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**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF N-T- CORP.

DATE: NOV. 16, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, a firm engaged in Internet infrastructure applications development, seeks to temporarily employ the Beneficiary as a “computer systems analyst” under the H-1B nonimmigrant classification. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The Director, Vermont Service Center, approved the petition but revoked the approval following additional review. The matter is now before us on appeal. The appeal will be dismissed.¹

I. ISSUE

The issue before us is whether the Director was correct in revoking the approval of the H-1B petition on the basis that the Beneficiary had been working at a location that had not been specified within the certified Labor Certification Application (LCA) submitted in support of the petition.²

II. FACTUAL BACKGROUND

The LCA submitted with the Form I-129 was valid from August 12, 2013 to August 11, 2016, for employment at the two locations identified in the Form I-129, Petition for a Nonimmigrant Worker. One employment location is the Petitioner’s business address in ██████████ Massachusetts, and the other is an address in ██████████ Georgia. On December 30, 2014, the Director approved the petition for the Beneficiary’s H-1B employment at those two locations.

¹ We reviewed the record in its entirety before issuing our decision. We conduct appellate review on a *de novo* basis. *Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542 (AAO 2015); *see also* 5 U.S.C. § 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”); *Dor v. INS*, 891 F.2d 997, 1002 n.9 (2d Cir. 1989).

² The record reflects that the Petitioner is not contesting the Director’s compliance with the NOIR and decision requirements in the regulation at 8 C.F.R. § 214.2(h)(11)(iii)(B), which states:

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.

However, a U.S. Citizenship and Immigration Services (USCIS) administrative site visit on May 22, 2014 was unable to verify that the Beneficiary was being employed in accordance with the terms and conditions of the approved petition. Consequently, the Director issued an NOIR which initiated the revocation-upon-notice procedures. The Petitioner's response to the NOIR acknowledged that it was employing the Beneficiary at a New Jersey location, rather than at a location specified in the LCA. The Petitioner asserted that the misidentification of the Beneficiary's work location was an "unintentional error" that was "based on a miscommunication between the recruiter and [the Petitioner's] former immigration counsel." The Petitioner requested that the Director withdraw the NOIR as inappropriate based upon the particular facts of this petition, based upon its assertions that the LCA's omission of the actual employment location was unintentional, that it had obtained an LCA certified for the correct location immediately after the USCIS site visit brought the erroneous location to light, that it had been paying the Beneficiary more than the pertinent prevailing-wage at either of the locations specified in the LCA submitted with the petition, and that it had been complying with the "the terms and conditions of [the Beneficiary's] job offer, including but not limited to job title, responsibilities, and salary." The Director declined to grant the Petitioner's request and, instead, issued the decision revoking the petition's approval.

II. LEGAL FRAMEWORK

A. Revocation

The regulation at 8 C.F.R. § 214.2(h)(11)(iii)(A), *Grounds for revocation*, instructs service center directors to "send to the petitioner a notice of intent to revoke the petition in relevant part [(NOIR)] if he or she finds" one or more of the following grounds:

- (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. 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).³

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.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 place(s) of intended employment, the prevailing wage for the occupational classification in each employment area in which the places of intended employment lie, and the actual rate of pay.

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

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 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.

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

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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 that 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); *Matter of Simeio Solutions*, 26 I&N Dec. 542 (AAO 2015).

III. ANALYSIS

For the reasons discussed below, we have concluded that the Director's decision to revoke approval of the petition was correct. Accordingly, we will dismiss the appeal.

As previously noted, the Petitioner acknowledges that the LCA which it submitted to support the petition had not been certified for the location, in New Jersey, where the Petitioner had assigned the Beneficiary to perform the duties of the proffered position. The locations specified in the LCA (one in ██████████ Massachusetts and the other in ██████████ Georgia) are in different metropolitan

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).

statistical areas than the New Jersey location where the Beneficiary has been working.⁶

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).⁷

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.⁸

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. 8 C.F.R. § 214.2(h)(2)(i)(E), (h)(11)(i)(A). By not filing an amended petition with a new LCA, or by attempting to submit a preexisting 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.

On appeal, the Petitioner again acknowledged that it did not have the appropriate work location indicated on the LCA, but emphasized that it acted in good faith to immediately rectify this situation, including retaining new counsel and developing new hiring protocols to ensure that this error does not occur again. However, the revocation-upon-notice regulations do not recognize unintentional error as grounds for excusing noncompliance with the H-1B regulations’ requirement

⁶ Also, the record reflects that the New Jersey location where the Beneficiary had been working was not a non-worksites or short-term placement, as defined at 20 C.F.R. §§ 655.715, 655.735, which would not require a new LCA.

⁷ Again, the record here indicates that the Beneficiary’s place of employment, in New Jersey, was not a short-term placement that would not require a new LCA certified for that location. *See generally* 20 C.F.R. §§ 655.715, 655.735. The evidence of record does not demonstrate that the Beneficiary’s actual work location fell under “non-worksites” locations as described at 20 C.F.R. § 655.715 or was a short-term placement or assignment as described at 20 C.F.R. § 655.735.

⁸ A change in a 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).

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for submission of a complete and accurate LCA certified prior to the petition's filing.⁹ Further, the Petitioner does not cite any statute, regulation, case holding, precedent decision, or any other legal authority for its contention that the Director should not have revoked the petition's approval on the basis cited in her decision.

Moreover, we also note that the new LCA does not correspond to the position for which the petition was filed. In this regard, we note that the LCA submitted to support the petition was certified for use with a position meriting a Level III prevailing-wage rate, while the new LCA was certified for use with a position meriting only a Level II prevailing-wage rate.¹⁰ Accordingly, by virtue of the difference in the prevailing-wage levels, by submitting the newly certified LCA as corresponding to the proffered position the Petitioner is in effect attesting that the duties of the proffered position are less responsible, less demanding, and meriting lower-level pay than claimed in the petition by virtue of the Petitioner's submission of an LCA that had been certified only for use with a Level III prevailing-wage position. Accordingly, the new LCA does not correspond to the position for which the petition was filed.

IV. CONCLUSION AND ORDER

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. We will affirm the decision of the Director. The Form I-129 petition's approval is revoked pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A).

ORDER: The appeal is dismissed.

Cite as *Matter of N-T- Corp.*, ID# 14417 (AAO Nov. 16, 2015)

⁹ Although not relevant to our decision, it is worth noting that the Petitioner has not provided independent documentary evidence to support its assertion of unintentional error. Accordingly, even if unintentional error were a basis for not strictly applying the revocation-on-notice regulations – which is not the case – the Petitioner has not established a sufficient factual basis for such a claim. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

¹⁰ Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) position after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties. See U.S. Dep't of Labor, Emp't & Training Admin., http://www.flcdatcenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf. DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.