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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

DATE: **OCT 29 2014**

OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:


SELF-REPRESENTED

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 summarily dismissed.

I. FACTUAL AND PROCEDURAL HISTORY

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the California Service Center. On the Form I-129 petition, the petitioner describes itself as a home health care provider that was established in [REDACTED]. The petitioner seeks to classify the beneficiary 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 for a Nonimmigrant Worker), the petitioner stated that it wishes to employ the beneficiary as a quality assurance supervisor. The petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B petition, designating the proffered position under the occupational category "Physical Therapists" - SOC (ONET/OES Code) 29-1123. The petitioner indicated on the Form I-129 (pages 5 and 17) that the beneficiary would be paid \$53,810 per year.

The director issued a request for evidence (RFE). In response to the RFE, the petitioner indicated that the correct occupational category for the proffered position was "Medical and Health Services Manager." The petitioner's president further stated, "My apology for my error in indicating a wrong occupation title when I initially applied for a certified LCA." The petitioner submitted a new LCA classifying the proffered position under the occupational category "Medical and Health Services Managers" – SOC (ONET/OES Code) 11-9111. The petitioner indicated that the prevailing wage for this occupational category was \$67,600 per year.¹ This new LCA was certified by the U.S. Department of Labor (DOL) subsequent to the H-1B filing date.

The director reviewed the response and found that the petitioner did not establish eligibility at the time of filing the H-1B petition. The director denied the petition, and the petitioner submitted a Form I-290B (Notice of Appeal or Motion) of this decision.

II. SUMMARY DISMISSAL

On the Form I-290B, Part 2, the petitioner checked Box A, indicating that it was filing an appeal. In a brief submitted with the appeal, the petitioner acknowledges that it "made a clerical mistake in completing the previous LCA." The petitioner continues by stating that the "subsequent certified LCA is only to correct a clerical error in the occupational title and code designation of the proffered position offered to the beneficiary." Throughout the brief, the petitioner states that it make an error in designating the proffered position under the occupational category "Physical Therapists" on the LCA.

¹ Thus, the salary offered to the beneficiary (as stated on the Form I-129) is significantly less than the prevailing wage provided on the new LCA for the occupational category "Physical Therapists."

Upon review, we find that the petitioner did not identify specifically how the director made any erroneous conclusion of law or statement of fact in denying the petition. The regulation at 8 C.F.R. § 103.3(a)(1)(v) states, in pertinent part: "An officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal." Therefore, the appeal will be summarily dismissed in accordance with 8 C.F.R. § 103.3(a)(1)(v).

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

Furthermore, we note that the director did not err in denying the petition.

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.²

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.³ 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.

² 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 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.

³ 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).

To promote the U.S. worker protection goals of a statutory and regulatory scheme that allocates responsibilities sequentially between the 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 U.S. Citizenship and Immigration Services (USCIS). 8 C.F.R. § 214.2(h)(4)(i)(B)(1); 20 C.F.R. § 655.700(b)(2).⁴ A change in the occupational classification and prevailing wage of a proffered position 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.⁵ 8 C.F.R. § 214.2(h)(2)(i)(E) and (11)(i)(A).

The regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

Here, in response to the RFE, the petitioner attempted to change the occupational category and prevailing wage for the proffered position. Such changes in the terms and conditions of the beneficiary's employment may affect eligibility under section 101(a)(15)(H) of the Act. The petitioner was required file a new H-1B petition with the appropriate fee(s), along with a corresponding LCA certified by DOL, with both documents indicating the relevant change. 8 C.F.R. § 214.2(h)(2)(i)(E), (h)(11)(i)(A). 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.

Further, the rate of pay offered to the beneficiary (as stated on the Form I-129) is \$13,790 less than the prevailing wage provided on the new LCA for the occupational category "Physical Therapists," contrary to sections 101(a)(15)(H)(i)(b) and 212(n)(1) of the Act.⁶ Therefore, the petitioner has

⁴ 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).

⁵ 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).

⁶ The initial LCA lists the prevailing wage for the occupational category "Physical Therapists" as \$53,810

failed to offer the beneficiary a wage that is equal to or greater than the prevailing wage.

IV. CONCLUSION

In response to the RFE and in the appeal, the petitioner states that the original LCA submitted with the H-1B petition contained inaccurate information.⁷ 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 summarily dismissed.

per year in Detroit, Michigan. The LCA, submitted in response to the RFE, lists the prevailing wage for the occupational category "Medical and Health Services Managers" as \$67,600 per year in Detroit, Michigan. On each LCA, the petitioner identified the source of the prevailing wage as the DOL Office of Foreign Labor Certification's Online Data Center.

⁷ An inaccurate statement anywhere on the Form I-129 or in the evidence submitted in connection with the petition mandates its denial. *See* 8 C.F.R. § 214.2(h)(10)(ii); *see also* 8 C.F.R. § 103.2(b)(1).