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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: JUN 2 6 2014 OFFICE: VERMONT SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]

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:

[redacted]

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, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

I. PROCEDURAL AND FACTUAL BACKGROUND

On the Form I-129 visa petition, the petitioner describes itself as a 26-employee staffing and recruitment business[1] established in 2000. In order to employ the beneficiary in what it designates as a full-time java developer position at a salary of $90,000 per year,[2] 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).

In support of the petition, the petitioner submitted a certified U.S. Department of Labor (DOL) Labor Condition Application for Nonimmigrant Workers (ETA Form 9035/9035E) (LCA).

On the Form I-129 and in the LCA, the petitioner attested that it would employ the beneficiary at the petitioner's facility. On the LCA, the petitioner identified an address in County), Florida (Tampa-St. Petersburg-Clearwater Metropolitan Statistical Area) as the beneficiary's place of employment.[3] The petitioner stated on its Form I-129 that the beneficiary would work at its Florida address and specifically stated that he would not work offsite. The petitioner did not request other worksites and did not submit an itinerary with its initial Form I-129 filing. *See* 8 C.F.R. § 214.2(h)(2)(i)(B) (requiring an itinerary for services performed in more than one location).

In response to the director's Request for Evidence (RFE), counsel stated that the beneficiary would be assigned to a third-party employer, Nebraska, throughout the requested validity period, but that he would still be employed by the petitioner. The petitioner

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[1] The petitioner provided a North American Industry Classification System (NAICS) Code of 561310, "Employment Placement Agencies." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2002 NAICS Definition, "561310 Employment Placement Agencies," http://www.naics.com/censusfiles/ND561310.HTM (last visited June 11, 2013).

[2] The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for use with a job prospect within the "Computer Programmers" occupational classification, SOC (O*NET/OES) Code 15-1131, and a Level III prevailing wage rate.

[3] With certain limited exceptions, the applicable Department of Labor 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 (June 28, 2010) (discussing and defining, *inter alia*, Metropolitan Statistical Areas).

submitted a new LCA certified for employment in Nebraska. A new Form I-129 was also submitted, and it stated that the beneficiary would work off-site and listed the same Nebraska work address as the new LCA.[4] The Nebraska worksite is located in a metropolitan statistical area differing from the Florida worksite listed on the original petition.

The director stated that the LCA was required to have been certified prior to the petitioner filing the Form I-129; the beneficiary would not be performing services at the location listed on the Form I-129; there is not persuasive documentation that a work assignment existed in Florida at the time the Form I-129 was filed; the petitioner must establish eligibility at the time of filing; and the evidence did not establish the availability of specialty occupation work as a java developer when the Form I-129 was filed.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's letter denying the petition; and (5) the Form I-290B and supporting documentation.

Upon review of the entire record of proceeding, the AAO finds that the evidence of record does not overcome the director's grounds for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

II. THE LCA AND H-1B VISA PETITION PROCESS

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).[5]

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[4] The "amended" Form I-129 submitted in response to the RFE was not properly filed. It was not filed at the correct location and with the relevant filing fee. *See* 8 C.F.R. § 214.2(h)(2)(i)(E).

[5] 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.

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.[6] *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 (December 20, 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 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).[7] 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 (August 5, 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 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

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[6] 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).

[7] 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).

> 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 place of employment of a beneficiary to a geographical area requiring a corresponding LCA be certified to DHS with respect to that beneficiary may affect eligibility for H-1B status and is, therefore, a material change for purposes of 8 C.F.R. § 214.2(h)(2)(i)(E) and (11)(i)(A). When there is a material change in the terms and conditions of employment, the petitioner must file an amended or new H-1B petition with the corresponding LCA. Counsel's arguments to the contrary are not persuasive. *See* 8 C.F.R. § 214.2(h)(2)(i)(E)

III. ANALYSIS

Counsel argues that a third party assignment did not exist in [redacted] Florida at the time the petitioner filed the Form I-129, and that the third party assignment agreement with [redacted] was not entered into until after the filing of the Form I-129. Counsel states that although the petitioner intended for the beneficiary to perform java developer work for the company itself when it filed the Form I-129; by the time the RFE was issued a third-party assignment developed.

As a preliminary matter, we find this argument unpersuasive because the evidence of record indicates that the third party agreement with [redacted] did in fact exist at the time the petition was filed. Specifically, although the instant petition was filed on April 4, 2013, the record contains a document signed by the beneficiary on March 5, 2013, more than a month before the petition was filed, in which he agreed to the [redacted] assignment. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

However, as discussed below we would find counsel's argument unpersuasive even if this evidence were not present.

In this matter, the petitioner claimed in both the Form I-129 petition and the certified LCA that the beneficiary's place of employment would be located in [redacted] Florida (Tampa-St. Petersburg-Clearwater Metropolitan Statistical Area).

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).

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 such a change may affect eligibility under section 101(a)(15)(H) of the Act. *See, e.g.*, 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.[8]

Counsel states that the petitioner provided evidence of the availability of specialty occupation work for the beneficiary at the time of filing; the job location changed after filing the Form I-129; the petitioner intended to comply with relevant regulations; the petitioner wanted to clarify the itinerary change and filed an amended Form I-129 and new LCA; and the director misinterpreted the new LCA as job unavailability at the time of filing the Form I-129.

Here, the Form I-129 and the originally submitted LCA identified the Florida facility as the place of employment. The LCA did not cover the Nebraska address. Having materially changed the beneficiary's intended place of employment to a geographical area not covered by the original LCA, the petitioner was required to file an amended or new H-1B petition, along with a corresponding LCA certified by DOL, with both documents indicating the relevant change. The petitioner submitted a Form I-129 with the new information, but this form was not properly filed to the correct location with the relevant filing fee to USICS. By failing to file an amended petition with a new LCA, 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.

Pursuant to the above discussion, we are not persuaded by counsel's assertion that the petitioner was not required to file an amended petition.[9] The record of evidence does not establish that the petitioner has overcome the director's specified grounds for denying this petition.

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[8] 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).

[9] Counsel's attempt to amend the petition, though done incorrectly, undermines that argument further. Also, while counsel argues at page 6 of the appellate brief that the LCA submitted when the petition was filed remains valid, counsel concedes at page 5 that the beneficiary's new work location does in fact invalidate the initial LCA.

Moreover, this petition would still not be approved even if an amended petition had not been required, because the LCA upon which the petitioner now relies was not certified prior to the filing of the petition.

As noted, the petitioner filed the instant petition on April 4, 2013. The LCA upon which this petition now relies[10] was certified on June 10, 2013, more than two months after the petition was filed.

The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) states the following:

> 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.

Furthermore, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(*1*) states that, when filing an H-1B petition, the petitioner must submit with the petition "[a] certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary."

Consequently, the LCA must have been certified before the H-1B petition was filed in order for an H-1B petition to be approvable. The submission of an LCA certified subsequent to the filing of the petition satisfies neither 8 C.F.R. § 214.2(h)(4)(i)(B)(*1*) nor 8 C.F.R. § 214.2(h)(4)(iii)(B)(*1*). Moreover, USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. 8 C.F.R. § 103.2(b)(1).

The petitioner's failure to procure a certified LCA prior to filing the H-1B petition precludes its approval, and the regulations contain no provision for discretionary relief from the LCA requirements. Accordingly, the appeal will also be dismissed and the petition will also be denied on this basis.

IV. CONCLUSION AND ORDER

As set forth above, the AAO finds that the petitioner has failed to overcome any of the director's specified grounds for denying this petition.[11] Accordingly, the director's decision will not be disturbed.

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[10] As noted, counsel has conceded that the LCA submitted when the petition was filed has been invalidated.

[11] As the petitioner has not overcome the director's specified grounds for denying the petition, it cannot be approved. As such, we will not discuss or explore further any of the additional issues and questions we have identified on appeal, namely: (1) the failure of the evidence of record to demonstrate that the petitioner qualifies as a "United States employer" who would engage the beneficiary in an employer-employee relationship; (2) the failure of the evidence of record to demonstrate that the beneficiary is qualified to

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed. The petition is denied.

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perform the duties of a specialty occupation; (3) the question of whether the petitioner has complied with the H-1B itinerary requirements; and (4) the question of whether the proffered position is a specialty occupation.