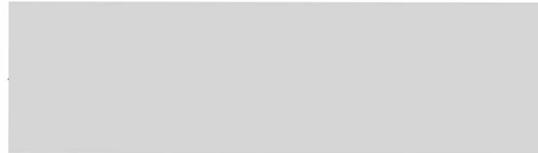


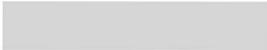


U.S. Citizenship
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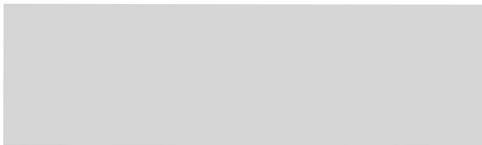
DATE: **MAY 13 2015**

PETITION RECEIPT #: 

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:



Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you.

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, initially approved the nonimmigrant visa petition. Upon subsequent review of the record, the Director issued a notice of intent to revoke (NOIR) the approval of the petition, and ultimately revoked the petition's approval. The matter is now before the Administrative Appeals Office (AAO) on appeal. We find that the petitioner has not overcome the specified grounds for revocation. Accordingly, the appeal will be dismissed and the approval of the petition remains revoked.

I. PROCEDURAL AND FACTUAL BACKGROUND

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a software consulting services company, with two employees, that was established in [REDACTED]. In order to employ the beneficiary in what it designates as a programmer analyst position, the petitioner sought 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).

In the Form I-129 petition, the petitioner stated that it seeks the beneficiary's services as a programmer analyst on a full-time basis.¹ On the Form I-129 petition, the petitioner identified an address in [REDACTED] Ohio ([REDACTED], OH Metropolitan Statistical Area) as the beneficiary's exclusive place of employment.

On the Labor Condition Application (LCA), the petitioner listed the [REDACTED], Ohio address, as well as two additional work locations – specifically in [REDACTED] Texas and [REDACTED] Ohio as the beneficiary's places of intended employment.² The petitioner did not provide evidence that the beneficiary would work at these two additional worksites, and did not submit an itinerary. See 8 C.F.R. § 214.2(h)(2)(i)(B) (requiring an itinerary for services performed in more than one location).

¹ It must be noted for the record that the petitioner has provided inconsistent information regarding the beneficiary's rate of pay. In the Form I-129 and employment agreement, the petitioner indicated that the beneficiary would be paid \$65,000 per year. On the Labor Condition Application (LCA) (Case Number [REDACTED]), the petitioner stated that the beneficiary would be compensated at the rate of \$62,504 per year. In response to the NOIR, the petitioner submitted a new LCA (Case Number [REDACTED]), which indicated the beneficiary's annual salary as \$60,000. No explanation for the variances was provided by the petitioner.

² With certain limited exceptions, the applicable U.S. Department of Labor (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 the letter of support, the petitioner confirmed that the beneficiary would work exclusively at the address in [REDACTED], Ohio for the duration of the requested validity period. The petitioner further indicated that this was the office location of [REDACTED] ("[REDACTED]"), the end-client.

The petition was approved from December 2, 2013 through December 31, 2014. The approval notice stated that after the beneficiary was admitted to the United States, he would be authorized to work for the petitioner "but only as detailed in the petition and for the period authorized." Subsequent to the approval of the petition, U.S. Citizenship and Immigration Services (USCIS) became aware of a change in the beneficiary's employment with the petitioner. The Director issued a NOIR, which provided a detailed statement of the revocation grounds, and afforded the petitioner an opportunity to provide a rebuttal. *See* 8 C.F.R. § 214.2(h)(11)(iii)(B). Specifically, the Director noted that the beneficiary appeared to be working for a new end-client, "Nabors," at a new worksite identified as [REDACTED] Texas.

The petitioner responded to the NOIR and stated that the beneficiary was no longer working on the [REDACTED] project and no longer working at the location specified in the original petition. The petitioner confirmed that the beneficiary had been working for a new end-client, through a new vendor, at a new worksite in [REDACTED], Texas.³

The petitioner supplied an LCA, certified on June 12, 2014, that listed a new worksite – in [REDACTED], Texas ([REDACTED] TX Metropolitan Statistical Area) – as the beneficiary's place of employment. The worksite is located in a metropolitan statistical area differing from the worksite listed on the original petition.⁴

The Director concluded 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. Pursuant to 8 C.F.R. § 214.2(h)(2)(i)(E), the petitioner was required to file an amended Form I-129 reflecting this change, and to which the newly submitted LCA corresponded. The Director revoked the approval of the petition. Thereafter, the petitioner submitted an appeal.

II. 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 . . .

³ The petitioner submitted a Work Order indicating the beneficiary served as an "Oracle PC/SQL Developer."

⁴ Notably, the LCA indicates (on page 1) that it is for a "Change in employer." No explanation was provided by the petitioner. Moreover, the LCA is not signed by the petitioner. Thus, we observe that the petitioner did not comply with the regulatory requirements for H-1B visa classification as set forth at 8 C.F.R. § 103.2(a)(2), 8 C.F.R. § 214.2(h)(4)(iii)(B)(2), 20 C.F.R. § 655.705, and 20 C.F.R. § 655.730(c).

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).⁵

In turn, section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A), 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.⁶ 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).⁷ If an employer does not submit the LCA to USCIS in support of a new

⁵ 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 U.S. Department of Justice official to the U.S. Department of Homeland Security (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.

⁶ 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).

⁷ 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

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).⁸ When there is a material change in the terms and conditions of employment, the

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).

⁸ 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

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

III. ANALYSIS

As previously noted, the petitioner claimed in the Form I-129 that the beneficiary's place of employment was located in [REDACTED] Ohio ([REDACTED] OH Metropolitan Statistical Area), and the petition was approved for employment in that location through December of 2014. In July 2014, however, the petitioner moved the beneficiary to a new place of employment in [REDACTED], Texas ([REDACTED] TX Metropolitan Statistical Area), a location not designated on the petition and the original LCA.⁹

In response to the NOIR, the petitioner did not dispute that the beneficiary's place of employment had changed since the petition's approval. Rather, the petitioner submitted documentary evidence confirming this change of location, as well as a change in the vendor, end-client, and project.¹⁰

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).¹¹ When there is a material change in the terms and conditions of employment, the

amended or new petition.

⁹ The record indicates that the new place of employment was not a short-term placement. *See generally* 20 C.F.R. §§ 655.715, 655.735. Although the petitioner claimed in response to the NOIR that the beneficiary's placement was initially a "temporary" assignment, the documentation provided does not indicate that the new place of employment falls under a "non-worksites" location as described at 20 C.F.R. § 655.715 or a short-term placement or assignment as described at 20 C.F.R. § 655.735.

¹⁰ Moreover, the petitioner provided an LCA indicating that there had also been a change in employer.

¹¹ 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 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

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

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 correspond to an H-1B petition, it must specify the beneficiary's place(s) of employment.¹²

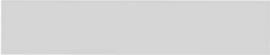
Here, the Form I-129 and the originally submitted LCA identified the [REDACTED] Ohio facility as the place of employment. The LCA did not cover the [REDACTED] Texas address provided in response to the NOIR, and the record demonstrates that the petitioner began employing the beneficiary at this new address prior to the filing of an amended or new petition. Such a change in the terms and conditions of the beneficiary's employment may, and in this case did, 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.¹³ 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, or by attempting to submit an 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.

amended or new petition.

¹² 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).

¹³ Here, the petitioner submitted an LCA certified for the beneficiary's place of employment in [REDACTED] Texas in response to the NOIR. The 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 that place of employment. *See* 8 C.F.R. § 214.2(h)(2)(i)(E).



IV. CONCLUSION AND ORDER

The appeal will be dismissed for the above stated reasons. 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 Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012). Here, that burden has not been met. We will affirm the decision of the Director.¹⁴

ORDER: The appeal is dismissed.

¹⁴ As the discussed ground for revocation is dispositive of the petitioner's continued eligibility, we need not address any additional issues in the record of proceeding.