

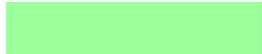
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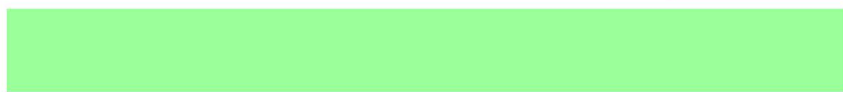
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship
and Immigration
Services



DATE: **SEP 04 2014** OFFICE: CALIFORNIA 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:

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 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. PROCEDURAL AND FACTUAL BACKGROUND

The petitioner filed a Petition for a Nonimmigrant Worker (Form I-129) to classify the beneficiary as an H-1B temporary nonimmigrant worker 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, the petitioner described itself as a provider of professional health care workers. The petitioner further indicated that it would continue to employ the beneficiary as an occupational therapist on a full-time basis.¹ On the Form I-129, the petitioner identified the place of employment as the [REDACTED] On page 4 of the Form I-129 petition, the petitioner indicated the following:

Will the beneficiary work off-site? ☒ No ☐ Yes

The petitioner failed to complete page 19 of the Form I-129. Specifically, the petitioner did not provide a response to the following:

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 LCA submitted in support of the Form I-129, the petitioner stated the beneficiary's places of employment as (1) [REDACTED]

The petitioner did not request other

¹ The petitioner indicated the beneficiary's prior periods of stay in H classification in the United States as follows:

I-129 Receipt Number	Validity Period
[REDACTED]	12/16/2003 to 11/30/2005
[REDACTED]	11/30/2005 to 11/29/2008
[REDACTED]	11/30/2008 to 07/11/2011

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

worksites and did not submit an itinerary.³ See 8 C.F.R. § 214.2(h)(2)(i)(B) (requiring an itinerary for services performed in more than one location).

After the petition was approved, an administrative site visit was conducted.⁴ The officers found that the beneficiary was not employed at the places of employment designated in the LCA. The director reviewed the site visit report and the record of proceeding and issued a NOIR. 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, the petitioner stated that the beneficiary was working "in [REDACTED] areas." With the response, the petitioner submitted several LCAs with the following information:

Case Number	Validity Dates	Place of Employment
[REDACTED]	12/07/2007 to 12/06/2010	[REDACTED]
	11/30/2008 to 11/29/2011	
	07/12/2011 to 07/11/2014	
	02/22/2012 to 02/21/2015	

The petitioner indicated that the beneficiary had worked at various locations, and that this included worksites located in metropolitan statistical areas differing from the worksites listed on the original

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).

³ We note that the petitioner provided inconsistent information as to whether the beneficiary would be employed on-site or off-site. No explanation for the variance was provided by the petitioner.

⁴ U.S. Citizenship and Immigration Services (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.

petition and LCA.

The director concluded that the change in the places 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. Pursuant to 8 C.F.R. § 214.2(h)(2)(i)(E), the petitioner was required to file an amended Form I-129 reflecting this change, and to which the newly submitted LCAs 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

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

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.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 (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.

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.

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).

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 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).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 (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 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).⁸ When there is a material change in the terms and conditions of employment, the

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).

⁸ 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.,

petitioner must file an amended or new H-1B petition with the corresponding LCA. 8 C.F.R. § 214.2(h)(2)(i)(E).

III. ANALYSIS

A. Change in the Place of Employment

In this matter, the petitioner claimed in the Form I-129 petition and the certified LCA (submitted with the initial petition) that the beneficiary's places of employment were located in [REDACTED]

[REDACTED] After conducting the site visit, USCIS determined that the beneficiary was not employed at the designated places of employment. In response to the director's NOIR, the petitioner indicated that the beneficiary had worked at various locations in Missouri and Illinois, and that this included worksites located in metropolitan statistical areas differing from the worksites listed on the original petition.⁹

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 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.¹⁰

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.

⁹ The record here indicates that the new places of employment were not short-term placements. *See generally* 20 C.F.R. §§ 655.715, 655.735. The petitioner did not claim, and the AAO does not find, that these new work locations fall under "non-worksite" locations as described at 20 C.F.R. § 655.715 or short-term placements or assignments as described at 20 C.F.R. § 655.735.

¹⁰ 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

Here, the Form I-129 and the originally submitted LCA identified addresses in Joplin, Missouri as the places of employment. The Form I-129 petition and LCA did not cover the locations where the beneficiary had worked and would be working that were submitted in response to the NOIR.

Having materially changed the beneficiary's places of employment to 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. 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. Accordingly, the petition must be revoked.

B. Specialty Occupation

Furthermore, we note that it is necessary for the end-client to provide sufficient information regarding the proposed job duties to be performed at its location(s) in order to properly ascertain the minimum educational requirements necessary to perform those duties. *See Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000). When an employee will provide services to an end-client and not to a petitioning staffing company, the petitioner-provided job duties and alleged requirements to perform those duties are generally not probative in establishing that a position qualifies as a specialty occupation. *See id.*

In the initial petition, the petitioner submitted a description of the proffered position and claimed the beneficiary would be employed in Joplin, Missouri for the client [REDACTED]. Thereafter, the petitioner indicated that the beneficiary had been employed and would be employed at entirely different locations for different end-clients.

USCIS 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). The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary when the petition was filed, therefore, precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under

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).

the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

Accordingly, as the petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position qualifies as a specialty occupation. Therefore, the petition must be revoked for this additional reason.

IV. 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.¹²

ORDER: The appeal is dismissed. The approval of the petition remains revoked.

¹² As the identified grounds for revocation are dispositive of the petitioner's continued eligibility, we will not address any additional issues in the record of proceeding.