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

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

MATTER OF PCLI-C- CO.

DATE: OCT. 8, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a construction business, seeks to employ the Beneficiary as a civil field engineer and classify him as a nonimmigrant worker in a specialty occupation. *See* 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, 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.

I. FACTUAL AND PROCEDURAL HISTORY

In the Form I-129 petition, the Petitioner stated that it seeks the Beneficiary's services as a civil field engineer on a full-time basis. The Petitioner stated that the Beneficiary would be employed at the Petitioner's location in [REDACTED] Georgia and submitted a Labor Condition Application (LCA) certified for employment at the same address, which is located in the [REDACTED]. The Petitioner did not request any other 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).

After the petition was approved, an administrative site visit was conducted.¹ The site inspector made contact with the Petitioner's District HR Recruiter, who confirmed the Beneficiary's continued employment with the Petitioner. However, the Beneficiary was not working at the location specified on the LCA, but was instead living and working in [REDACTED] Texas.

The Director reviewed the site visit report and the record of proceeding and issued a notice of intent to revoke (NOIR). The NOIR 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). In response, the Petitioner stated that the Beneficiary works at the [REDACTED] office performing pre-planning

¹ USCIS must be able to verify the information provided in the petition to further determine eligibility for an immigration benefit and/or compliance with applicable laws and authorities. To that end, agency verification methods may include but are not limited to review of public records and information; contact via written correspondence, the Internet, facsimile or other electronic transmission, or telephone; unannounced physical site inspections; and interviews. *See* 8 C.F.R. §§ 103, 204, 205, and 214, 8 U.S.C. §§ 1103, 1155, 1184.

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duties and coordinating upcoming projects, but that at the time of the site visit was reporting to a worksite located in [redacted] Texas on a temporary basis to "coordinate field details, inspect the site with field subcontractors/consultants, and assist site inspectors with the reporting function, file system set-up and maintenance." The Petitioner also submitted, *inter alia*, an itinerary showing the projects that the beneficiary would be working on, along with the project locations and dates:

<u>Project Name</u>	<u>Address</u>	<u>Project Dates</u>
[redacted]	[redacted]	March 9, 2010–April 4, 2012
[redacted]	[redacted]	Jan 16, 2012–April 1, 2012
[redacted]	[redacted]	May 1, 2012–Sept 30, 2013
[redacted]	[redacted]	Nov 12, 2012–ongoing
[redacted]	[redacted]	May 14, 2013–March 5, 2014

We note that the worksites listed are located in metropolitan statistical areas differing from the worksite listed on the original petition and on the certified LCA.

In response to the Director's NOIR, the Petitioner further explained that:

[The Beneficiary] rents temporary housing when he is in Georgia, where the headquarters are, and he also rents temporary housing while he is temporarily assigned to jobs in other cities. He always returns to the [redacted] office location in between project assignments. He can be at the [redacted] office for several months coordinating jobs in the pre-construction stage and from there can be assigned to another project site thereafter.

The Director found that the Petitioner did not establish that the job site locations listed in the itinerary could be considered "non-worksite" locations or "short-term placements" as described at 20 C.F.R. §§ 655.715, 655.735. As such, the petitioner was required to submit an LCA certified by the U.S. Department of Labor for each work location listed in the itinerary prior to the Beneficiary beginning work at those locations. Because the Petitioner had not submitted a certified LCA corresponding to the listed job locations, the Director revoked the approval of the petition. Thereafter, the Petitioner submitted this 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 . . . 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).²

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.³ 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 U.S. Citizenship and Immigration Services (USCIS). 8 C.F.R. § 214.2(h)(4)(i)(B)(1); 20 C.F.R. § 655.700(b)(2).⁴ If an employer does not

² 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.

³ 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).

⁴ 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

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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). 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

As previously noted, the Petitioner has stated that in addition to the [REDACTED], Georgia location noted on the certified LCA, the beneficiary will be employed at worksites located in [REDACTED] Texas; [REDACTED] Texas; [REDACTED] Kentucky; and [REDACTED] Oklahoma. These locations are in different metropolitan statistical areas than the location specified in the certified LCA. We agree with the Director that the Petitioner has not established that these locations represent non-worksite locations or short-term placement, as defined at 20 C.F.R. §§ 655.715, 655.735.

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*

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).

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).⁵

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.⁶

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.

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)(1), (A)(3), and (A)(4).⁷

ORDER: The appeal is dismissed.

Cite as *Matter of PCLI-C- Co.*, ID# 13663 (AAO Oct. 8, 2015)

⁵ The record here indicates that the new places of employment were not short-term placements. *See generally* 20 C.F.R. §§ 655.715, 655.735. We do not find that the new work locations fell under "non-worksites" locations as described at 20 C.F.R. § 655.715 or short-term placements or assignments as described at 20 C.F.R. § 655.735.

⁶ 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).

⁷ As the discussed ground for revocation is dispositive of the petitioner's continued eligibility, we need not address any of the additional issues we observe in the record of proceeding.