U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 25528010

Date: FEB. 13, 2023

Appeal of Vermont Service Center Decision

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

The Petitioner seeks to extend the Beneficiary's temporary employment 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 Vermont Service Center Director initially approved then revoked the approval of the Form I-129, Petition for a Nonimmigrant Worker (petition), concluding that the Petitioner did not establish that it paid the Beneficiary the required wage. 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. *Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

After reviewing the entire record, we adopt and affirm the Director's revocation decision with the added comments below. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994); *see also Chen v. INS*, 87 F.3d 5, 7–8 (1st Cir. 1996) ("[W]e join eight of our sister circuits in ruling that the Board [of Immigration Appeals] need not write at length merely to repeat the IJ's [Immigration Judge's] findings of fact and his reasons for denying the requested relief, but, rather, having given individualized consideration to a particular case, may simply state that it affirms the IJ's decision for the reasons set forth in that decision."). The Director laid out the facts of this case, and we incorporate them here by reference.

We begin noting the Beneficiary worked for this Petitioner based on a previous H-1B petition and this was a request to extend her status in the same position. That previous petition had a separate U.S. Department of Labor (DOL) ETA Form 9035 & 9035E, Labor Condition Application for Nonimmigrant Workers (LCA) in which the wage the Petitioner was required to pay to the Beneficiary was at a lower annual rate than the wage required in the current petition.

On the current petition and its associated LCA, the Petitioner committed to compensate the Beneficiary with a yearly wage of $84,552. After the Director approved the petition, agency officials performed an administrative site visit in which they determined the Petitioner was compensating the Beneficiary at a rate lower than was certified on the LCA and the petition. The Director afforded the Petitioner an opportunity to demonstrate it was compensating her at the wage they attested to through issuing a notice of intent to revoke (NOIR) the petition's approval. But the Director found the response to be inadequate to establish they were paying the Beneficiary in accordance with the approved LCA and petition and they revoked the approval.

A primary 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) (indicating that the wage protections in the Act seek "to protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring temporary foreign workers" and that this "process of protecting U.S. workers begins with [the filing of an LCA] with [DOL]."). *See also Aleutian Cap. Partners, LLC v. Scalia*, 975 F.3d 220, 231 (2d Cir. 2020) (quoting 20 C.F.R. § 655.0 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.").

DOL's LCA wage requirement also serves to protect H-1B workers from wage abuses. A petitioner submits the LCA to the 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); *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.*, No. 07-97, 2009 WL 2371236, at *8 (Dep't of Labor Admin. Rev. Bd. July 30, 2009).

Regarding the payment of wages, the pertinent part of 20 C.F.R. § 655.731(c) provides:

> *Satisfaction of required wage obligation.*
>
> (1) The required wage must be paid to the employee, cash in hand, free and clear, when due. . . .

The same regulation at (c)(5)–(6) states:

> (5) For salaried employees, wages will be due in prorated installments (e.g., annual salary divided into 26 bi-weekly pay periods, where employer pays bi-weekly) paid no less often than monthly except that, in the event that the employer intends to use some other form of nondiscretionary payment to supplement the employee's regular/pro-rata pay in order to meet the required wage obligation (e.g., a quarterly production bonus),

> the employer's documentation of wage payments (including such supplemental payments) must show the employer's commitment to make such payment and the method of determining the amount thereof, and must show unequivocally that the required wage obligation was met for prior pay periods and, upon payment and distribution of such other payments that are pending, will be met for each current or future pay period . . . .
>
> (6) For hourly-wage employees, the required wages will be due for all hours worked and/or for any nonproductive time (as specified in paragraph (c)(7) of this section) at the end of the employee's ordinary pay period (e.g., weekly) but in no event less frequently than monthly.

Although the Petitioner presents several arguments within their appeal brief, none adequately resolve the issue at hand: whether they were properly compensating the Beneficiary as they attested on the relevant forms at a yearly or annual basis of $84,552. Based on the questions raised throughout this process, and based on a lack of adequate evidence from the Petitioner, they have not met their burden to show that they did—or would—compensate her at the required annual wage rate. Demonstrating the amount they would pay to the Beneficiary should be a straightforward process and not some other exercise in which her annual wage is ensconced within a set of complicated factors; regardless of whether the complicating nature is purposeful.

We first note that both on the LCA and the petition, the petitioning organization attested it would pay the Beneficiary using a yearly wage rate and 20 C.F.R. § 655.731(c)(5) provides the method by which the Petitioner must compensate her (i.e., "in prorated installments . . . show[ing] unequivocally that the required wage obligation was met for prior pay periods and . . . will be met for each current or future pay period . . . ."). So, the Petitioner was required to show they provided the Beneficiary with equal and proportional installments showing without equivocation that they had already paid her the required yearly wage. Instead, they provided evidence that they pay the Beneficiary using an hourly method.

Even setting that aside, of greater concern is the rate at which the Petitioner paid the Beneficiary, and we agree with the Director that they have not shown they complied with the regulations. The Director also addressed the bonus the Petitioner provided to the Beneficiary, which we note only occurred after they received the NOIR and they were put on notice of the pay deficiency. Due to the method by which the Petitioner compensated the Beneficiary, to meet the $84,552 annual wage they were required to pay her, it was necessary for them to compensate the Beneficiary at an hourly rate that was higher than the corresponding hourly rate listed for this occupation and location on the Foreign Labor Certification Data Center Online Wage Library.[1]

Given the timing of the Beneficiary's bonus—after the Director issued the NOIR—it appears as if it was made only to make a deficient petition conform to the H-1B requirements. A petitioner may not make material changes to make an apparently deficient set of facts to subsequently conform to U.S.

[1] *FLC Wage Results*, Foreign Labor Certification Data Center (Feb. 13, 2023), https://www.flcdatacenter.com/OesQuickResults.aspx?code=15-1132&area=47260&year=22&source=1.

Citizenship and Immigration Services requirements. *Cf. Matter of Izummi*, 22 I&N Dec. 169, 175 (Assoc. Comm'r 1998). As we noted, the Director informed the Petitioner that such bonuses or compensation must be assured and cannot be contingent on some event. *See* 20 C.F.R. § 655.731(c)(2)(v).

Here, the Petitioner has not established that they complied with the regulatory requirements at 20 C.F.R. § 655.731(c). Not only has the Petitioner failed to demonstrate they compensated the Beneficiary in the manner they attested to on the LCA and the petition, but they also did not demonstrate such compensation was at a rate that would result in an annual wage of $84,552. Such a failure warrants a revocation of the petition's approval. We conclude the evidence in the record does not establish that the Beneficiary was paid the requisite wage, "cash in hand, free and clear, when due." *See* 20 C.F.R. § 655.731(c)(1). Such a showing is the Petitioner's burden to make, and they have not done so here.

ORDER: The appeal is dismissed.