



U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: **AUG 18 2014**

OFFICE: VERMONT SERVICE CENTER

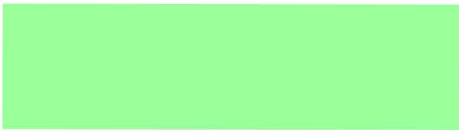
FILE: 

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 director initially approved the nonimmigrant visa petition. Upon subsequent review of the record, the director issued a notice of intent to revoke (NOIR) the approval of the petition, and ultimately did revoke the approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The approval of the petition remains revoked.

## I. FACTUAL AND PROCEDURAL HISTORY

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the Vermont Service Center. In the Form I-129 petition and supporting documentation, the petitioner describes itself as a software design and development firm established in 2005. Seeking to employ the beneficiary in what it designates as a software engineer position, the petitioner filed this H-1B petition in an endeavor 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 the Form I-129 petition, the petitioner stated that it wishes to employ the beneficiary as a software engineer on a full-time basis.<sup>1</sup> The petitioner indicated that the beneficiary would be employed in-house at its office. On the Labor Condition Application (LCA), the petitioner indicated its own office address in [REDACTED] New York [REDACTED] Metropolitan Statistical Area) as the beneficiary's place of employment.<sup>2</sup> The petitioner did not request other worksites and did not submit an itinerary. See 8 C.F.R. § 214.2(h)(2)(i)(B) (requiring an itinerary for services performed in more than one location). After approving the petition, the director issued a NOIR.<sup>3</sup> The NOIR provided a detailed statement of the revocation grounds, and afforded the petitioner an opportunity to provide a rebuttal. See 8 C.F.R. § 214.2(h)(11)(iii)(B).

In response, counsel submitted an LCA that provided a new worksite – in [REDACTED] Florida [REDACTED] Metropolitan Statistical Area) – as the beneficiary's place of

<sup>1</sup> It must be noted for the record that the petitioner has provided inconsistent information regarding the beneficiary's rate of pay. In the Form I-129 and LCA, the petitioner indicated that the beneficiary will be paid \$65,000 per year. However, on the LCA submitted in response to the NOIR, the petitioner indicated the beneficiary's rate of pay as \$62,000 per year. No explanation for the variance was provided by the petitioner.

<sup>2</sup> With certain limited exceptions, the applicable U.S. Department of Labor (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).

<sup>3</sup> USCIS must be able to verify the information provided in the petition to further determine eligibility for an immigration benefit and/or compliance with applicable laws and authorities. To that end, agency verification methods may include but are not limited to review of public records and information; contact via written correspondence, the Internet, facsimile or other electronic transmission, or telephone; unannounced physical site inspections; and interviews. See 8 C.F.R. §§ 103, 204, 205, and 214, 8 U.S.C. §§ 1103, 1155, 1184.

employment. The worksite is located in a metropolitan statistical area differing from the worksite listed in the original H-1B filing.

The director concluded that the changes in the place of employment and wage level of the beneficiary constituted material changes to the terms and conditions of the beneficiary's employment as specified in the original petition.<sup>4</sup> Pursuant to 8 C.F.R. § 214.2(h)(2)(i)(E), the petitioner was required to file an amended Form I-129 reflecting the changes, and to which the newly submitted LCA corresponded. The petitioner failed to file an amended petition, and the director revoked the approval of the petition. Thereafter, the petitioner submitted an appeal.

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

### A. Change in Place of Employment

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).<sup>5</sup>

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<sup>4</sup> In addition, the director concluded that the beneficiary was not eligible for an extension of his nonimmigrant status. It must be noted that a request for an extension of stay in an H-1B submission is not a petition within the meaning of section 214(c)(1) of the Act, 8 U.S.C. § 1184(c)(1), and does not confer any of the appeal rights normally associated with a petition. The Form I-129 in this context is merely the vehicle by which information is collected to make a determination on the application for an extension of stay.

The regulations are clear on this matter. Under 8 C.F.R. § 214.1(c)(5), there is no appeal of a denial of an application for extension of stay. Specifically, the regulation at 8 C.F.R. § 214.1(c)(5) states the following (emphasis added):

Decision in Form I-129 or I-539 extension proceedings. Where an applicant or petitioner demonstrates eligibility for a requested extension, it may be granted at the discretion of the Service. **There is no appeal from the denial of an application for extension of stay filed on Form I-129 or I-539.**

We have no jurisdiction over the denial of the extension of stay request, as issues surrounding the beneficiary's maintenance of nonimmigrant status are within sole discretion of the director.

<sup>5</sup> 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 U.S. Department of Justice official to U.S. Department of Homeland Security (DHS) by the HSA "shall be deemed to refer to the Secretary" of



In turn, section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A), 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.<sup>6</sup> 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).<sup>7</sup> 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 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

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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.

<sup>6</sup> 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).

<sup>7</sup> 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).

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 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).<sup>8</sup> 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. 8 C.F.R. § 214.2(h)(2)(i)(E).

In this matter, the petitioner claimed in the certified LCA that the beneficiary's place of employment was located in [REDACTED] New York [REDACTED] Metropolitan Statistical Area). Thereafter, the petitioner indicated the beneficiary's place of employment as [REDACTED] Florida [REDACTED] Metropolitan Statistical Area).<sup>9</sup> No other locations were provided.

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*

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<sup>8</sup> This interpretation of the regulations clarifies but does not depart from 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"). To the extent any previous agency statements may be construed as contrary to this decision, *see, e.g.,* Letter from Efren Hernandez III, Dir., Bus. and Trade Branch, USCIS to Lynn Shotwell, Am. Council on Int'l Pers., Inc. (Oct. 23, 2003), those statements are hereby superseded. We 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.

<sup>9</sup> The record here indicates that the new place of employment was not a short-term placement. *See generally* 20 C.F.R. §§ 655.715, 655.735. The petitioner did not claim, and we do not find, that this new work location falls under a "non-worksites" location as described at 20 C.F.R. § 655.715 or a short-term placement or assignment as described at 20 C.F.R. § 655.735.



*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).<sup>10</sup>

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.<sup>11</sup>

Having materially changed the beneficiary's authorized place of employment to a geographical areas 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.<sup>12</sup> 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.

#### B. Change in Wage Level

Further, we will briefly note that the petitioner initially designated the proffered position on the LCA under the occupational category "Computer Software Engineers, Applications" - SOC (ONET/OES Code) 15-1031.00, at a Level II (qualified) wage.<sup>13</sup> However, on the LCA submitted

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<sup>11</sup> 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).

<sup>12</sup> Here, the petitioner submitted a new LCA certified for the beneficiary's place of employment in [REDACTED] Florida in response to the NOIR. 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).

<sup>13</sup> The petitioner indicated on the LCA that the prevailing wage for the occupational category "Computer Software Engineers, Applications" in [REDACTED] New York) was \$62,379 per year at a Level II wage at the time the LCA was filed. However, the correct prevailing wage for the occupational category of "Computer Software Engineers, Applications" for [REDACTED] New York) was \$63,107 per year at a Level II wage. For additional information on the prevailing wage for "Software Engineers,

in response to the NOIR, the petitioner indicated the wage level as a Level I (entry).<sup>14</sup>

The wage levels should be determined only after selecting the most relevant Occupational Information Network (O\*NET) code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.<sup>15</sup>

Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) position after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the

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Applications" in [REDACTED] see the All Industries Database for 7/2010 - 6/2011 for Computer Software Engineers, Applications at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatcenter.com/> [REDACTED] (last visited August 14, 2014). No explanation was provided by the petitioner.

<sup>14</sup> The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." Levels I and II wage rates are described as follows:

**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.

**Level II** (qualified) wage rates are assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation. They perform moderately complex tasks that require limited judgment. An indicator that the job request warrants a wage determination at Level II would be a requirement for years of education and/or experience that are generally required as described in the O\*NET Job Zones.

U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

<sup>15</sup> For additional information regarding prevailing wage determinations, see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).



prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties.<sup>16</sup> DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

The change in the wage level suggests that the duties and requirements of the position in [REDACTED] New York differ from the position in [REDACTED] Florida. As previously discussed, 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).

### III. CONCLUSION

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 Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012). Here, that burden has not been met. We will affirm the decision of the director. The Form I-129 petition's approval is revoked pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A)(1), (A)(3), and (A)(4).<sup>17</sup>

**ORDER:** The director's decision is affirmed, and the appeal is dismissed. The approval of the petition remains revoked.

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<sup>16</sup> A point system is used to assess the complexity of the job and assign the wage level. Step 1 requires a "1" to represent the job's requirements. Step 2 addresses experience and must contain a "0" (for at or below the level of experience and SVP range), a "1" (low end of experience and SVP), a "2" (high end), or "3" (greater than range). Step 3 considers education required to perform the job duties, a "1" (more than the usual education by one category) or "2" (more than the usual education by more than one category). Step 4 accounts for Special Skills requirements that indicate a higher level of complexity or decision-making with a "1" or a "2" entered as appropriate. Finally, Step 5 addresses Supervisory Duties, with a "1" entered unless supervision is generally required by the occupation.

<sup>17</sup> As the identified ground for revocation is dispositive of the petitioner's continued eligibility, we need not address any additional issues in the record of proceeding.