U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: NOV 21 2013 OFFICE: CALIFORNIA SERVICE CENTER

IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

On the Form I-129 visa petition, the petitioner describes itself as an information technology / supply chain management company established in 1996. In order to employ the beneficiary in what it designates as a computer systems analyst position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the change in the place of employment of the beneficiary constituted a material change to the terms and conditions of the beneficiary's employment as specified in the original petition. On appeal, counsel for the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) the Form I-290B and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

For the reasons that will be discussed below, the AAO agrees with the director that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

In the petition signed on April 27, 2012, the petitioner indicates that it wishes to employ the beneficiary as a computer systems analyst on a full-time basis at the rate of pay of $82,000 per year. In addition, the petitioner states that the beneficiary will work at its headquarters located at [redacted] The petitioner did not request any other worksites. On the Form I-129 petition (pages 4 and 19), the petitioner provides the following information:

> Will the beneficiary work off-site? ☒ No ☐ Yes
>
> * * *
>
> Part D. Off-Site Assignment of H-1B Beneficiaries
>
> ☒ No ☐ Yes a. The beneficiary of this petition will be assigned to work at an off-site location for all or part of the period for which H-1B classification is sought.

In the support letter dated April 26, 2012, the petitioner states that the beneficiary will be responsible for the following duties:

> [The beneficiary] will work for [the petitioner] as a Computer Systems Analyst, and

> will be involved in the analysis, modification, design, and continued development and implementation of software and systems components from the inception of projects to completion for offices of [the petitioner], located at which is our headquarters.

In addition, the petitioner states, "The minimum requirements for this professional position are a Bachelor's degree in Computer Science, Engineering or Science or any related field and relevant work experience."

With the initial petition, the petitioner submitted a copy of the beneficiary's foreign diplomas and transcripts, as well as a credential evaluation from The The evaluation indicates that the beneficiary's foreign education is equivalent to a U.S. bachelor's degree in electronic engineering.

In support of the petition, the petitioner also submitted several documents, including the following:

- A Labor Condition Application (LCA).[1] The occupational category is designated as "Computer Systems Analysts" at a Level II wage level. The AAO notes that the LCA lists the place of employment as Area).[2] No other work sites are provided.

- An Itinerary. The AAO observes that the itinerary states "Location of Work: [The petitioner], The duration is listed as 10/1/2012 to 09/30/2015.

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[1] The instructions to the LCA (ETA Form 9035 & 9035E) state the following:

> It is important for the employer to define the place of intended employment with as much geographic specificity as possible. The place of employment address listed . . . must be a physical location and cannot be a P.O. Box. The employer may use this section to identify up to three (3) physical locations and corresponding prevailing wages covering each location where work will be performed and the electronic system will accept up to 3 physical locations and prevailing wage information.

Thus, the instructions require that the employer list the place of intended employment "with as much geographic specificity as possible" and, further notes that the employer may identify up to three physical locations, including street address, city, county, state, and zip code, where work will be performed. Additionally, the U.S. Department of Labor (DOL) regulations state that "[e]ach LCA *shall state . . . [t]he places of intended employment*." 20 C.F.R. § 655.730(c)(4) (emphasis added).

[2] With certain limited exceptions, the applicable DOL regulations define the term "place of employment" as the worksite or physical location where the work actually is performed by the H-1B nonimmigrant. *See* 20 C.F.R. § 655.715. The Office of Management and Budget established Metropolitan Statistical Areas to provide nationally consistent geographic delineations for collecting, tabulating and publishing statistics. *See* 44 U.S.C. § 3504(e)(3); 31 U.S.C. § 1104(d); Exec. Order No. 10,253, 16 Fed. Reg. 5605 (June 11, 1951); 75 Fed. Reg. 37,246, 37,246-252 (2010) (discussing and defining, *inter alia*, Metropolitan Statistical Areas).

- Printouts from the petitioner's website.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on September 17, 2012. The petitioner was asked to submit documentation to establish that it has sufficient specialty occupation work that is immediately available upon the beneficiary's entry into the United States through the entire requested H-1B validity period. The director outlined the specific evidence to be submitted.

On November 21, 2012, the petitioner and counsel responded to the RFE. In a letter dated November 15, 2012, submitted in response to the RFE, the petitioner states the following:

> As provided in the organizational chart, various Sr. Consultants (Computer Systems Analyst) are needed for this long term project for our client International Rectifier (IR). Our client is located in California and although our resources may need to travel to California, we have an internal onboarding process which requires our employees to come to headquarters to complete various administrative tasks before being sent out on the project. . . . As part of this process, employees are required to come to our headquarters and complete paperwork as well as initial training for deployment to the project site.
>
> Also, employees for the IR project may be trained in various procedures and timelines associated with the project. This is done in our offices so our employees will be as effective as possible once arriving onsite. . . . Once the onboarding process and training is complete, the employee is commissioned to the project. We have submitted the proper Labor Condition Application applicable for the site of the project (please see attached).

In response to the RFE, the petitioner and counsel submitted documentation in support of the H-1B petition, including a new LCA that provided a new worksite – in – as the beneficiary's place of employment (the physical location where the work will be performed). *See* 20 C.F.R. § 655.715. The worksite is located in a metropolitan statistical area differing from the worksite listed on the original petition.

The director reviewed the response, and concluded that the change in the beneficiary's place of employment constituted a material change to the terms and conditions of the beneficiary's employment as specified in the original petition. The director denied the petition on December 31, 2012. Counsel submitted an appeal of the denial of the H-1B petition. With the appeal, counsel submitted a brief. In the brief, counsel references the preponderance of the evidence standard.

The AAO notes that with respect to the preponderance of the evidence standard, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010), states in pertinent part the following:

> Except where a different standard is specified by law, a petitioner or applicant in

> administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.
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> * * *
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> The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case.
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> * * *
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> Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.
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> Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. *See INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Thus, in adjudicating the petition pursuant to the preponderance of the evidence standard, USCIS examines each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true. The "preponderance of the evidence" standard does not relieve the petitioner from satisfying the basic evidentiary requirements set by regulation. The standard of proof should not be confused with the burden of proof. Specifically, the petitioner bears the burden of establishing eligibility for the benefit sought. A petitioner must establish that it is eligible for the requested benefit at the time of filing the petition. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *see e.g.*, *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). As will be discussed, in the instant case, that burden has not been met.

In pertinent part, the Act defines an H-1B nonimmigrant worker as:

> [A]n 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 [Secretary of Homeland Security] that the intending employer has filed with the Secretary [of Labor] an application under section 212(n)(1)* . . . .

Section 101(a)(15)(H)(i)(b) of the Act (emphasis added).[3]

In turn, section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A) (2012), requires an employer to 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 experience and qualifications who are performing the same services.[4] *See* 20 C.F.R. § 655.731(a). *Venkatraman v. REI Sys., Inc.*, 417 F.3d 418, 422 & n.3 (4th Cir. 2005); *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).

Implemented through the LCA certification process, section 212(n)(1) is intended to protect U.S. workers' wages by eliminating economic incentives or advantages in hiring temporary foreign workers. *See, e.g.*, 65 Fed. Reg. 80,110, 80,110-111, 80,202 (2000). The LCA currently requires petitioners to describe, *inter alia*, the number of workers sought, the pertinent visa classification for such workers, their job title and occupational classification, the prevailing wage, the actual rate of pay, and the place(s) of employment.

To promote the U.S. worker protection goals of a statutory and regulatory scheme that allocates responsibilities sequentially between the U.S. Department of Labor (DOL) and the U.S. Department of Homeland Security (DHS), a prospective employer must file an LCA and receive certification from DOL before an H-1B petition may be submitted to USCIS. 8 C.F.R. § 214.2(h)(4)(i)(B)(1); 20 C.F.R. § 655.700(b)(2).[5] If an employer does not submit the LCA to USCIS in support of a new or amended H-1B petition, the process is incomplete and the LCA is not certified to the Secretary of Homeland Security. *See* section 101(a)(15)(H)(i)(b) of the Act; 8 C.F.R. § 214.2(h)(4)(i)(B)(1); 20 C.F.R. § 655.700(b); *see also* 56 Fed. Reg. 37,175, 37,177 (1991); 57 Fed. Reg. 1316, 1318 (1992) (discussing filing sequence).

In the event of a material change to the terms and conditions of employment specified in the

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[3] In accordance with section 1517 of title XV of the Homeland Security Act of 2002 (HSA), Pub. L. No. 107-296, 116 Stat. 2135, any reference to the Attorney General in a provision of the Act describing functions which were transferred from the Attorney General or other Department of Justice official to DHS by the HSA "shall be deemed to refer to the Secretary" of Homeland Security. *See* 6 U.S.C. § 557 (2003) (codifying HSA, tit. XV, § 1517); 6 U.S.C. § 542 note; 8 U.S.C. § 1551 note.

[4] The prevailing wage may be determined based on the arithmetic mean of the wages of workers similarly employed in the area of intended employment. 20 C.F.R. § 655.731(a)(2)(ii).

[5] Upon receiving DOL's certification, the prospective employer then submits the certified LCA to USCIS with an H-1B petition on behalf of a specific worker. 8 C.F.R. § 214.2(h)(2)(i)(A), (2)(i)(E), (4)(iii)(B)(1). DOL reviews LCAs "for completeness and obvious inaccuracies," and will certify the LCA absent a determination that the application is incomplete or obviously inaccurate. Section 212(n)(1)(G)(ii) of the Act. In contrast, USCIS must determine whether the attestations and content of an LCA correspond to and support the H-1B visa petition, including the specific place of employment. 20 C.F.R. § 655.705(b); *see generally* 8 C.F.R. § 214.2(h)(4)(i)(B).

original petition, the petitioner must file an amended or new petition with USCIS with a corresponding LCA. Specifically, the pertinent regulation requires:

> The petitioner shall file an amended or new petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition. An amended or new H–1C, H–1B, H–2A, or H–2B petition must be accompanied by a current or new Department of Labor determination. *In the case of an H–1B petition, this requirement includes a new labor condition application.*

8 C.F.R. § 214.2(h)(2)(i)(E) (emphasis added). Furthermore, petitioners must "immediately notify the Service of any changes in the terms and conditions of employment of a beneficiary which may affect eligibility" for H-1B status and, if they will continue to employ the beneficiary, file an amended petition. 8 C.F.R. § 214.2(h)(11)(i)(A).

A change in the terms and conditions of employment requiring an LCA be certified to DHS with respect to a beneficiary may affect eligibility for H-1B status and is, therefore, a material change. Accordingly, when the place of employment of a beneficiary changes to a geographical area requiring a corresponding LCA be certified to DHS with respect to that beneficiary, the petitioner must file a new or amended H-1B petition to reflect that material change.[6]

In this matter, the petitioner claimed in both the Form I-129 petition and the certified LCA (submitted with the initial petition) that the beneficiary's place of employment was located in [redacted]. In response to the director's RFE, the petitioner indicated the beneficiary's place of employment also included [redacted].[7]

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[6] This reading of 8 C.F.R. § 214.2(h)(2)(i)(E) is consistent with the agency's past policy pronouncements that "the mere transfer of the beneficiary to another work site, in the same occupation, does not require the filing of an amended petition provided the initial petitioner remains the alien's employer and, provided further, the supporting labor condition application remains valid." *See, e.g.*, Memorandum from T. Alexander Aleinikoff, Exec. Assoc. Comm'r, Office of Programs, Immigration and Naturalization Serv., Amended H-1B Petitions 1-2 (Aug. 22, 1996), 73 *Interpreter Releases* No. 35, 1222, 1231-32 (Sept. 16, 1996); *see also* 63 Fed. Reg. 30,419, 30,420 (1998) (stating in pertinent part that the "proposed regulation would not relieve the petitioner of its responsibility to file an amended petition when required, for example, when the beneficiary's transfer to a new work site necessitates the filing of a new labor condition application"). The AAO need not decide here whether, for purposes of 8 C.F.R. § 214.2(h)(2)(i)(E), there may be material changes in terms and conditions of employment that do not affect the alien's eligibility for H-1B status but nonetheless require the filing of an amended or new petition.

[7] The petitioner did not claim, and the AAO does not find, that this new work location falls under a "non-worksite" location or a short-term placement or assignment. *See* 20 C.F.R. § 655.715 and 655.735. For instance, the petitioner may not make short-term placement(s) or assignments of H-1B nonimmigrants at worksite(s) in any area of employment for which the petitioner has a certified LCA for the occupational classification. 20 C.F.R. § 655.735(e).

A change in the terms and conditions of employment of a beneficiary which may affect eligibility under section 101(a)(15)(H) of the Act is a material change. *See* 8 C.F.R. § 214.2(h)(2)(i)(E); *see also id.* § 214.2(h)(11)(i)(A) (requiring that a petitioner file an amended petition to notify USCIS of any material changes affecting eligibility of continued employment or be subject to revocation).[8]

Because section 212(n) of the Act ties the prevailing wage to the "area of employment," a change in the beneficiary's place of employment to a geographical area not covered in the original LCA would be material for both the LCA and the Form I-129 visa petition, as a change may affect eligibility under section 101(a)(15)(H) of the Act. *See also* 20 C.F.R. § 655.735(f). If, for example, the prevailing wage is higher at the new place of employment, the beneficiary's eligibility for continued employment in H-1B status will depend on whether his or her wage for the work performed at the new location will be sufficient. As such, for an LCA to be effective and correspond to an H-1B petition, it must specify the beneficiary's place(s) of employment.[9]

Having materially changed the beneficiary's place of employment to a geographical area not covered by the original LCA, the petitioner was required to immediately notify USCIS and file an amended or new H-1B petition, along with a corresponding LCA certified by DOL, with both documents indicating the relevant change.[10] 8 C.F.R. § 214.2(h)(2)(i)(E), (h)(11)(i)(A). By failing to file an amended petition with a new LCA, or by attempting to submit a preexisting LCA that has never been certified to USCIS with respect to a specific worker, a petitioner may impede efforts to verify wages and working conditions. Full compliance with the LCA and H-1B petition process, including adhering to the proper sequence of submissions to DOL and USCIS, is critical to the U.S. worker protection scheme established in the Act and necessary for H-1B visa petition approval.

It is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361 (2012); *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012). Here, that burden has not been met.[11]

ORDER: The appeal is dismissed.

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[9] A change in the beneficiary's place of employment may impact other eligibility criteria, as well. For example, at the time of filing, the petitioner must have complied with the DOL posting requirements at 20 C.F.R. § 655.734. Additionally, if the beneficiary will be performing services in more than one location, the petitioner must submit an itinerary with the petition listing the dates and locations. 8 C.F.R. § 214.2(h)(2)(i)(B); *see also id.* § 103.2(b)(1).

[10] Here the petitioner submitted a new LCA certified for the beneficiary's place of employment in in response to the RFE. This LCA was not previously certified to USCIS with respect to the beneficiary and, therefore, it had to be submitted to USCIS as part of an amended or new petition before the beneficiary would be permitted to begin working in this place of employment. *See* 8 C.F.R. § 214.2(h)(2)(i)(E).

[11] As the identified ground for denial is dispositive of the petitioner's continued eligibility, the AAO need not address any additional issues in the record of proceeding.