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U.S. Citizenship
and Immigration
Services



DATE: **JAN 15 2015**

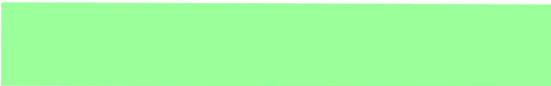
OFFICE: VERMONT SERVICE CENTER

FILE: 

IN RE:

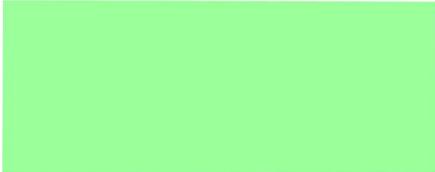
Petitioner:

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

The petition was filed at the Vermont Service Center on October 22, 2010, seeking to classify the beneficiary as an H-1B temporary 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) in order to employ him in what the petitioner designates as a computer systems analyst position.

The director approved the visa petition on June 2, 2011. However, on October 9, 2013 the service center director issued an NOIR in this matter. The petitioner's response was received on November 8, 2013. Subsequently, on January 6, 2014, the director revoked approval of the visa petition. The petitioner filed a timely appeal on January 30, 2014.

The director's revocation of approval of the petition was based on his finding that the evidence available indicates that the petitioner has not complied with the terms and conditions of H-1B employment. We have further determined that the director did not err in his decision to revoke approval of the petition. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and approval of the petition will remain revoked.

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 request for evidence (RFE) and the response to it; (3) the service center's NOIR and the response to it; (4) the director's revocation letter; and (5) the Form I-290B and counsel's submissions on appeal.

II. THE LAW

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
 - (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

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.¹ 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 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).² If an

¹ 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).

² 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.

employer does not submit the LCA to USCIS in support of a new or amended H-1B petition, the process is incomplete and the LCA is not certified to the Secretary of Homeland Security. See section 101(a)(15)(H)(i)(b) of the Act; 8 C.F.R. § 214.2(h)(4)(i)(B)(1); 20 C.F.R. § 655.700(b); see also 56 Fed. Reg. 37,175, 37,177 (1991); 57 Fed. Reg. 1316, 1318 (1992) (discussing filing sequence).

In the event of a material change to the terms and conditions of employment specified in the original petition, the petitioner must file an amended or new petition with USCIS with a corresponding LCA. Specifically, the pertinent regulation requires:

The petitioner shall file an amended or new petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition. An amended or new H-1C, H-1B, H-2A, or H-2B petition must be accompanied by a current or new Department of Labor determination. *In the case of an H-1B petition, this requirement includes a new labor condition application.*

8 C.F.R. § 214.2(h)(2)(i)(E) (emphasis added).

Furthermore, petitioners must "immediately notify the Service of any changes in the terms and conditions of employment of a beneficiary which may affect eligibility" for H-1B status and, if they will continue to employ the beneficiary, file an amended petition. 8 C.F.R. § 214.2(h)(11)(i)(A).

A change in the place of employment of a beneficiary to a geographical area requiring a corresponding LCA be certified to DHS with respect to that beneficiary may affect eligibility for H-1B status and is, therefore, a material change for purposes of 8 C.F.R. § 214.2(h)(2)(i)(E) and (11)(i)(A).³ When there is a material change in the terms and conditions of employment, the

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).

³ 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,

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

Further, while DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the 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.

[Italics added].

As 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary, this regulation inherently necessitates the filing of an amended H-1B petition to permit USCIS to perform its regulatory duty to ensure that the new LCA actually supports the H-1B petition filed on behalf of the beneficiary. In addition, 8 C.F.R. § 103.2(b)(1) requires eligibility to be established at the time of filing, and it is factually impossible for an LCA approved 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 for USCIS to perform its regulatory duties under 20 C.F.R. § 655.705(b), a petitioner must file an amended petition whenever a beneficiary's job location changes such that a new LCA is required to be filed with DOL, rather than only a new LCA, as counsel appears to propose.

III. EVIDENCE AND ANALYSIS

The visa petition was submitted without any indication that the petitioner was represented by counsel and without any indication that anyone had assisted the petitioner in preparing the visa petition and supporting documents.

see, e.g., Letter from Efren Hernandez III, Dir., Bus. and Trade Branch, USCIS to Lynn Shotwell, Am. Council on Int'l Pers., Inc. (Oct. 23, 2003), those statements are hereby superseded. We need not decide here whether, for purposes of 8 C.F.R. § 214.2(h)(2)(i)(E), there may be material changes in terms and conditions of employment that do not affect the alien's eligibility for H-1B status but nonetheless require the filing of an amended or new petition.

The visa petition states that the petitioner would employ the beneficiary at [REDACTED]. The LCA submitted is certified for employment at [REDACTED] Massachusetts. It is not certified for any other area. The visa petition was approved based on evidence provided with the visa petition and in response to an RFE issued February 18, 2011. The response to the RFE also contains no indication that the beneficiary was represented or that the response was prepared by an attorney or other representative.

Subsequent to the petition's approval, the director issued a NOIR, dated October 9, 2013, to the petitioner, stating that USCIS had obtained new information regarding the beneficiary's employment with the petitioner. The NOIR states, *inter alia*, that a site visit revealed that no one at [REDACTED] Massachusetts knew anything about the petitioner, and subsequent contact with the petitioner revealed that the beneficiary is working at a [REDACTED] South Dakota. The director indicated that USCIS intended to revoke approval of the visa petition based on the petitioner's failure to abide by the terms and conditions of H-1B employment, and offered the petitioner an opportunity to respond to the NOIR.

In response, the petitioner submitted (1) a "Memorandum in Response to Notice of Intent to Revoke I-129 Petition, and (2) a declaration, dated November 7, 2013. Although the response was not accompanied by a Form G-28, the memorandum was signed by [REDACTED] a New York attorney.

The November 7, 2013 declaration was executed by [REDACTED] who stated:

I am the owner of [the petitioner] which owns motels in South Dakota. I had hired the services of Mr. [REDACTED] TX [REDACTED] to file the H1B visa petition for [the beneficiary] from our company as the Computer Systems Analyst. The attorney completed and filed the H1B application. Being laypersons we totally depended on the expertise of the attorney.

Please note that I respectfully state that I did not have any motel in Massachusetts and [the beneficiary] was always employed [by the petitioner] in South Dakota. Therefore, I request you to consider the ineffective service of counsel and assist us in this matter.

In his memorandum, attorney [REDACTED] stated:

[T]he failure to submit an LCA which designated [REDACTED] South Dakota as the Beneficiary's true place of employment was the result of inadequate assistance by the Petitioner's former counsel who suggested that the Petitioner list a business address located in Massachusetts, despite the Petitioner having no connection to and no business transactions in that state. The attorney's intent was to have the Petitioner's I-129 Application on behalf of the Beneficiary be adjudicated at the Vermont Service Center"

A footnote states, "Please note that the Petitioner is currently in process of filing a complaint against former counsel with the grievance committee." Attorney [REDACTED] did not claim personal knowledge or otherwise state his basis for that assertion.

Counsel further stated:

For reasons that have never been fully clarified by Petitioner's former attorney and regarding which the Petitioner is unclear, Petitioner's former counsel misinformed the Petitioner in regards to the appropriate filing requirements for an I-129 Petition. As a result, the Petitioner, reasonably relying on the advice of counsel, erroneously indicated that their business location was in Massachusetts, as opposed to the true location in [REDACTED] South Dakota.

The director revoked approval of the visa petition.

The appeal in this matter was accompanied by a duly executed Form G-28 indicating that [REDACTED] now represents the petitioner. On appeal, counsel again admitted that the beneficiary is not employed in Massachusetts, but, rather, in South Dakota. He stated that the decision of revocation did not address the evidence and argument submitted on appeal. Counsel asserted that, although the location where the beneficiary would work was misrepresented on the visa petition and on the LCA, the visa petition should be approved as the misrepresentation was the result of inadequate representation by previous counsel.

IV. ANALYSIS

All of the arguments in support of approving the instant visa petition are based on ineffective assistance of counsel. Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

In the instant case, counsel's statement suggests that the petitioner's owner was aware that the petitioner's location was being misrepresented on the visa petition. That is, counsel stated: ". . . the Petitioner, reasonably relying on the advice of [REDACTED] erroneously indicated that their business location was in Massachusetts, as opposed to the true location in [REDACTED] South Dakota."

That statement does not indicate that counsel placed an incorrect address on the visa petition without the petitioner's owner's knowledge. Rather, it indicates that, based on counsel's advice, the petitioner's owner misrepresented, or agreed to misrepresent, the location where the beneficiary would work. We cannot characterize that action as "*reasonably* relying on the advice of [REDACTED]." [Emphasis provided.]

In any event, there is no evidence in the record, other than the assertion of the petitioner's owner, that [REDACTED] ever represented the petitioner or participated in this visa petition in any way. Further, the record does not establish that [REDACTED] was informed of the petitioner's allegations and accorded an opportunity to respond. In fact, the petitioner has not even demonstrated that person named [REDACTED] who is an attorney, or who is holding himself out to be an attorney, exists. The assertion that the misrepresentation of the location where the beneficiary would work was occasioned by the ineffective assistance of [REDACTED] will not be considered, as the petitioner's claim does not satisfy the requirements of *Matter of Lozada*, *supra*.

Upon review of the record, 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, namely, that the approval of the petition violated the regulatory requirements regarding the proffered position at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The petitioner violated the terms of the approved visa petition by employing the beneficiary in a location for which the LCA was invalid. The petitioner was, therefore, in violation of the terms and conditions of the approved H-1B visa petition and the approval of the visa petition was correctly revoked on that basis. At all times since the site visit, the petitioner's owner and counsel have confirmed that the beneficiary is not now working and, in fact, has never previously worked in accordance with the terms of the approved visa petition.

V. CONCLUSION

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 petition remains revoked.