Form I-129 H-1B Adjudication

U.S. Citizenship and Immigration Services

2/22/2018 Contracts & Itineraries Memo

- Intended to be read together with the Employer-Employee (E-E) Memo (January 8, 2010)
- Discusses potential employer violations arising when petitioners place employees at 3rd party worksites

Contracts & Itineraries Memo, cont'd

- Evidence, such as contracts and work orders, may demonstrate that, for the duration of the validity period:
  - Beneficiary will be employed in a specialty occupation
  - Employer will maintain an E-E relationship with beneficiary for the duration of the validity period
- Contracts that merely set forth the general obligations of the parties, and that do not provide specific information pertaining to the work to be performed, may be insufficient

Contracts & Itineraries Memo, cont'd

- Itineraries are a regulatory requirement for petitions requiring services to be performed in multiple locations
  - The itinerary must include the dates and locations of the services to be provided
- The inclusion of a worksite on an itinerary is not required if it is not required on the LCA because:
  - The petitioner establishes that the location is not a "place of employment" under 20 CFR 655.715
    - Peripatetic workers
    - Workers who travel occasionally
- Detailed itineraries can assist in demonstrating non-speculative employment in a specialty occupation for entire validity period

Contracts & Itineraries Memo, cont'd

- If eligibility is established, adjudicators should limit the approval period to the length of time demonstrated that the beneficiary will be placed in non-speculative work, and that the petitioner will maintain the requisite employer-employee relationship as documented by contracts, SOWs, etc.

- Extension requests should also establish that all H-1B requirements were met for entire prior approval period

Wage Level Analysis Guidance

- Clarifying internal guidance in relation to March 31, 2017, Rescission memo
- Meant to assist adjudicators in determining whether the wage level listed on the LCA is "clearly inconsistent" with the proffered position
- Provides additional information regarding DOL's process
- Not comprehensive guidance and not intended to replace the 2009 DOL guidance

Wage Level Analysis Guidance

- A Level 1 wage would not be appropriate if:
  - The Petitioner's education requirement is higher than what is usual for the occupation per:
    - Appendix D of the DOL guidance, or
    - If not listed in Appendix D, the O*NET Job Zone information
  - The Petitioner's experience requirement is higher than the minimum experience requirement defined by the SVP range in O*NET
  - The Petitioner requires a foreign language, license or certification, or other special skill beyond the O*NET description
  - The proffered position is a combination of two unrelated occupations

Wage Level Analysis Guidance

DOL uses a 5 step process to determine wage level:

Step 1: Review SOC code

Step 2: Review experience required

Step 3: Review education requirement

Step 4: Look for potential level increases (special skills or other requirements)

Step 5: Look for supervisory duties

Wage Level Analysis Guidance

Step 1: Review SOC code

- Confirm that LCA SOC code is correct and includes documented worksites
- If a combination of two different occupations but:
  - Related: Use SOC code for the occupation with higher wage
  - Unrelated: One wage level increase and use SOC code for occupation with higher wage)

Wage Level Analysis Guidance

Step 2: Review experience required

- Compare Petitioner's experience requirements to those listed in O*NET

- Can't be Level I if:
  - Job Zone 4 with an SVP of 7 < 8 and position requires more than 2 years of experience
  - Job Zone 5 with SVP of 8 < 9 and position requires more than 4 years of experience

Wage Level Analysis Guidance

Step 3: Review education requirement

- Cannot be Level I if the education requirement is higher than that:
  - Listed in Appendix D of the DOL guidance, or
  - If SOC code not listed in Appendix D, the O*NET Job Zone information

Wage Level Analysis Guidance

Step 4: Special Skills or Other Requirements (look for potential level increases)

- Potential job requirements leading to level increases:
  - Foreign language
  - License or certification
  - Travel for more than incidental training & development
  - Special skills or requirements that aren't part of the normal duties as described in O*NET

Wage Level Analysis Guidance

Step 5: Look for supervisory duties

- Supervising individuals in the same (or parallel) occupations will usually mean the position can't be Level I
  - Unless provided for in O*NET

- Supervising subordinates will only require a one level increase if the supervision is not part of the normal duties as described in O*NET

Deference

- When evaluating whether or not an appropriate Labor Condition Application (LCA) was submitted with the petition, deference does not apply.
- USCIS must determine whether the attestations and content of an LCA correspond to and support the H-1B visa petition. See INA 101(a)(15)(H)(i)(B), INA 212(N), 8 CFR 214.2(h)(4)(B) and *Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542, 546 (AAO 2015).

Deference Cont.

- Pursuant to an April 23, 2004 memo, when evaluating the specialty occupation for same/same EOS petitions, a position should be given deference unless you can articulate that there was
  - A material error
  - A substantial change in circumstances, or
  - New material information

- Pursuant to the March 31, 2017 memo, if USCIS previously approved a petition based on evidence ***solely*** from the OOH when seeking to sponsor a beneficiary for a computer programmer position, deference should not be given and the petition should be adjudicated consistent with the new guidance.

Implementation of March 31, 2017 Memo, *Rescission of the December 22, 2000 "Guidance memo on H1B computer related positions"*

Main Analysis

- The petitioner bears the burden of proof to establish that the particular position in which the beneficiary will be employed qualifies as a specialty occupation.
- For some occupations, such as computer programmers, the general discussion in the OOH may be insufficient, in the absence of additional evidence, to establish that the particular position is a specialty occupation.
- The OOH states "Most computer programmers have a bachelor's degree in computer science or a related subject; however, some employers hire workers with an associate's degree."

Main Analysis Continued

- The fact that the OOH states that an individual may enter the field with an associate's degree suggests that entry level computer programmer positions do not necessarily require a bachelor's degree and would not generally qualify as a position in a specialty occupation.
- Therefore, for all computer programmer petitions, the petitioner will not have met its burden of proof based on the OOH alone.
- In such cases, the petitioner will need to submit other evidence to establish that the particular position is a specialty occupation as defined by 8 CFR 214.2(h)(4)(ii) that also meets one of the prongs at 8 CFR 214.2(h)(4)(iii).

Applicable to Many Occupations

- The Policy Memorandum is specific to the computer programmer occupation.
- However, this same analysis should be conducted for occupations where the OOH does not specify that the minimum requirement for a particular position is normally a bachelor's or higher degree in a specific specialty.

Specialty Occupation Vs. Beneficiary Qualifications

- The specialty occupation determination is not driven by a beneficiary's qualifications.
- Although the beneficiary may have a bachelor's or higher degree in a specific specialty, the beneficiary's degree alone does not independently establish that the position qualifies as a specialty occupation.
- Adjudicators should determine:
  - First, whether the proffered position qualifies for classification as a specialty occupation, and
  - Second, whether the beneficiary qualifies for the position.
- These are two separate issues.

Appropriate LCA?

- Adjudicators may also address inconsistencies when the job duties described in a petition do not correspond to the wage level indicated on the Labor Condition Application (LCA).
- USCIS is required to verify, by a preponderance of the evidence, that the information on the certified LCA corresponds to and supports the H-1B petition.
- Adjudicators may issue a request for evidence if they determine that the wage level selected by the petitioner does not appear to correspond to the petitioner's description and requirements for the proffered position.
- This type of analysis should be conducted on all H-1B petitions, including those that are clearly specialty occupations.

Adjudicating Different Wage Levels

- If a wage level I is *clearly inconsistent with/lower than* the level of responsibility of the position, etc., then the petitioner has not established that the petition is supported by a certified LCA corresponding to the petition/position. This would typically result in an RFE.
- If, however, an officer believes there is an issue with a Level II position, and that the Level II LCA appears to be *clearly inconsistent with/lower than* the position as stated in the petition, the officer may raise it with their supervisor and, if needed, seek the advice of counsel.
- Trying to distinguish a Level III from a Level IV position, however, is very difficult under the 2009 DOL guidance, so we recommend against analyzing the appropriateness of the wage level in such cases until further notice .

What is a Level I Wage?

- The "Prevailing Wage Determination Policy Guidance" issued by the Department of Labor provides a description of the wage levels.
- A level I wage is defined as:
  - 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.

No Deference Given

- Consistent with the March 31, 2017 memo, and the exceptions set forth in the existing deference memo, if USCIS previously approved a petition based on evidence *solely* from the OOH for an entry level computer programmer or otherwise was not adjudicated consistent with the March 31, 2017 memo, deference should NOT be given, and the petition should be adjudicated consistent with the new guidance.

- In such cases, including extension petitions, motions, and consular returns, officers should conduct an independent review of the facts and evidence submitted in support of the petition in order to assess eligibility since deference will not apply.

How Does this Affect Adjudications?

- Note: The following examples are overly-simplified and for illustrative purposes only. They are intended only to provide examples of the areas that may be affected by this policy memo. Adjudicators should make each determination on a case by case basis, ensuring that they are considering the totality of the evidence.

Example 1

- A same/same extension for an accountant who has been in the United States for 9 years as an H-1B with the same financial company. The LCA is for a level I wage. The list of duties describe advanced accounting functions, nothing looks introductory. The beneficiary is listed as being a "subject matter expert."
  - Consistent with the March 31, 2017 memo – Unless they have a sufficient explanation for selecting the level I wage, or are otherwise able to resolve the apparent wage level discrepancy, we would RFE/deny for not having a certified LCA that corresponds to and supports the H-1B petition. It does not appear that the bene is entry level, the duties do not support that the bene is doing routine tasks that require limited, if any, exercise of judgment, working under close supervision, etc.

Example 2

- A cap case for a computer programmer for a major IT consulting company. The LCA is for a level I wage. The beneficiary will be working off-site with "weekly phone calls" and "monthly evaluations" as her only real supervision. The list of duties describes only vaguely what any computer programmer does.
- Consistent with the March 31, 2017 memo –
  - We would RFE for evidence that this is a specialty occupation (unless the petitioner submitted additional documentation to demonstrate that they have met one of the prongs).
  - We would also RFE on whether a level I wage LCA is appropriate, as she is working offsite with minimal supervision, etc. This is not in line with a level I wage description.
  - The petitioner will need to submit additional evidence to establish that the particular position is a specialty occupation. If the position qualifies as a specialty occupation, particularly if based on evidence regarding the complexity of the position, then it's probably not a level I wage.

Example 3

- A cap case for a systems analyst or software developer for a major IT consulting company. The LCA is for a level I wage. The beneficiary will be working off-site with "weekly phone calls" and "monthly evaluations" as his only real supervision. His list of duties is detailed and documents that he is performing normal, high-level systems analysis or software development.
  - Consistent with the March 31, 2017 memo – We would RFE/deny (unless they have a sufficient explanation, etc.) on whether a level I wage LCA is appropriate, as they are working offsite with minimal supervision. Also, the duties are not "basic" with only routine tasks. This is not in line with a level I wage description.

Example 4

- A change of employer/extension for a computer programmer for a IT consulting company. The LCA is for a level I wage. The beneficiary will be working on-site on an unnamed, undocumented in-house project. Her list of duties describes only vaguely what any computer programmer does.
  - Consistent with the March 31, 2017 memo – We would still issue an RFE for the same reasons. Now, we could add the level I wage issues into our discussion. A denial would still typically follow for the same reasons, but with added support from the level I wage analysis.

Final Reminder

- As always, adjudicators should make each determination on a case by case basis, ensuring that they are considering the totality of the evidence when making a final determination.

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