



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

In Re: 20633045

Date: MAR. 3, 2022

Appeal of Nebraska Service Center Decision

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

The Petitioner seeks to 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 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 Nebraska Service Center Director denied the Form I-129, Petition for a Nonimmigrant Worker, concluding that: (1) the record did not establish that the petition was supported by a U.S. Department of Labor (DOL) Labor Condition Application for Nonimmigrant Workers Form ETA-9035 & 9035E, (LCA) which corresponded with the proffered position described in the petition, and (2) that the Petitioner did not provide an LCA that was certified for the specialty occupation as required by the regulation at 8 C.F.R. § 214.2(h)(4)(i). The matter is now before us on appeal. The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). We review the questions in this matter *de novo*. *See Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon *de novo* review, we conclude that a remand is warranted in this case.

I. LAW

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)(I). The purpose of DOL's LCA wage requirement is "to protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring temporary foreign workers." *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). *See also Aleutian Cap. Partners, LLC v. Scalia*, 975 F.3d 220, 231 (2d Cir. 2020) (quoting 20 C.F.R. § 655.0(a)(1) and finding that a primary goal of U.S. non-immigrant foreign worker programs like the H-1B Program is to ensure that "the employment of the foreign worker in the job

opportunity will not adversely affect the wages or working conditions of similarly employed U.S. workers.”).

The LCA 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. 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).

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, U.S. Citizenship and Immigration Services (USCIS) “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.” 20 C.F.R. § 655.705(b). *See also Matter of Simeio Solutions*, 26 I&N Dec. 542, 546 n.6 (AAO 2015).

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) ; *ITServe All., Inc. v. Dep’t of Homeland Sec.*, No. 1:20-CV-03855 (TNM), 2022 WL 493081, at *10 (D.D.C. Feb. 17, 2022) (citing *Simeio Solutions*, 26 I&N Dec. at 546 n.6 and 20 C.F.R. § 655.705(b)); *United States v. Narang*, No. 19-4850, 2021 WL 3484683, at *1 (4th Cir. Aug. 9, 2021) (finding that USCIS adjudicators evaluate whether the employment proposed in an H-1B petition will conform to the wage and location specifications in the LCA); *Parzenn Partners, LLC v. Baran*, No. 19-CV-11515-ADB, 2020 WL 5803143, at *8–9 (D. Mass. Sept. 29, 2020) (finding that USCIS operates within its authority when it either considers or evaluates DOL’s wage level regulation when determining if an LCA corresponds with and supports an H-1B petition).

In a similar vein, USCIS possesses the authority to evaluate whether the proffered position’s duties are in accordance with the occupational classification on the LCA, and if not, to determine under which occupational titles the responsibilities correspond. *See GCCG Inc v. Holder*, 999 F. Supp. 2d 1161, 1167–68 (N.D. Cal. 2013) (in which the court agreed with USCIS that a large portion of the beneficiary’s duties were most similar to those found within the Bookkeeping, Accounting, and Auditing Clerks occupation, rather than within the Accountants Standard Occupational Classification (SOC) code.) Effectively, this reiterates the USCIS’ ability to determine whether the LCA corresponds with and supports the petition.

“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).

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. And to clarify, USCIS does not purport to exercise any authority over the LCA. Instead, we are ensuring that the claims made on the LCA sufficiently align to those made within the H-1B petition.

Furthermore, the Act 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” Section 212(n)(1)(G)(ii) of the Act. 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.

Simeio Solutions, 26 I&N Dec. at 546 n.6. 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, by simply submitting the LCA to DOL without also obtaining a prevailing wage determination, a petitioner has only received DOL’s certification that the form is complete and does not contain obvious inaccuracies. *Id.*¹ In fact, DOL “is not generally permitted to investigate the veracity of the employer’s attestations on the LCA prior to certification.” *Aleutian Cap. Partners, LLC*, 975 F.3d at 225–26 (quoting *Cyberworld Enter. Techs., Inc. v. Napolitano*, 602 F.3d 189, 193 (3d Cir. 2010)).

Further, when DOL certifies an LCA, it does not perform any meritorious review of an employer’s claims to ensure the information is true. DOL’s Office of Inspector General, 06-21-001-03-321, *Overview of Vulnerabilities and Challenges in Foreign Labor Certification Programs* 11 (2020) (describing the DOL Employment and Training Administration’s role as “simply rubber-stamping during the application certification process”). In other words, employers do 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, we follow DOL’s guidance, which provides a five-step process for determining the appropriate SOC code and wage level. *See* U.S. Dep’t of Labor, Emp’t & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev.

¹ Employers may obtain a prevailing wage determination by taking the additional step of submitting Form ETA-9141 (Application for Prevailing Wage Determination) to DOL’s National Prevailing Wage Center.

Nov. 2009) (DOL guidance), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

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.” 20 C.F.R. § 655.705(c)(1). 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 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.

Additionally, it is important for USCIS to ensure the employer has selected the SOC code on the LCA that most closely matches the proffered position for reasons that affect H-1B statutory and regulatory requirements. First, the wrong SOC code can direct USCIS to evaluate an inapplicable occupational title or occupation. It is the occupation itself that we evaluate to decide if it requires a “theoretical and practical application of a body of highly specialized knowledge,” and “attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.” Section 214(i)(1) of the Act. Therefore, an incorrect SOC code could mean we would not be able to properly evaluate whether a petitioner has satisfied the statute’s definition of a specialty occupation.

Second, we also cannot provide a proper analysis under two H-1B regulatory requirements. Those requirements fall under the regulations at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) and (2). 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) requires a petitioner to demonstrate that a baccalaureate or higher degree—or its equivalent—is normally the minimum requirement for entry into the particular position. Because education requirements may differ markedly from one occupational classification to the next, the incorrect SOC code (e.g., occupational classification) can skew the analysis. Also, 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) requires that the degree requirement is common to the industry in parallel positions among similar organizations. Because the degree requirement that is considered common to the industry for one occupation may also be distinct in comparison to others, USCIS must ensure the SOC code specified on the LCA is the one that most closely matches the position in the petition.

It is also important to ensure the correct wage level is specified on the LCA because even if an employer designates the correct SOC code and satisfies the H-1B related requirements, if the wage level is lower than the position’s requirements warrant, USCIS still cannot approve the H-1B petition because employers are required to compensate H-1B workers at *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). Stated differently, were USCIS to allow an employer to compensate an H-1B worker at a wage level that is lower than the position’s requirements warrant, it would not be compensating that individual at the necessary prevailing wage, nor the actual wage it pays to similarly situated employees.

In summary, when filing an LCA and an H-1B petition, a petitioner subjects itself to two authorities: (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.

II. ANALYSIS

Here, the Petitioner obtained an LCA certified under the SOC code, 23-1012 relating to “Judicial Law Clerks.” The Petitioner specified a Level I prevailing wage on the LCA. Even though that required wage rate was only \$51,917 annually, the Petitioner proposed to compensate the Beneficiary at \$190,000 per year.² When it filed the petition, the Petitioner provided the position’s description and duties and noted that they required a bachelor’s degree (or foreign equivalent) plus: (1) two years of study toward a Juris Doctor degree, (2) current enrollment or completion of a Master of Laws degree, or (3) admission to the bar of a foreign jurisdiction and experience working as a lawyer in a foreign jurisdiction. This appears to exceed the education of the equivalent for the Judicial Law Clerks occupation as described in Appendix D of the DOL guidance, which would require the Petitioner to compensate the Beneficiary at or above the Level II wage rate. That Level II wage rate was listed as \$60,902 annually and the Petitioner exceeded that monetary requirement in its proposed compensation listed on the Form I-129.

DOL provides guidance explaining that a job’s SOC code is identified by selecting the Occupational Information Network (O*NET) job description “that most closely matches the employer’s request” from a list of similar occupations. The DOL guidance further provides that the selection of the SOC code should not be based solely on the title of the employer’s job offer, but instead what should be considered are the particulars of the employer’s job offer in a comparison of the full description to the tasks, knowledge, work activities, and job zone information generally associated with an SOC occupation to ensure the most relevant occupational code has been selected. Therefore, the selection of the correct SOC code should be based on the position requirements and how those compare with the above identified areas of the O*NET.

The Director indicated that conducting legal research was the single duty the position and the O*NET entry for Judicial Law Clerks had in common. However, we note other commonalities such as preparing various legal documents and case-related materials. And still, based on the DOL guidance, the correct SOC code is not identified simply through the position’s duties. Instead, we must compare the O*NET “Tasks, Knowledge, Work Activities, and Job Zone information” to the proffered position’s requirements to then select the O*NET occupation “that most closely matches the employer’s request” from a list of similar occupations.

Additionally, the Director compared the Judicial Law Clerks SOC code with the O*NET occupational code for Lawyers under the 23-1011 SOC code and differentiated the two by whom they serve; judges versus clients. But according to DOL’s *Occupational Outlook Handbook (Handbook)*, the Lawyers occupational profile requires a law degree and oftentimes successfully passing a state’s written bar exam as a prerequisite. *How to Become a Lawyer*, Bureau of Labor Statistics (Sept. 8, 2021), <https://www.bls.gov/ooh/legal/lawyers.htm#tab-4>. It is clear that the Petitioner’s position requirements were less than those listed in the *Handbook* for the Lawyers occupational profile.

² For additional information, see the *Online Wage Library - FLC Wage Search Wizard*, Foreign Labor Certification Data Center, <https://www.flcdatcenter.com/OESWizardStart.aspx> (visited Mar. 3, 2022).

Then, the Director compared the position in the petition to the Paralegals and Legal Assistants occupational profile in the *Handbook* and indicated that the primary focus of the Petitioner's position was to assist attorneys in a law firm, which appears to match not only the specific duties of the Paralegals and Legal Assistants SOC code, but also the *Handbook's* synopsis of "What Paralegals and Legal Assistants Do." The Petitioner responded that the position was more complex than one that is classified under the Paralegals and Legal Assistants occupational profile in part based on the education level of that occupation when compared with the proffered position. But the Director considered that as the Petitioner's preference for higher education credentials.

We agree with the Director that there are some instances in which an employer will apply a level of education that is merely a preference and is not necessarily warranted by the position's responsibilities. And we agree that the "Paralegals and Legal Assistants" and the "Judicial Law Clerks" occupational profiles in the *Handbook* reflect some related tasks. However, in this instance, the complexities of this proffered position's related tasks and the preparation and knowledge required to perform them at a more intricate level can be attained through the education described by the Petitioner.

We note that the Paralegals and Legal Assistants occupational title falls under an O*NET Job Zone 3 grouping, while the Judicial Law Clerks occupational title is grouped under Job Zone 5. An O*NET Job Zone 3 groups together occupations that only require medium preparation. More specifically, most occupations in this zone "require training in vocational schools, related on-the-job experience, or an associate's degree." See *O*NET OnLine Help*, O*NET OnLine (Mar. 1, 2022), <http://www.onetonline.org/help/online/zones>. Contrast those education requirements with those of the Judicial Law Clerks occupational title under Job Zone 5, which groups occupations based on the need for extensive preparation and most of the occupations in this grouping require graduate school up to and including a Doctor of Philosophy, Doctor of Medicine., or a Juris Doctor degree. *Id.* DOL's guidance instruct us to "Review the Tasks, Knowledge, Work Activities, and Job Zone information" in O*NET to understand what is generally required to prepare and to perform in a particular occupation. When considering these areas within the O*NET, and complexities of this offered position combined with the annual compensation, we conclude this is a further indication that the Judicial Law Clerks occupation that the Petitioner designated on the LCA was the best SOC code. Although this occupational code and the proffered position are not a precise match, DOL guidance instructs employers to select the O*NET job description "that most closely matches the employer's request." Based on the facts of this case we have determined that the Petitioner selected the occupational code that was the best match with the duties of the proffered position.

As it relates to the Level I wage rate specified on the LCA, the Director indicated that the position appears to require special skills and knowledge that exceed that of entry-level positions in the Judicial Law Clerks occupation and the Director implied that the specified wage level was incorrect. Although the Director did not provide analysis relating to what wage level rate the position appeared to require, they concluded that this further demonstrated the LCA did not correspond with the petition. However, regarding our consideration of wage levels, we consider the totality of the record to assess whether the Petitioner complied with section 212(n)(1)(A) of the Act. That statute requires a petitioner to compensate a foreign national with the higher of: (1) the actual wage level it pays to all others with similar experience and qualifications for the specific employment in question, or (2) the prevailing wage level for the occupational classification in the area of employment.

Here, even if the position's requirements would mandate an increase in the wage level by one increment, the annual rate of compensation the Petitioner proposed on the Form I-129 far surpassed a Level II wage rate.³ This further illustrates that the Petitioner complied with section 212(n)(1)(A) of the Act, as well as the ultimate purpose of the LCA program, which is "to protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring temporary foreign workers."

III. CONCLUSION

The Petitioner has established that the LCA's attestations and content corresponds with and supports the H-1B petition. *See* 20 C.F.R. § 655.705(b). *See also Simeio Solutions*, 26 I&N Dec. at 546 n.6. Therefore, we remand the matter to the Director for further proceedings to consider any remaining eligibility requirements.

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

³ For additional information, see the *Online Wage Library - FLC Wage Search Wizard*, Foreign Labor Certification Data Center, <https://www.flcdatcenter.com/OESWizardStart.aspx> (visited Mar. 3, 2022).