that the wage is significantly lower than the beneficiary's peers or the particular industry, the Director may also consider that fact when evaluating the totality of the evidence relating to the petitioner's specialized knowledge claim.

As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the INA, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further development of the record in accordance with the foregoing discussion and entry of a new decision.