



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

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

In Re: 28375204

Date: SEPT. 15, 2023

Appeal of Texas Service Center Decision

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

The Petitioner seeks to temporarily 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 Director of the Texas Service Center denied the petition, concluding the record did not establish, as required, that the submitted certified labor condition application (LCA) corresponds with the H-1B petition. The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (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 withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

## **I. LAW**

The H-1B petition process involves several steps and forms filed with the Department of Labor (DOL) and United States Citizenship and Immigration Services (USCIS). A Petitioner seeking to file an H-1B petition must submit a certified LCA. Section 212(n)(1) of the Act; 8 U.S.C. § 1182(n)(1). A DOL certified LCA memorializes the attestations a petitioner makes regarding the employment of the noncitizen in H-1B status. *See* 20 C.F.R. § 655.734(d)(1)-(6). One of the attestations a petitioner makes relates to the protection of U.S. workers in the matter of their wages and preventing wage abuse. *See* 20 C.F.R. § 655.731. 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 the employer pays other employees with similar duties, experience, and qualifications. 20 C.F.R. § 655.731(a). Whilst DOL is responsible for certifying that a petitioner has made the required LCA attestations, USCIS evaluates whether the submitted LCA corresponds with the H-1B petition. 20 C.F.R. § 655.705(b). 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). *See also ITServe Alliance, Inc. v. DHS*, 590 F. Supp. 3d 27, 40 (D.D.C. 2022), *aff’d sub nom ITServe Alliance, Inc. v. DHS*, 71 F. 4th 1028 (D.C. Cir. 2023) (noting that 20 C.F.R. § 655.705 requires USCIS “to check that the [H-1B] petition matches the LCA”); *see also United States v. Narang*, No. 19-4850, 2021 WL 3484683, at \*1 (4th Cir. Aug. 9, 2021)(per curiam)(“[USCIS] adjudicators look for whether [the] employment [listed in the H-1B petition] will conform to the wage and location specifications in the LCA”).

When examining the wage level indicated on the LCA, USCIS does not purport to supplant DOL’s responsibility with respect to wage determinations. But to assess whether the wage indicated on the H-1B petition corresponds with the wage level listed on the LCA, USCIS will apply 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). So, an adjudicator must determine whether the O\*NET occupation selected by the petition 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.

Whilst relevant, a position’s wage level is not a substitute for a determination of whether a proffered position meets the requirements for section 214(i)(1) of the Act, 8 U.S.C. 1184(i)(1). There is no patent inconsistency between an entry-level position and a specialty occupation. For example, in some occupations, a “basic understanding” warranting 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 does not 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.

## II. ANALYSIS

The sole issue in this matter is whether the LCA corresponds with the H-1B petition. To make that determination, we must assess whether the Petitioner properly selected a Level I (entry-level) wage on the LCA for the proffered position of software developer. In its LCA, the Petitioner selected the Level I wage based on the proffered position’s job requirements, education, experience, special skills/other requirements, and supervisory duties. The Director determined the Level I wage was inappropriate. The Director cited to DOL’s generic definition of a Level I wage and the Petitioner’s junior software developer role which was categorized at the same wage level. But, according to DOL guidance, that is not the correct comparison. The Director also mentioned that the proffered position appeared to encompass complex tasks and require skills, knowledge, and independent judgment

beyond that typically associated with an entry level software developer. But the Director did not clarify any specific facts or details related to the Petitioner's proffered position leading them to their conclusion that the Petitioner-indicated job attributes and requirements for the specific job in question were more complex and required exercising more independent judgment than those associated with the entry-level of appropriate O\*NET software developer occupation. We therefore withdraw the Director's determination and remand the matter so that the Director can evaluate the record and express a clear factual basis for its legal conclusions.

As the Director conducts that inquiry, they may start their examination based on the first step of the DOL guidance by comparing the Petitioner's duties to those provided in O\*NET to determine whether the Petitioner selected the appropriate SOC code for the proffered position. The Director could also evaluate any work experience, educational requirements, or supervisory duties the Petitioner provided to determine if wage level increases are warranted in steps two, three and five of the DOL guidance. And if the Director's first line adjudication concludes that there is evidence in the record supporting their conclusion that the job duties the Petitioner provided are more complex and require the exercise of more independent judgment than those encompassed by the O\*NET description, the Director can note and explain their reasons in detail as to why they warrant an increase to the wage level under step four of the DOL guidance.

And the Director's decision observes no facts and makes no conclusions about whether the Petitioner's proffered job is a specialty occupation and, if so, whether the Beneficiary possesses the qualifications required to undertake a specialty occupation. If warranted, the Director can elect to conduct a first-line adjudication of those issues and issue a request for evidence or notice of intent to deny as appropriate to compose an appropriate record for adjudication.

### III. CONCLUSION

So the record should be further developed to articulate whether the certified LCA accompanying the petition corresponds to the Petitioner's proffered job consistent with our foregoing analysis. And, as they do so, the Director may also wish to consider whether the proffered position is a specialty occupation and, if so, whether the Beneficiary is qualified to undertake a specialty occupation. We express no opinion regarding the ultimate disposition of this petition.

**ORDER:** The Director's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.