The AAO Finds That Entry Level Wages Do Not Automatically Preclude H-1B Visa Classification

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As we have previously blogged, many of the Requests for Evidence (RFEs) issued to petitions filed under the FY 2018 H-1B visa lottery objected to the H-1B worker being paid an entry level wage.

The AAO recently took up the issue of Level I wages in two decisions, *Matter of B-C-, Inc.*, ID #1139516 (AAO Jan 25, 2018); and *Matter of G-J-S-USA, Inc.*, ID# 1182139 (AAO Jan. 25, 2018), concluding in both cases that Level I wages are not determinative of whether a position is indeed a specialty occupation.

In *Matter of B-C-,* the Petitioner sought to temporarily employ the Beneficiary as a geotechnical engineer-in-training (EIT) under the H-1B classification. The Director of the Vermont Service Center denied the petition concluding that the Petitioner did not establish that the submitted LCA corresponded with the H-1B petition. The Director determined that the Level 1 wage was incorrect by comparing the proffered duties directly with DOL's generic definition of a Level I wage. *Id.* at 3. According to the DOL's Prevailing Wage Policy Guidance, referenced in the *Matter of B-C-* decision, 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.

U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009).

The AAO, however, found that this was not the correct analysis for assessing whether or not an LCA properly corresponds with the petition. The Director, instead, should have compared the proffered job duties to those associated with the appropriate Occupational Information Network (O*NET) occupation. *Id*. On appeal, Petitioner asserted that an EIT is entry level by its very definition. *Id*. The AAO acknowledged that by its plain terms, an EIT appeared to be entry-level, but a hasty review would be insufficient. In order to determine whether Petitioner properly selected a Level I wage, the AAO analyzed whether Petitioner selected the most relevant standard occupational classification (SOC) code, and then compared the experience, education, special skills required, and any other requirements provided in the petition and O*Net classification. Here, the description and tasks in O*NET for civil engineer generally coincided with the proffered job duties, concluding that the Petitioner selected the appropriate SOC code. Next, the AAO analyzed whether the proffered position required experience, education, special skills, or supervisory duties beyond those listed in the related O*NET occupation. Here, the AAO found that the proffered position did not require more education, experience, special skills or supervisory duties beyond

what was listed on O*Net, and, thus, was properly classified as a Level I wage. *Id*. The appeal was sustained.

In Matter of G-J-S-USA, Inc., the Petitioner sought to temporarily employ the Beneficiary as an investment banking analyst under the H-1B classification. *Matter of G-J-S-USA, Inc*. The Director denied the petition concluding that the Petitioner did not establish that the submitted LCA corresponded with the H-1B petition where (s)he believed that the designated Level I wage was incorrect. On appeal, the Petitioner asserted that an incorrect methodology was used. *Id*. Although the AAO found that USCIS erred in its methodology by comparing the job duties of the proffered position to the definition of a Level I wage given in the DOL's guidance, the AAO ultimately held that the Level I wage assignment was indeed improper.

The AAO explained that the Director should have applied the five-step process outlined in the DOL's prevailing wage guidance which required comparing the experience, education, special skills, and supervisory duties described in the O*NET description to those required by the employer for the proffered position. After employing the proper analysis, the AAO found that the assignment of a Level I wage was improper, and that the petition was thus not approvable. The Petitioner had specifically failed on step three, which involved a comparison of the education requirements. The Petitioner's stated minimum education requirement was a master's degree in finance or a related field. Appendix D of the DOL guidance, however, indicates that the usual education level for a financial analyst was a bachelor's degree. According to the AAO, the master's degree requirement warranted a one level increase in the wage and the appeal was dismissed. *Id*.

Critically, the AAO highlighted in both cases that there is no inherent inconsistency between an entry-level position and a specialty occupation. Most professionals begin their careers in entry-level positions; however, this does not preclude USCIS from classifying the entry-level position as a specialty occupation. Conversely, a Level IV wage does not inherently mean that an occupation qualifies as a specialty occupation if the position has not satisfied the requirements of a specialty occupation. As the AAO stated, while wage levels are indeed relevant, wages do not by themselves define or change the character of the occupation. On the other hand, according to the AAO, the key issue is whether the LCA corresponds to the H-1B petition. If the wage on the LCA does not correspond to duties and requirements described in the H-1B petition, then the H-1B petition can be denied.

It is indeed salutary that the AAO confirms that H-1B eligibility cannot be denied solely on the ground that a proffered position is classified as a Level I wage. There is nothing in the INA or in the implementing regulations that suggest that a position that commands an entry level wage is ineligible for H-1B visa classification. Still, the AAO substituting its purported expertise for the DOL's expertise in determining wage levels on the LCA is of great concern. The AAO stated, "When assessing the wage level indicated on the LCA, USCIS does not purport to supplant DOL's responsibility with respect to wage determinations." But the AAO did precisely just that in *Matter of G-S-J-USA, Inc.* by usurping what DOL knows how to do best, which is making a wage determination.

The AAO relied on Appendix D in the prevailing wage guidance that provides a list of professional occupations with their corresponding usual education. If an occupation requires only a bachelor's degree in Appendix D, and the employer requires a Master's degree, which was the case in *Matter of G-S-J-USA, Inc*., then according to the DOL guidance, the employer is required to increase the wage level by one notch even if there is no experience requirement. It is not clear from the AAO

decision whether it selected the appropriate occupation under Appendix D, which again is in the realm of DOL's expertise. Even assuming the AAO arrived at the correct comparable occupation under Appendix D and the employer did not bump up the wage level, this ought to be considered as an LCA violation, which the DOL to deal with in the event of an LCA audit, and should not undermine the employer's ability to employer the worker in a specialty occupation, resulting in USCIS outright denying the H-1B petition.

The two new AAO decisions teach that it may be a best practice for an employer to request and obtain a prevailing wage determination from the DOL's National Prevailing Wage Center prior to filing an LCA. As a practical matter, though, obtaining such a prevailing wage determination can take several weeks, and employers must timely file H-1B petitions within the first five business days of April each year to be considered under the H-1B lottery, or in the case of an extension, before the current H-1B status expires, or before the H-1B worker wishes to port to a new employer. In the event the employer disagrees with the NPWC determination, an appeal to the Board of Alien Labor Certification can take several months. It is thus important to check Appendix D before the employer decides to require a Master's degree and still pay a Level 1 wage. On occasion, a position may require, at a minimum, an advanced degree. For example, a law degree is required for minimum entry into legal profession. However, an employer seeking to employ a new graduate would still be allowed to pay an entry level wage to the prospective employee under the DOL guidance. For lawyers, the DOL acknowledges that prospective employees need a professional degree prior to entering the profession, and thus a Level I wage is appropriate for an entry-level attorney position. Similarly, Market Research Analysts, Economists, and Urban Planners, among others, typically require a Master's degree, for entry into the field. Attention should also be paid to other factors that may cause a bump up in the wage level, such as special skills or language requirements that may not be consistent with the skills listed in O*Net for a specific occupation. Thus, if the employer requires a foreign language skill, it may or may not need to bump up the wage level depending on whether a foreign language is inherently required for the job but which does not increase the complexity or seniority of the position. All this further confirms the point we make that assessing whether there is an excessive educational requirement or a skill lies within DOL's rather than USCIS's expertise.

Still, until the AAO changes its position, employers must carefully review the DOL Wage Guidance and Appendix D when assigning a wage on the LCA in the brave new world of H-1B adjudications in order to stave off a needless denial!

(The authors acknowledge the assistance of Eleyteria Diakopoulous who is a student in the JD program at Brooklyn Law School and is presently an Extern at Cyrus D. Mehta & Partners PLLC)