

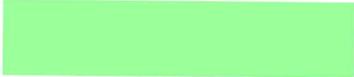
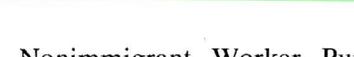


U.S. Citizenship
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Services

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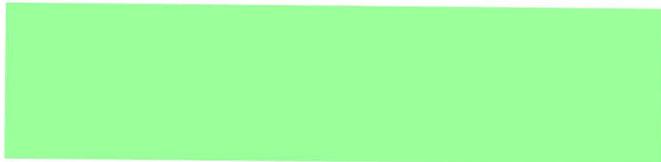


DATE: **JUL 23 2014** OFFICE: VERMONT SERVICE CENTER FILE: 

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 service center director initially approved the nonimmigrant visa petition. In response to new evidence the director issued a notice of intent to revoke (NOIR), and ultimately did revoke the approval of the petition. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed. Approval of the petition will remain revoked.

I. PROCEDURAL AND FACTUAL BACKGROUND

In the Petition for a Nonimmigrant Worker (Form I-129), filed on November 3, 2011, the petitioner describes itself as a provider of telecom consulting and system integration services. It seeks to employ the beneficiary in what it designates as a telecom engineer position and 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).

The director approved the visa petition on November 9, 2011; however, on March 25, 2013, the service center director issued a NOIR in this matter. The petitioner's response was received on April 23, 2013. Subsequently, on July 10, 2013, the director revoked approval of the visa petition. The petitioner filed a timely appeal on August 12, 2013.

We base our decision upon our review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's NOIR; (3) the response to the NOIR; (4) the director's revocation letter; and (5) the Form I-290B and counsel's submissions on appeal.

II. THE LAW PERTINENT TO REVOCATION OF APPROVED H-1B VISA PETITIONS

U.S. Citizenship and Immigration Services (USCIS) may revoke the approval of an H-1B petition pursuant to 8 C.F.R. § 214.2(h)(11)(iii), which states the following:

- (A) Grounds for revocation. The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:
 - (1) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition, or if the beneficiary is no longer receiving training as specified in the petition; or
 - (2) The statement of facts contained in the petition was not true and correct, inaccurate, fraudulent, or misrepresented a material fact; or
 - (3) The petitioner violated terms and conditions of the approved petition; or

- (4) The petitioner violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of this section; or
- (5) The approval of the petition violated paragraph (h) of this section or involved gross error.

(B) Notice and decision. The notice of intent to revoke shall contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal. The petitioner may submit evidence in rebuttal within 30 days of receipt of the notice. The director shall consider all relevant evidence presented in deciding whether to revoke the petition in whole or in part. If the petition is revoked in part, the remainder of the petition shall remain approved and a revised approval notice shall be sent to the petitioner with the revocation notice.

III. 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).¹

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.² 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 &*

¹ 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.

² 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).

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 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).³ 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

³ 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).

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).⁴ 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).

IV. EVIDENCE

As noted above, the visa petition was filed on November 3, 2011. In a November 2, 2011 letter submitted with the visa petition, [REDACTED] the petitioner's Head – Technology and Operations stated:

[The petitioner intends] to employ the beneficiary in the US pursuant to our employment agreement for the entire duration of the petition subject to USCIS approval. His employment at our company is not limited nor controlled by an engagement.

[The beneficiary] will work directly for [the petitioner] at our office located at [REDACTED] and at our client site located at [REDACTED]

⁴ 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 Efrén Hernández 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.

The visa petition stated that the beneficiary would work at those two locations in Irving, Texas. The LCA submitted to support the visa petition was certified for employment in those two locations in Irving, Texas.

Subsequent to the petition's approval, the director issued a NOIR to the petitioner, stating that USCIS had obtained new information regarding the beneficiary's employment with the petitioner. Specifically, a consular memorandum in the record states that when the beneficiary appeared for his consular interview on March 2, 2012, the interviewer requested additional evidence pertinent to his employment by the petitioner. According to the consulate, no such evidence was submitted.

In response to the March 25, 2013 NOIR, counsel submitted, *inter alia*: (1) a letter dated April 18, 2013, signed by Mr. [REDACTED] and [REDACTED] Lead Project Business Manager for [REDACTED]; (2) a Frame Agreement for Subcontracting executed by the petitioner and [REDACTED] (3) a Project Agreement executed by the petitioner and [REDACTED] (4) an LCA certified on December 27, 2011 for a [REDACTED] and [REDACTED] and (5) counsel's own letter, dated April 22, 2013.

In their April 18, 2013 letter, Mr. [REDACTED] and Mr. [REDACTED] stated:

We currently anticipate for [the beneficiary] to perform work at the following [Nokia] sites/office:

- [REDACTED]
- [REDACTED]
- [REDACTED]

The Frame Agreement for Subcontracting, executed in 2009, states the general terms pursuant to which the petitioner may provide workers to [REDACTED]

The Project Agreement states that it would become effective on January 1, 2013 and continue until the work under it is completed or either party opts to terminate the agreement. As such, it does not encompass the entire period of requested employment. Further, it does not specifically identify any workers the petitioner was to provide. Yet further, that agreement was signed by a representative of the petitioner on December 17, 2012 and by a representative of [REDACTED] on December 21, 2012. As such, it is not evidence of any work the petitioner had available on November 1, 2011, the beginning of the requested validity period of the instant visa petition.

In his April 22, 2013 letter, counsel asserted that the determination that the beneficiary would also work in Virginia was made after the visa petition was submitted. He further asserted that an amended visa petition is not required for a change of location. On July 10, 2013 the director revoked approval of the instant visa petition, based on the change in location.

On appeal, counsel reiterated the assertion that an amended visa petition is not required for a change in location. He further observed that neither the NOIR nor the decision of revocation explicitly identified which of the 8 C.F.R. § 214.2(h)(11)(iii)(A) bases for revocation was relied upon in revoking approval.

V. ANALYSIS

In this matter, the petitioner claimed in both the Form I-129 petition and the certified LCA submitted with the Form I-129 that the beneficiary's place of employment was located in [REDACTED]. In response to the RFE, the petitioner provided evidence that it also intended to employ the beneficiary in [REDACTED] Virginia and [REDACTED] Virginia.⁵ 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 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 to correspond to an H-1B petition, it must specify the beneficiary's place(s) of employment.⁶

Here, the Form I-129 and the originally submitted LCA identified two locations in [REDACTED] Texas as the places of employment. The LCA did not cover the [REDACTED] Virginia or [REDACTED] Virginia addresses identified by the petitioner in response to the NOIR. Such changes in the terms and conditions of the beneficiary's employment may affect eligibility under section 101(a)(15)(H) of the Act.

⁵ The record here does not indicate that the new places of employment were 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-worksites" 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.

⁶ 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).

Having materially changed the beneficiary's authorized place 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.⁷ 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 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.

The change in work location relied upon in the decision of revocation was revealed by counsel in response to the NOIR. That change in location had not been revealed previously, and so was not available as a basis for revocation prior to the receipt of counsel's submissions in response to the NOIR.

The revocation decision indicated that approval of the visa petition was revoked because of the change in work location. We find that the NOIR placed the petitioner on notice that revocation of the approval of the petition was contemplated within the scope of the revocation-on-notice provisions. The NOIR stated that an LCA "listing all areas of the beneficiary's intended employment" and "certified prior to the filing of the Form I-129" was required. The NOIR further notified the petitioner that it should "clarify the validity dates for the project or projects that the beneficiary will be assigned to and establish that a valid employer-employee relationship will exist for the requested validity period." The NOIR also requested that the petitioner submit an itinerary that specified, *inter alia*, "the names and addresses of the establishment, venues, or locations where the services will be performed." Thus, we find that the NOIR provided sufficient notice to the petitioner of the grounds upon which a revocation was contemplated.

Further, we observe that counsel has responded to the finding that the change in location required a revised visa petition. Therefore, no useful purpose would be served by remanding the case to afford the petitioner the opportunity to supplement the record with new evidence or argument pertinent to that issue. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

Upon review, the director revoked the approval on the basis of 8 C.F.R. § 214.2(h)(11)(iii)(A)(I) – (4). We find that, fully considered in the context of the entire record of proceedings, the petitioner's response to the NOIR failed to overcome the grounds for revoking the petition.

⁷ Here the petitioner submitted a new LCA certified for the beneficiary's places of employment in [REDACTED] Virginia and [REDACTED] Virginia in response to the NOIR. This LCA was certified on December 17, 2011, which was after the submission of the instant visa petition. Because the LCA was not certified prior to submission of the instant visa petition, it could only be submitted to USCIS as part of an amended or new petition before the beneficiary would be permitted to begin working in those places of employment. *See* 8 C.F.R. § 214.2(h)(2)(i)(E).

VI. CONCLUSION

The appeal will be dismissed and approval of the visa petition will remain revoked on the bases specified above. 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 approval of the petition remains revoked.