



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

DATE: **APR 03 2015** 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,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The director revoked approval of the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed, and approval of the petition will remain revoked.

I. INTRODUCTION

On the Form I-129 visa petition, the petitioner describes itself as a 35-employee "IT Staffing and Software Application of Development Company"¹ established in [REDACTED]. In order to employ the beneficiary in what it designates as a full-time programmer analyst position at a salary of \$60,000 per year,² the petitioner seeks to extend her classification 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 petitioner filed the petition on June 26, 2013, and the director approved it on July 2, 2013. According to the petitioner, the beneficiary would provide her services to the petitioner's end-client, the [REDACTED], at [REDACTED] place of business in [REDACTED] Illinois from August 2, 2013 until August 1, 2016. Similarly, the LCA submitted by the petitioner in support of the petition was certified for an employment in [REDACTED] Illinois for a period of August 1, 2013 to July 31, 2016. No other job locations were indicated on the LCA or on the Form I-129.

Subsequent to the petition's approval, U.S. Citizenship and Immigration Services (USCIS) randomly selected the petition for an administrative site visit (ASV). On December 5, 2013, an investigator contacted [REDACTED] the signatory of the petition, by phone. Mr. [REDACTED] acknowledged that the beneficiary was employed by the petitioner, but provided the phone number for the petitioner's human resources representative for the beneficiary's detailed employment information. [REDACTED] the petitioner's human resources representative, informed the investigator that the beneficiary started working at [REDACTED] Wisconsin location on July 15, 2013. The investigator also contacted the previous end-client, [REDACTED] and confirmed that the beneficiary stopped working at that company's [REDACTED] Illinois location on July 8, 2013. The beneficiary, therefore, ceased working at the location identified in the petition less than one week after the petition was approved.

The director issued a notice of intent to revoke (NOIR) approval of the petition on February 24, 2014, which notified the petitioner that she was contemplating revoking approval of the petition

¹ The petitioner provided a North American Industry Classification System (NAICS) Code of 541511, "Custom Computer Programming Services" U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=541511&search=2012> (last visited March 18, 2015).

² The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for use with a job prospect within the "Computer Programmers" occupational classification, SOC (O*NET/OES) Code 15-1131, and a Level I (entry-level) prevailing wage rate, the lowest of the four assignable wage-levels.

pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A).

The director did not find the petitioner's response to the NOIR persuasive, and she revoked the approval of the petition on September 12, 2014. Counsel submitted a timely appeal.

The record of proceeding before us contains the following: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's NOIR; (3) the petitioner's response to the NOIR; (4) the director's revocation notice; and (5) the Form I-290B (Notice of Appeal) and supporting documentation. We reviewed the record in its entirety before issuing our decision.

II. STANDARD OF REVIEW

In the exercise of our administrative review in this matter, as in all matters that come within our purview, we follow the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010), unless the law specifically provides that a different standard applies. In pertinent part, that decision states the following:

Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.

* * *

The "preponderance of the evidence" of "truth" is made based on the factual circumstances of each individual case.

* * *

Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. *See INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

We conduct our review of service center decisions on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d at 145. In doing so, as noted above, we apply the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon our review of the present matter pursuant to that standard, however, we find that the evidence in the record of proceeding does not support counsel's contentions that the evidence of record requires that the petition at issue be approved. Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, we find that the director's determinations in this matter were correct. Upon our review of the entire record of proceeding, and with close attention and due regard to all of the evidence, separately and in the aggregate, submitted in support of this petition, we find that the evidence of record does not establish that the petitioner's claims are "more likely than not" or "probably" true. As the evidentiary analysis of this decision will reflect, the evidence of record does not contain relevant, probative, and credible evidence that leads us to believe that the petitioner's claims are "more likely than not" or "probably" true.

III. AUTHORITY TO REVOKE APPROVAL OF AN H-1B PETITION

In general, the authority to revoke approval of an H-1B petition is found at 8 C.F.R. § 214.2(h)(11), which states, in pertinent part, the following:

Revocation of approval of petition.

(i) *General.*

- (A) The petitioner shall immediately notify the Service of any changes in the terms and conditions of employment of a beneficiary which may affect eligibility under section 101(a)(15)(H) of the Act and paragraph (h) of this section. An amended petition on Form I-129 should be filed when the petitioner continues to employ the beneficiary. . . .
- (B) The director may revoke a petition at any time, even after expiration of the petition.

* * *

(iii) *Revocation on notice—*

- (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

- (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. . . .

We find' that the content of the NOIR comported with the regulatory notice requirements, as it provided a detailed statement that conveyed the ground for revocation encompassed by the regulation at 8 C.F.R. § 214.2(h)(11)(iii)(A), and that it also allotted the petitioner the required time for the submission of evidence in rebuttal that is specified in the regulation at 8 C.F.R. § 214.2(h)(11)(iii)(B).

IV. DISCUSSION

As noted, the petitioner stated in the petition that the beneficiary would provide her services to its end-client, State Farm, at State Farm's place of business in [redacted] Illinois from August 2, 2013 until August 1, 2016. The petitioner provided a work address for the beneficiary of [redacted] Illinois on the Form I-129, and the LCA was certified for employment at the same address. The investigator, however, was notified that the beneficiary had ceased working at that address on July 8, 2013, less than one week after the petition was approved.

In response to the NOIR, in a letter dated March 29, 2014, the business manager of the petitioner stated the following:

On July 7, 2013, [the beneficiary] left the end client location of "[redacted] Illinois [redacted]" and joined a new end client project with [redacted] on July 15, 2013, located at "[redacted] Wisconsin [redacted]". However, due to the miscommunication in [the beneficiary], me,

our Immigration Consultant and our Human Resource Department, a new LCA reflecting the new end client location was not filed until November 26, 2013.

The new LCA indicates that the period of intended employment is from November 26, 2013 until November 25, 2016. The record of proceeding does not contain a new or an amended petition.

In her NOIR response letter, counsel stated, "[d]espite . . . the employer's inadvertent error of untimely filing of a new LCA, the petitioner humbly request[s] the Service Center's discretion to grant its *Nuc [sic] Pro Tunc* request to reinstate the beneficiary's approved H-1B petition." On appeal, counsel reiterates the petitioner's error and concedes that "[t]here is no excuse for failing to comply with the LCA requirements."

Upon review, we find that the evidence of record does not overcome the director's September 12, 2014 decision revoking approval of the petition.

The regulation at 8 C.F.R. § 214.2(h)(2)(E) states:

Amended or new petition. 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.

It is self-evident that a change in the location of a beneficiary's work to a geographical area not covered by the LCA filed with the Form I-129 is a material change in the terms and conditions of employment. While the petitioner submitted a new LCA listing the Wisconsin work location and the respective dates of employment with its NOIR response, the petitioner was also required to submit an amended or new H-1B petition with USCIS indicating the change in locations and dates along with the newly certified LCA that establishes eligibility at the time that new or amended petition is filed.

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the U.S. Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining 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.

[emphasis added]. As 20 C.F.R. § 655.705(b) requires that USCIS ensure that an H-1B petition is filed with a "DOL-certified LCA attached" that actually supports and corresponds with the petition on the petition's filing, this regulation inherently necessitates the filing of an amended H-1B petition to permit USCIS to perform its regulatory duty to ensure that a certified LCA actually supports and corresponds with an H-1B petition as of the date of that petition's filing. In addition, as 8 C.F.R. § 103.2(b)(1) requires eligibility to be established at the time of filing, it is factually impossible for an LCA certified by DOL after the filing of an initial H-1B petition to establish eligibility at the time the initial petition was filed. Therefore, in order for a petitioner to comply with 8 C.F.R. § 103.2(b)(1) and USCIS to perform its regulatory duties under 20 C.F.R. § 655.705(b), a petitioner must file an amended or new petition, with fee, whenever a beneficiary's job location changes such that a new LCA is required to be filed with DOL.

In light of the above, we find that a necessary condition for approval of an H-1B visa petition is an LCA, certified *on or before* the filing date of the petition, with information, accurate as of the date of the petition's filing, as to where the beneficiary would actually be employed. Furthermore, the petition must list the locations where the beneficiary would be employed and be accompanied by an itinerary with the dates the beneficiary will provide services at each location. Both conditions were not satisfied in this proceeding. The petitioner's attempt to amend the petition by submitting a new work order in response to the NOIR and to remedy the LCA deficiency by submitting an LCA certified after the filing of the petition is ineffective. Again, a petitioner must establish eligibility at the time of filing a 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).

It is further noted that to ascertain the intent of a petitioner, USCIS must look to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. If a petitioner's intent changes with regard to a material term and condition of employment or the beneficiary's eligibility, an amended or new petition must be filed. To allow a petition to be amended in any other way would be contrary to the regulations. Taken to the extreme, a petitioner could then simply claim to offer what is essentially speculative employment when filing the petition only to "change its intent" after the fact, either before or after the H-1B petition has been adjudicated. The agency made clear long ago that speculative employment is not permitted in the H-1B program. For example, a 1998 proposed rule documented this position as follows:

Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. See section 214(i)

of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998). While a petitioner is certainly permitted to change its intent with regard to non-speculative employment, e.g., a change in duties or job location, it must nonetheless document such a material change in intent through an amended or new petition in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E).

In view of the foregoing, the petitioner has not overcome the director's basis for revoking the approval of the petition. Accordingly, we shall not disturb the director's revocation decision.

In a letter dated November 11, 2014, counsel requests *nunc pro tunc* relief and requests that the initial petition with a validity period from August 2, 2013 to August 1, 2016 be reinstated. It must be noted for the record that, even if eligibility for the benefit sought was otherwise established, as our authority is limited to that specifically granted or delegated to us by the Act, its implementing regulations, and the Secretary of the U.S. Department of Homeland Security pursuant to 8 C.F.R. § 2.1, we cannot grant counsel's *nunc pro tunc* request.

Specifically and as discussed above, the regulations mandate that a new or amended petition with fee be filed when any material changes in the terms and conditions of employment occur. See 8 C.F.R. § 214.2(h)(2)(E). Furthermore, a petitioner must establish eligibility for the benefit sought at the time the petition is filed. See 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). Accordingly, as the law does not provide a discretionary basis to do so, we have no authority to grant counsel's *nunc pro tunc* request in this matter.

As discussed above, when considered both separately and in the aggregate, the evidence submitted by the petitioner in response to the NOIR and on appeal does not overcome the director's decision revoking approval of the petition. The evidence of record therefore does not establish that the petitioner was employing the beneficiary in the capacity specified in the petition, and consequently we affirm the director's September 12, 2014 decision revoking its approval.

V. CONCLUSION AND ORDER

We agree with the director's finding that approval of this petition must be revoked pursuant to 8 C.F.R. § 214.2(h)(11)(ii)(A). Accordingly, the director's September 12, 2014 decision revoking approval of the petition will not be disturbed.³

³ As the identified grounds for revocation are dispositive of the petitioner's continuing eligibility, we will not address any of the additional issues we observe in the record of proceeding.

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NON-PRECEDENT DECISION

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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, and approval of the petition remains revoked.