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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

[Redacted]

DATE: **JUN 18 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:

[Redacted]

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,

for Michael T. Kelly
Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed, and the petition will be denied.

On the Form I-129 visa petition, the petitioner describes itself as a 22-employee IT consulting company¹ established in 2008. In order to employ the beneficiary in what it designates as a full-time SAP Transportation Management Consultant position at a salary of \$68,000 per year the petitioner seeks 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 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. The director's decision includes a concluding statement to the effect that the petitioner failed to meet a material condition precedent to filing the petition in that it had not submitted a Labor Condition Application (LCA) that had been certified before the petition's filing for the particular location where the beneficiary is working.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's letter denying the petition; and (5) the Form I-290B, a brief, and supporting documentation.

The AAO finds that upon review of the entire record of proceeding, the evidence of record does not overcome the director's grounds for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

I. PROCEDURAL AND FACTUAL BACKGROUND

In the petition signed on April 3, 2013, the petitioner indicated that it intended to employ the beneficiary as a SAP Transportation Management Consultant on a full-time basis at the rate of pay of \$68,000 per year. In addition, the petitioner stated that the beneficiary would work in-house at [REDACTED]. The petitioner did not request any other worksites. On the Form I-129 petition (pages 4 and 19), the petitioner provided the following information:

Will the beneficiary work off-site? No Yes

* * *

¹ The petitioner provided a North American Industry Classification System (NAICS) Code of 541690, "Other Scientific and Technical Consulting Services." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "541690 Other Scientific and Technical Consulting Services," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited May 12, 2014).

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 support letter dated April 3, 2013, the petitioner stated the following:

[The beneficiary] will work at our Training and Innovation Center at [redacted] office in [redacted]. He will be working in-house to develop our products....

The supporting documents that the petitioner filed with the Form I-129 included one LCA, certified prior to the petition's filing. The LCA had been certified for the petitioner's use with a job prospect in the "Computer Systems Analysts" occupational group, at a Level I prevailing-wage rate. We note that the particular place of employment is a material aspect of the information required in the LCA. The AAO notes that the LCA lists the place of employment as [redacted] (San Francisco-San Mateo-Redwood City, CA Metropolitan Statistical Area).² The petitioner did not request other worksites and did not submit an itinerary. See 8 C.F.R. § 214.2(h)(2)(i)(B) (2013) (requiring an itinerary for services performed in more than one location).

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on May 29, 2013. The petitioner was asked to submit documentation to establish that it has sufficient specialty occupation work that is immediately available through the entire requested H-1B validity period.

On August 20, 2013, the petitioner and counsel responded to the RFE. In a letter submitted in response to the RFE, the petitioner stated the following:

You have requested evidence of sufficient Specialty Occupation work for the Mr. [redacted] [the beneficiary]. Mr. [redacted] is currently working for [redacted] on F1 (OPT) status and at the time of filing (*sic*) his H-1B Cap petition he was working in-house, at [redacted] offices in [redacted]. However, since the filing of the H-1B petition, on April 08, 2013, we have assigned Mr. [redacted] to work at our End-Client, [redacted] (hereinafter [redacted] at [redacted] .. [redacted] letter is enclosed as Exhibit 1 and states that:

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 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).

- Mr. [REDACTED] will perform services at [REDACTED] at [REDACTED] work site as a SAP Transportation Management Consultant ("SAP TM Consultant), pursuant to the contract agreement entered into [REDACTED]

We have enclosed a certified Labor Condition Application (original) for the client-site [REDACTED] where the Beneficiary will be working....

Mr. [REDACTED] will be working at [REDACTED] client, [REDACTED] office in [REDACTED] pursuant to the CSA entered into [REDACTED] for the provision of support of implementation of the SAP Software Systems to [REDACTED]

In response to the RFE, the petitioner and counsel submitted documentation in support of the H-1B petition, including a new LCA that provided a new worksite – in [REDACTED] (Eastern Texas nonmetropolitan area) – as the beneficiary's place of employment (the physical location where the work will be performed). *See* 20 C.F.R. § 655.715. That worksite is located in a metropolitan statistical area differing from the worksite listed on the original petition.

The director reviewed the RFE response, and concluded, correctly, that the change in the beneficiary's place of employment 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 September 4, 2013. Counsel submitted an appeal of the denial of the H-1B petition.

II. THE LCA AND THE H-1B 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).³

³ 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.

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.⁴ 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).⁵ 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

⁴ 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).

⁵ 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).

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).

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). 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).

III. ANALYSIS

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]. In response to the director's RFE, the petitioner indicated the beneficiary's place of employment was located in [REDACTED].

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). 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.⁷

Here, the Form I-129 and the originally submitted LCA identified the [REDACTED] facility as the place of employment. The LCA did not cover the [REDACTED] address requested in response to the RFE. 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

⁶ The petitioner did not claim, and the AAO does not find, that this new work location falls under a "non-worksite" location or a short-term placement or assignment. *See* 20 C.F.R. § 655.715 and 655.735.

⁷ 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).

(11)(i)(A).⁸ 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).

Having materially changed the beneficiary's 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.⁹ 8 C.F.R. § 214.2(h)(2)(i)(E), (h)(11)(i)(A). By failing to file a new 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.

As will now be discussed, the AAO finds that the director was correct to deny the petition on the LCA issue.

The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) stipulates the following:

Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(1) states that, when filing an H-1B petition, the petitioner must submit with the petition “[a] certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary.” Thus, in order for a petition to be approvable, the LCA must have been certified before the H-1B petition was filed. The submission of an LCA certified subsequent to the filing of the petition satisfies neither 8 C.F.R. § 214.2(h)(4)(i)(B)(1) nor 8 C.F.R. § 214.2(h)(4)(iii)(B)(1). 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).

⁸ It is noted that private discussions and correspondence solicited to obtain advice from USCIS, such as Mr. [REDACTED] letter submitted on appeal by counsel, are not binding on the AAO or other USCIS adjudicators and do not have the force of law. *Matter of Izummi*, 22 I&N 169, 196-197 (Comm. 1968); see also, Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, U.S. Immigration & Naturalization Service, *Significance of Letters Drafted By the Office of Adjudications* (December 7, 2000).

⁹ Here the petitioner submitted a new LCA certified for the beneficiary's place of employment in [REDACTED] TX in response to the RFE. 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).

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, the DOL regulations note that it is within the discretion of the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) to determine whether the content of an LCA filed for a particular Form I-129 actually supports that petition. See 20 C.F.R. § 655.705(b), which states, in pertinent part:

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification. . . .

(Italics added.)

As we have determined that the evidence of record supports the director's decision to deny the petition on the basis specified in that decision, the appeal will be dismissed and the petition will be denied.

IV. BEYOND THE DIRECTOR'S DECISION

In addition and beyond the decision of the director, we call the petitioner's attention to the fact that there is an additional aspect of this record of proceeding that also precludes approval of this petition. That is the fact that the petition was not filed with an itinerary that identified the location and the dates when the beneficiary would be working there. The AAO conducts appellate review on a *de novo* basis (See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)), and it was in the exercise of this function that the AAO identified this additional ground for denying the petition.

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) states, in pertinent part:

Service or training in more than one location. A petition which 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 the Service office which has jurisdiction over I-129H petitions in the area where the petitioner is located. The address which the petitioner specifies as its location on the I-129H petition shall be where the petitioner is located for purposes of this paragraph.

The itinerary language at 8 C.F.R. § 214.2(h)(2)(i)(B) of the regulation, with its use of the mandatory "must," establishes that the itinerary as there defined is a material and necessary document for an H-1B petition involving employment at multiple locations. Further, the fact this

provision is included within the regulations specifically titled "Petitions" and subtitled "Filing of Petitions" indicates that the itinerary is a matter that must be provided at the petition's filing.

In addition, a 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).

V. CONCLUSION AND ORDER

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

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. The appeal will be dismissed and the petition denied for this reason.

ORDER: The appeal is dismissed. The petition is denied.