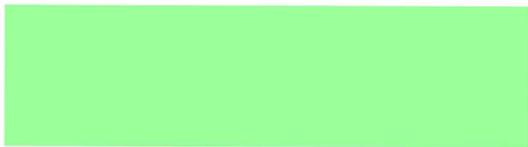
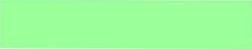




U.S. Citizenship  
and Immigration  
Services

(b)(6)

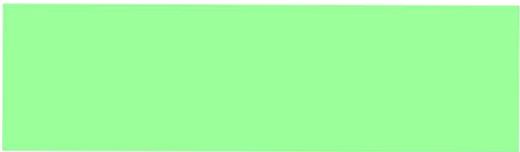


DATE: **NOV 27 2013** OFFICE: VERMONT SERVICE CENTER FILE: 

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 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 services company established in 2006. In order to employ the beneficiary in what it designates as a systems analyst position, the petitioner seeks to classify her 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; (5) the Form I-290B and supporting materials; (6) the AAO's request for additional and missing evidence; and (7) the response to the AAO's request for additional and missing evidence.

As a preliminary matter, the AAO notes that a review of U.S. Citizenship and Immigration Services (USCIS) records indicates that on June 7, 2012, a date subsequent to the denial of the instant petition, another employer filed a Form I-129 petition seeking nonimmigrant H-1B classification on behalf of the beneficiary. USCIS records further indicate that this other employer's petition was approved on October 1, 2012. Because the beneficiary in the instant petition has been approved for H-1B employment with another petitioner, further pursuit of the matter at hand is moot.

Nevertheless, the AAO reviewed the record in its entirety. 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 October 1, 2011, the petitioner indicates that it wishes to employ the beneficiary as a systems analyst on a full-time basis at the rate of pay of \$60,000 per year. In addition, the petitioner states that the beneficiary will work 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.

The petitioner further states that the beneficiary will be responsible for "[a]nalyz[ing], plan[ning], develop[ing], test[ing] and deploy[ing] software applications based upon the business requirements[.]"

In the support letter dated September 21, 2011, the petitioner claims that "[the beneficiary] is well qualified to fill the position of Systems Analyst."<sup>1</sup> The petitioner further states that "[the beneficiary] was awarded a Degree of Bachelor of Engineering and her academic background and work experience are particularly well suited for our needs." The AAO observes that the petitioner did not state that the proffered position has any particular academic requirements.<sup>2</sup>

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 American Evaluation and Translation Service, Inc. The evaluation indicates that the beneficiary's foreign education is equivalent to a U.S. master's degree in computer information systems.

The petitioner also submitted a Labor Condition Application (LCA) in support of the instant H-1B petition.<sup>3</sup> The occupational category is designated as "Computer Systems Analysts" at a Level I

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<sup>1</sup> It must be noted for the record that the petitioner mistakenly and repeatedly referenced the beneficiary in the letter in the masculine pronoun case. The record provides no explanation for this inconsistency. Thus, the AAO must question the accuracy of the letter and whether the information provided is correctly attributed to this particular position and beneficiary.

<sup>2</sup> The petitioner does not claim that the position requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent, as the minimum requirement for entry into the occupation, as required by the Act. See section 214(i)(1) of the Act.

<sup>3</sup> 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, the instructions further note 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).

wage level. The AAO notes that the LCA lists the place of employment as [REDACTED] TX Metropolitan Division).<sup>4</sup> No other places of employment are provided. Notably, this address is also listed on the LCA as the petitioner's address in the sections entitled "Employer Information" and "Employer Point of Contact Information." Furthermore, a document described by the petitioner as its "Company Profile" also indicates that this address is the petitioner's address. Accordingly, it does not appear that the beneficiary will work off-site; however, no explanation was provided by the petitioner.

In addition, the petitioner submitted an employment offer letter, dated September 21, 2011, from the petitioner to beneficiary. The letter states, in part, "You will render all reasonable duties expected of a system analyst. These services will be provided at locations designated by [the petitioner] and will include offices of [the petitioner's] clients."

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on February 22, 2012. The director outlined the specific evidence to be submitted.

On April 25, 2012, the petitioner responded to the RFE. In the April 19, 2012 letter, submitted in response to the RFE, the petitioner indicated that the beneficiary was no longer assigned to work on the project or at the location specified in the original H-1B petition and LCA. The petitioner stated the following:

Please note that the beneficiary was initially contracted to work at the petitioner's office in [REDACTED] Tx [sic]. However, as evidenced by the contract and the letter, the end client, Fusion, requires the beneficiary to work on-site at their premises in MA. Due to the technology and tools required to perform the job duties of that of a Systems Analyst, on-site employment at the client site is essential. Since the beneficiary's credentials and work experience was a perfect match for the current job, she is now assigned to work at the end client's location. A revised/new LCA is enclosed reflecting the change.

In a letter dated April 19, 2012, counsel repeatedly referenced the client site, and states that the new LCA "shows the beneficiary's worksite and prevailing wage requirements." Counsel continues by stating that "[the petitioner] has assigned [the beneficiary] as a contractor to work at its facilities in Massachusetts. . . . Day-to-day interactions with US-based Fusion employees require [the beneficiary] to work in MA. . . . [The beneficiary] directly reports to her supervisor at Fusion. . . . The petitioner keeps abreast of all the activities of the beneficiary at the end-client site to determine need and room for any improvisation."

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<sup>4</sup> 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).

In addition, the petitioner submitted, in part, the following documentation:

- A Contractual Agreement for Consulting Services between the petitioner and [redacted] (dated March 12, 2012), along with a Scope of Work (SOW) (dated April 1, 2012).<sup>5</sup> The SOW indicates, in part, the following:

- |                       |                     |
|-----------------------|---------------------|
| 1. Name of Contractor | : [the beneficiary] |
| 2. Supplier           | : [the petitioner]  |
| 3. Start Date         | : 04/30/2012        |
| 4. Bill Rate          | : \$ 50.00/Hr       |

\* \* \*

Work Location:

[The petitioner] agrees to make the consultant available on-site at the following location during the entire project assignment.

[redacted]

- A new LCA that provides two new worksites – in [redacted] Massachusetts [redacted] MA-NH NECTA Division) and [redacted] Texas [redacted] TX Metropolitan Division) - as the beneficiary's places of employment.<sup>6</sup> The address in [redacted] Texas is also listed on the LCA as the petitioner's address in the sections entitled "Employer Information" and "Employer Point of Contact Information."<sup>7</sup>

<sup>5</sup> It must be noted for the record that the agreement and the SOW were executed after the director's RFE and do not pre-date the filing of the petition. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

<sup>6</sup> The petitioner indicated on the LCA that the prevailing wage for the occupational category "Computer Systems Analysts" in [redacted] Massachusetts) was \$63,066 per year at the time the LCA was filed. However, the correct prevailing wage for the occupational category of "Computer Systems Analysts" for [redacted] Massachusetts) was \$69,659 per year. For additional information on the prevailing wage for "Computer Systems Analysts" in [redacted] see the All Industries Database for 7/2011 - 6/2012 for Computer Systems Analysts at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatacenter.com/OesQuickResults.aspx?code=15-1121&area=74804&year=12&source=1> (last visited November 26, 2013). No explanation was provided by the petitioner. Upon review, the petitioner has not established that it would pay the beneficiary an adequate salary for her work, if the petition were approved. Thus, even if the petitioner overcame the director's basis for denial of the petition (which it has not), the petition could not be approved for this reason as well.

<sup>7</sup> A petition that requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with USCIS as

The director reviewed the response, and concluded 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. The director denied the petition on May 8, 2012. Counsel submitted an appeal of the denial of the H-1B petition. With the appeal, counsel submitted a brief and a copy of the petitioner's lease agreement.<sup>8</sup> The AAO reviewed the record of proceeding in its entirety.

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>9</sup>

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.<sup>10</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

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provided in the form instructions. 8 C.F.R. § 214.2(h)(2)(i)(B). In the instant case, the petitioner did not submit an itinerary.

<sup>8</sup> Counsel submitted a copy of the petitioner's lease agreement, dated January 12, 2012, which lists the petitioner's address as [REDACTED]. However, in the Form G-28 signed on February 25, 2013, the petitioner indicates its address as [REDACTED].

<sup>9</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 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.

<sup>10</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).

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>11</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 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.<sup>12</sup>

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<sup>11</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).

<sup>12</sup> This reading of 8 C.F.R. § 214.2(h)(2)(i)(E) is consistent with the agency's past policy pronouncements

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] TX Metropolitan Division). In response to the director's RFE, the petitioner indicated the beneficiary's places of employment as [REDACTED] Massachusetts [REDACTED] MA-NH NECTA Division) and [REDACTED] Texas ([REDACTED] TX Metropolitan Division).<sup>13</sup>

A material change in the terms or conditions of employment of a beneficiary includes one which may affect eligibility under section 101(a)(15)(H) of the Act. *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).<sup>14</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 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.<sup>15</sup>

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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.

<sup>13</sup> The petitioner did not claim, and the AAO does not find, that the new work locations 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).

<sup>14</sup> Title 8 C.F.R. § 214.2(h)(11)(i)(A) and 214.2(h)(2)(i)(E) are complementary: the former clarifies that a material change is one that may affect eligibility; the latter provides that an amended or new petition must be filed to reflect a material change in the terms and conditions of employment.

<sup>15</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,

Here, the Form I-129 and the originally submitted LCA identified the [REDACTED] Texas facility as the place of employment. Thereafter, in response to the RFE, the petitioner provided an LCA indicating that the beneficiary's places of employment would be in [REDACTED] Massachusetts and [REDACTED] Texas. In addition, the petitioner attested on the Form I-129 (pages 5 and 17) that it would pay the beneficiary a salary approximately \$9,600 less than would be required for the subsequently-identified place of employment in [REDACTED] Massachusetts, contrary to sections 101(a)(15)(H)(i)(b) and 212(n)(1) of the Act.<sup>16</sup> Such changes in the terms and conditions of the beneficiary's employment may affect eligibility under section 101(a)(15)(H) of the Act.

Having materially changed the beneficiary's authorized 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.<sup>17</sup> 8 C.F.R. § 214.2(h)(2)(i)(E), (h)(11)(i)(A). By failing to file an amended or new 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.<sup>18</sup>

**ORDER:** The appeal is dismissed.

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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>16</sup> On the LCA, the petitioner identified the source of the prevailing wage as the OFLC (Office of Foreign Labor Certification) Online Data Center. The prevailing wage for the designated occupational category was \$69,659 per year in [REDACTED] Massachusetts [REDACTED] MA-NH NECTA Division) at the time of filing. *See* the All Industries Database for 7/2011 - 6/2012 for Computer Systems Analysts at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatacenter.com/OesQuickResults.aspx?code=15-1121&area=74804&year=12&source=1> (last visited November 26, 2013).

<sup>17</sup> Here, in response to the RFE, the petitioner submitted a new LCA certified for the beneficiary's new places of employment. 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. *See* 8 C.F.R. § 214.2(h)(2)(i)(E).

<sup>18</sup> 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.