

DECISION

Dear Sir/Madam,

On [[[LETTER_CASE_RECEIPT_DT]]], you filed a Form I-129, Petition for a Nonimmigrant Worker with U.S. Citizenship and Immigration Services (USCIS) to classify the beneficiary under section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act).

Section 101(a)(15)(H)(i)(b) of the Act defines such a beneficiary as an alien:

...who is coming temporarily to the United States to perform services...in a specialty occupation described in section 214(i)(1)..., who meets the requirements for the occupation specified in section 214(i)(2)..., and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary an application under 212(n)(1).

Furthermore, section 212(n)(1) of the Act states:

No alien may be admitted or provided status as an H-1B nonimmigrant in an occupational classification unless the employer has filed with the Secretary of Labor an application stating the following:

(A) The employer-

(i) is offering and will offer during the period of authorized employment to aliens admitted or provided status as an H-1B nonimmigrant wages that are at least-

(I) the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question, or

(II) the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the application...

XXXINCLUDE IF THE POSITION IN THE INDEPENDENT SURVEY IS NOT THE PROPER OCCUPATIONAL CLASSIFICATION FOR THE PROFFERED POSITION

Title 8 Code of Federal Regulations (8 CFR), section 214.2(h)(4)(i) states in part:

(B) General requirements for petitions involving a specialty occupation.

(1) Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.XXX

Title 20 Code of Federal Regulations (20 CFR), section 655.705(b) states in pertinent part:

...DHS accepts the employer's petition (DHS Form I-129) with the DOL-certified LCA attached. In doing so, the DHS 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 or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements for H-1B visa classification.

XXXUSE IF A NEW LCA CERTIFIED AFTER FILING IS SUBMITTED: Finally, Title 8 Code of Federal Regulations (8 CFR), section 214.2(h)(4)(i) **OR** 8 CFR section 103.2 states in part:

(b) *Evidence and Processing.*

(1) *Demonstrating eligibility at time of filing.* An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request and must continue to be eligible through adjudication. Each benefit request must be properly completed and filed with all initial evidence required by applicable regulations and other USCIS instructions...

...

(12) *Effect where evidence submitted in response to a request does not establish eligibility at the time of filing.* A benefit request shall be denied where evidence submitted in response to a request for evidence does not establish filing eligibility at the time the benefit request was filed...

The LCA submitted with your response was certified after the date of filing your petition. This LCA does not establish eligibility at the time of filing as required by 8 CFR section 103.2(b)(12).XXX

Your XXX**INDICATE TYPE OF**XXX business seeks to employ the beneficiary as a XXX**POSITION**XXX at an annual salary of \$XXX**AMOUNT**XXX. Based on information provided, your business was established in XXX**YEAR**XXX and currently employs XXX**NUMBER**XXX workers. Included in your initial filing is an ETA 9035 Labor Condition Application (LCA) certified by the Department of Labor (DOL) for the position of XXX**POSITION**XXX under the XXX**OCCUPATIONAL CLASSIFICATION**XXX in XXX**LIST LOCATION(S) - CITY, STATE**XXX. The LCA lists the prevailing wage source as the XXX**SOURCE YEAR AND NAME FROM BOXES 11A AND 11B**, e.g., 2016 Towers Watson Data Services Acctg & Fin Compensation SurveyXXX, which appears to be an independent authoritative source.

At issue is whether the petition is supported by an LCA which corresponds with the proffered position XXX**INCLUDE IF THE POSITION IN THE INDEPENDENT SURVEY IS NOT THE PROPER OCCUPATIONAL CLASSIFICATION FOR THE PROFFERED**

POSITION: and whether that the LCA is certified for the specialty occupation in which the beneficiary will be employedXXX. USCIS does not use a position title alone in determining whether the position certified on the LCA relates to the proffered position; the agency reviews the educational and experience requirements, individual job duties and specific function, and supervisory duties, if any, of the proffered position. With the initial filing, you submitted the following description of duties for the proffered position: **XXXLIST DUTIES PROVIDED WITH INITIAL FILINGXXX**

On **XXXDATE OF RFEXXX**, USCIS informed you in a Request for Evidence (RFE) that the initial evidence did not establish that your petition was supported by an LCA which corresponded with the proffered position described in the petition. You were requested to submit evidence to demonstrate that the occupation listed in the independent authoritative source was comparable to the proffered position.

On **XXXDATE OF RESPONSEXXX**, USCIS received your response, which included: **XXXLIST EVIDENCE RECEIVEDXXX**

Your response is insufficient to establish that your petition is supported by an LCA that corresponds with the proffered position described in the petition.

As indicated in *Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542 (AAO 2015), USCIS must determine whether the attestations and content of the LCA correspond to and support the H-1B visa petition.

In your response you have provided a copy of the **XXXSOURCE YEAR AND NAME FROM BOXES 11A AND 11B**, e.g., 2016 Towers Watson Data Services Acctg & Fin Compensation SurveyXXX prevailing wage survey for the position of **XXX POSITION FROM INDEPENDENT SOURCE XXX** at a **XXXLIST INDEPENDENT SOURCE CAREER LEVEL (IF APPLICABLE)**, e.g., P2 intermediate career level.XXX The prevailing wage survey describes the following roles and responsibilities for the position of a **XXXPOSITION AND CAREER LEVELXXX**:

XXXLIST DUTIES AND RESPONSIBILITIES FROM THE PREVAILING WAGE SURVEYXXX

In considering the description of the occupation as listed in the **XXXSOURCE YEAR AND NAME FROM BOXES 11A AND 11B**, e.g., 2016 Towers Watson Data Services Acctg & Fin Compensation SurveysXXX and the totality of the evidence in the record, it does not appear that the proffered position comports with the description for the occupation as certified on the LCA. A detailed analysis of the evidence provided in relation to that description follows.

XXXOFFICER'S ANALYSIS OF THE POSITION AS COMPARED TO THE ROLES AND RESPONSIBILITIES LISTED IN THE PREVAILING WAGE SURVEYXXX

In support of your petition, you submitted a certified LCA for the position of **XXX POSITION FROM INDEPENDENT SOURCE XXX** at a **XXXLIST INDEPENDENT SOURCE**

CAREER LEVEL (IF APPLICABLE), e.g., P2 intermediate career level.XXX. As discussed above, you have not established that the proffered position XXX**SUMMARIZE DEFICIENCY**, e.g., requires the performance of similar duties and responsibilities, is similar in scope and responsibility to a P2 intermediate career level position, etc.XXX

The record does not establish that the petition is supported by an LCA which corresponds with the proffered position described in the petition as required by 20 CFR 655.705(b) and *Matter of Simeio Solutions*. XXX**INCLUDE IF THE POSITION IN THE INDEPENDENT SURVEY IS NOT THE PROPER OCCUPATIONAL CLASSIFICATION FOR THE PROFFERED POSITION**: Additionally, you have not provided an LCA which is certified for the specialty occupation in which the beneficiary will be employed, as required by 8 CFR section 214.2(h)(4)(i).XXX **USE IF A NEW LCA CERTIFIED AFTER FILING IS SUBMITTED**: Furthermore, as discussed above, the LCA submitted with your response was certified after the date of filing your petition. Therefore, this LCA does not establish eligibility at the time filing as required by 8 CFR section 103.2(b)(12).XXX Therefore, your petition is denied.

If applicable, the portion of the petition requesting an extension of stay or change of status for the alien is now being denied as the nonimmigrant petition filed in the alien's behalf has been denied. XXX**INSERT AUTOTEXT 0054 IF THE ALIEN IS OUT OF STATUSXXX**

DECISION

Dear Sir/Madam,

On [[[LETTER_CASE_RECEIPT_DT]]], you filed a Form I-129, Petition for a Nonimmigrant Worker with U.S. Citizenship and Immigration Services (USCIS) to classify the beneficiary under section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act).

Section 101(a)(15)(H)(i)(b) of the Act defines such a beneficiary as an alien:

...who is coming temporarily to the United States to perform services...in a specialty occupation described in section 214(i)(1)..., who meets the requirements for the occupation specified in section 214(i)(2)..., and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary an application under 212(n)(1).

Furthermore, section 212(n)(1) of the Act states:

No alien may be admitted or provided status as an H-1B nonimmigrant in an occupational classification unless the employer has filed with the Secretary of Labor an application stating the following:

(A) The employer-

(i) is offering and will offer during the period of authorized employment to aliens admitted or provided status as an H-1B nonimmigrant wages that are at least-

(I) the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question, or

(II) the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the application...

Title 20 Code of Federal Regulations (20 CFR), section 655.705(b) states in pertinent part:

...DHS accepts the employer's petition (DHS Form I-129) with the DOL-certified LCA attached. In doing so, the DHS 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 or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements for H-1B visa classification.

XXXUSE IF A NEW LCA CERTIFIED AFTER FILING IS SUBMITTED: Finally, 8 CFR section 103.2 states in part:

(b) Evidence and Processing.

(1) Demonstrating eligibility at time of filing. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request and must continue to be eligible through adjudication. Each benefit request must be properly completed and filed with all initial evidence required by applicable regulations and other USCIS instructions...

...

(12) Effect where evidence submitted in response to a request does not establish eligibility at the time of filing. A benefit request shall be denied where evidence submitted in response to a request for evidence does not establish filing eligibility at the time the benefit request was filed...

The LCA submitted with your response was certified after the date of filing your petition. This LCA does not establish eligibility at the time of filing as required by 8 CFR section 103.2(b)(12).XXX

Your **XXXINDICATE TYPE OFXXX** business seeks to employ the beneficiary as a **XXXPOSITIONXXX** at an annual salary of **XXXAMOUNTXXX**. Based on information provided, your business was established in **XXXYEARXXX** and currently employs **XXXNUMBERXXX** workers. Included in your initial filing is an ETA 9035 Labor Condition Application (LCA) certified by the Department of Labor (DOL) for the position of **XXXPOSITIONXXX** under the **XXXOCCUPATIONAL CLASSIFICATIONXXX** with a Level I wage designation in **XXXLIST LOCATION(S) - CITY, STATEXXX**.

At issue is whether the petition is supported by an LCA which corresponds with the proffered position. USCIS does not use a position title alone in determining whether the position and its associated wage level as certified on the LCA relates to the proffered position; the agency considers the totality of the evidence of record and reviews the educational and experience requirements, individual job duties and specific function, and supervisory duties, if any, of the proffered position. With the initial filing, you submitted the following description of duties for the proffered position: **XXXLIST DUTIES PROVIDED WITH INITIAL FILINGXXX**

On your LCA, you have designated the proffered position as a Level I wage (the lowest of four assignable wage levels).

On **XXXDATE OF RFEXXX**, USCIS informed you in a Request for Evidence (RFE) that the initial evidence did not establish that your petition was supported by an LCA which corresponded with the proffered position described in the petition. You were requested to submit evidence to demonstrate that the LCA you have provided, with a Level I wage designation, corresponds to the proffered position.

On **XXXDATE OF RESPONSEXXX**, USCIS received your response, which included: **XXXLIST EVIDENCE RECEIVEDXXX**

Your response is insufficient to establish that your petition is supported by an LCA that corresponds with the proffered position described in the petition.

As indicated in *Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542 (AAO 2015), USCIS must determine whether the attestations and content of the LCA correspond to and support the H-1B visa petition. Accordingly, USCIS reviews the LCA to ensure that the wage level designated by the petitioner corresponds to the proffered position.

The DOL's Employment and Training Administration Prevailing Wage Determination Policy Guidance Nonagricultural Immigration Programs, Rev. November, 2009 (DOL Policy Guidance) discusses the four wage levels and states the following concerning the process for determining a wage level:

All employer applications for a prevailing wage determination shall initially be considered an entry level or Level I wage. The employer's requirements for experience, education, training, and special skills shall be compared to those generally required for an occupation as described in the O*NET and shall be used as indicators that the job opportunity is for an experienced (Level II), qualified (Level III), or fully competent (Level IV) worker.

Therefore, USCIS will consider the established wage level determination criteria in evaluating whether the LCA corresponds with the proffered position.

XXXADD DISCUSSION OF WHY THE WAGE LEVEL IS CLEARLY INCONSISTENT WITH THE POSITION DESCRIBED IN THE PETITIONXXX

XXXIF THE PETITIONER SUBMITTED A COPY OF AN OES WORKSHEET IN RESPONSE, INSERT 2049 AND MODIFY AS NEEDEDXXX

In support of your petition, you submitted a certified LCA for the position of **XXXPOSITIONXXX** at a Level I wage. As discussed above, you have not established that the proffered position is an entry-level position within the occupational category of **XXXPOSITIONXXX**.

The record does not establish that the petition is supported by an LCA which corresponds with the proffered position described in the petition as required by 20 CFR 655.705(b) and *Matter of Simeio Solutions*. **XXXUSE IF A NEW LCA CERTIFIED AFTER FILING IS SUBMITTED:** Furthermore, as discussed above, the LCA submitted with your response was certified after the date of filing your petition. Therefore, this LCA does not establish eligibility at the time filing as required by 8 CFR section 103.2(b)(12).XXX Therefore, your petition is denied.

If applicable, the portion of the petition requesting an extension of stay or change of status for the alien is now being denied as the nonimmigrant petition filed in the alien's behalf has been denied. **XXXINSERT AUTOTEXT 0054 IF THE ALIEN IS OUT OF STATUSXXX**