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

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

MATTER OF AX-S- LLC

DATE: MAY 4, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a computer consulting business, seeks to temporarily employ the Beneficiary as a “senior technical lead [REDACTED]” under the H-1B nonimmigrant classification for specialty occupations. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The H-1B program allows a U.S. employer to temporarily employ a qualified foreign worker in a position that requires both (a) the theoretical and practical application of a body of highly specialized knowledge and (b) the attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum prerequisite for entry into the position.

The Director, California Service Center, denied the petition. The Director concluded that there was insufficient evidence to establish that (1) the proffered position qualifies as a specialty occupation; and (2) the Petitioner has submitted a valid labor condition application (LCA).

The matter is now before us on appeal. In its appeal, the Petitioner asserts that the Director’s conclusions are erroneous and without legal basis.

Upon *de novo* review, we will dismiss the appeal.

I. SPECIALTY OCCUPATION

We will first address whether the proffered position qualifies as a specialty occupation.

A. Legal Framework

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term “specialty occupation” as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

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The regulation at 8 C.F.R. § 214.2(h)(4)(ii) largely restates this statutory definition, but adds a non-exhaustive list of fields of endeavor. In addition, the regulations provide that the proffered position must meet one of the following criteria to qualify as a specialty occupation:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

8 C.F.R. § 214.2(h)(4)(iii)(A). U.S. Citizenship and Immigration Services (USCIS) has consistently interpreted the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proposed position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing “a degree requirement in a specific specialty” as “one that relates directly to the duties and responsibilities of a particular position”); *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000).

As recognized by the court in *Defensor*, 201 F.3d at 387-88, where the work is to be performed for entities other than the petitioner, evidence of the client companies’ job requirements is critical. *See Defensor v. Meissner*, 201 F.3d at 387-88. The court held that the former Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary’s services. *Id.* Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work

B. Proffered Position

On the Form I-129, the Petitioner stated that the Beneficiary would work at its office in [REDACTED], [REDACTED]. The Petitioner did not request any other work sites.

In the letter of support, the Petitioner stated that the Beneficiary would perform the following job duties in the proffered position:

The individual will contribute his specialized IT skills with overall development of [REDACTED] solutions, utilizing existing programming experience in high

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level languages (C++, C#, Java) and relational databases. The individual will design and develop custom reports using the [REDACTED], and/or [REDACTED], as well as developing and deploying codebase using requisite formal enterprise development technologies, such as [REDACTED] or related source control technologies. The Senior Technical Lead-[REDACTED] will outline technical design specifications, working in conjunction with functional teams and their outputs (i.e. functional designs.) The individual will also provide his services in one or more modules, such as: Project Accounting, Financials (AR/AP/GL/Bank) specifically in [REDACTED] constructing and deploying [REDACTED] cubes within the [REDACTED] framework. The Senior Technical Lead [REDACTED] will also lead and manage multiple-member team(s), as required to perform the following:

- Resource and deliveries management.
- Management of customer applications upgrade from [REDACTED] to [REDACTED].
- Ensuring quality deliveries in timeline and budget.
- Deliveries review.
- Requirement and issues tracking.
- Status reporting.
- Ensuring team adherence to [REDACTED] and its customer(s)' processes.

In addition, the Petitioner stated that the position requires "at least a Master's Degree or Bachelor's Degree plus at least five (5) years of experience, in Computer Science, Engineering, or a related IT field, or the equivalent due to the complexity of the job functions."

The LCA submitted to support the visa petition states that the proffered position corresponds to Standard Occupational Classification (SOC) code and occupation title 15-1121, "Computer Systems Analysts," at a Level II wage rate. The LCA lists the Beneficiary's sole place of employment as the Petitioner's [REDACTED] office.

In response to the Director's request for evidence (RFE), the Petitioner stated that the Beneficiary "will be part of the [Petitioner's] team assigned to various client projects" and "will be required to spend a specific number of hours at the client site." The Petitioner further stated that while the Beneficiary is "on assignment at the client site, [the Petitioner] will also provide lodging, transportation and other accommodations to facilitate the Beneficiary's ability to perform his duties." Also in response to the RFE, the Petitioner stated that the Beneficiary's "physical work-location is . . . [REDACTED] WA," at the home office of the Petitioner's owner.

C. Analysis

On appeal, the Petitioner asserts that the Director erred in concluding that the proffered position did not qualify as a specialty occupation. Upon review of the record in its totality and for the reasons set out below, we determine that the Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation. Specifically, we find that the record (1) does not establish the substantive

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nature of the proffered position and its constituent duties; and (2) does not demonstrate that the indicated duties require an educational background, or its equivalent, commensurate with a specialty occupation.

USCIS in this matter must review the actual duties the Beneficiary will be expected to perform to ascertain whether those duties require at least a baccalaureate degree in a specific specialty, or its equivalent. To accomplish that task, USCIS must analyze the actual duties in conjunction with the specific project(s) to which the Beneficiary will be assigned. To allow otherwise, results in generic descriptions of duties that, while they may appear (in some instances) to comprise the duties of a specialty occupation, are not related to any actual services the Beneficiary is expected to provide.

In that regard, we have reviewed the information in the record regarding the Petitioner's computer consulting business and the claimed project(s) upon which the Beneficiary would work. Upon review of this information, we find that the record of proceedings lacks sufficient documentation regarding the actual work that the Beneficiary will perform to sufficiently substantiate the claim that the Petitioner has H-1B caliber work for the Beneficiary for the period of employment requested in the petition.

For instance, the Petitioner has made vague and inconsistent claims regarding the identity and number of end-client(s) to be serviced by the Beneficiary. The Petitioner stated in its RFE response that the Beneficiary would be "assigned to various client projects as detailed in the 'Client List,'" and submitted a "Client List" with six different clients. However, the Petitioner later indicated in the RFE response, and again on appeal, that the Beneficiary would be assigned to only one client, a pharmacy, for the entire duration of the three-year validity period requested in the petition. Likewise, the Petitioner has made inconsistent statements regarding where the Beneficiary's work would occur, alternatively stating that the Beneficiary would work solely from the Petitioner's [redacted] office, the Petitioner's home office in Washington, and at one or more unidentified client sites.¹ The Petitioner has not resolved these inconsistencies.

Assuming that the Beneficiary would only be assigned to one client, the pharmacy, as alternatively asserted, the Petitioner has not submitted a detailed work order, statement of work, or similar

¹ On appeal the Petitioner asserts that it has "NEVER" made any statement that the Beneficiary would be working in [redacted], Washington, at the home office of the Petitioner's President. However, the Petitioner's assertions are not consistent with the evidence of record. In its RFE response, the Petitioner submitted photographs of the home office in Washington, and specifically stated that these are "Photographs of Beneficiary's Work Location . . . [at the Petitioner's] OWNER'S HOME OFFICE." The Petitioner resubmitted these and additional photographs of its home office in a separate document entitled "Work-location" which states the following (verbatim):

As per above, physical work-location is . . . [redacted], WA [redacted]. The office is an addition to the private residence of [the Petitioner's owner]. The office has two distinct work areas, where both [the owner] and [the Beneficiary] can work comfortably and each area can be shared if needed, which would allow occupancy of up to four. There is an additional conference table available in the separate room which accommodates 6 people and can be expanded to 10 people

documentation confirming that the Petitioner and the client have a contractual agreement for the Beneficiary's services, and if so, the terms of his assignment.

In the instant case, the Petitioner submitted a Master Subcontractor Service Agreement (MSA) between itself ("Contractor") and a mid-vendor, and the accompanying Statement of Work (SOW) for the Petitioner to provide services to the mid-vendor's client. The SOW, however, lists the only "Key Personnel" as the Petitioner's President. The Beneficiary is not listed in the SOW. Notably, the MSA defines the term "Key Personnel" as "any employee of or contractor engaged by the Contractor assigned to the performance of Services under this Agreement or any Statement of Work," and the term "Statement of Work" as "any document agreed and signed by the parties pursuant to this Agreement and incorporated herein, specifying the details and specifications of Services to be performed . . . including details on an 'as required basis' of Key Personnel." The Petitioner has not identified any provisions in the MSA or SOW that would allow the Petitioner to assign unidentified personnel to the client, nor has the Petitioner provided any documentation from the client signaling its agreement to the Beneficiary's services although he is not listed in the SOW.

Moreover, the MSA and SOW were executed on May 6, 2015, after the Director's RFE. Thus, they do not establish that the Petitioner had secured this work assignment as of the time of filing the petition. The Petitioner must establish eligibility at the time of filing the 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 the Beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978).

On appeal, the Petitioner claims that the date of the SOW is "not relevant," because "[t]he petitioner had reason to anticipate that an agreement would be reached at the time of filing." The Petitioner also asserts on appeal that it is unable to list the Beneficiary on the SOW because he "was not employed at present" and "had no current permission to work in the United States." However, the date of the SOW is relevant to establishing that the Petitioner had sufficient *bona fide*, non-speculative work for the Beneficiary at the time of filing.² Furthermore, the Petitioner did not submit objective evidence to corroborate its statement that it had "reason to anticipate that an agreement would be reached at the time of filing."

² 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. . . . Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

Petitioning Requirements for the H Nonimmigrant Classification, 63 Fed. Reg. 30,419, 30,419-20 (proposed June 4, 1998) (to be codified at 8 C.F.R. pt. 214).

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Notwithstanding these deficiencies, the MSA and SOW also do not contain a detailed explanation of the work to be performed for the client.³ The SOW describes the services to be provided in broad terms such as “[i]mplementation of [redacted] projects to [mid-vendor’s] customers,” and “[p]roviding business and application consulting services, as well as training services to customers.” The SOW also states the following job duties: “Assisting the project manager to ensure successful project delivery, and also providing pre-sales assistance.” These job duties are described in broad terms that do not sufficiently illuminate the substantive nature and complexity of the tasks to be performed by the Petitioner’s personnel.

Notably, the job duties stated in the SOW are not consistent with the Petitioner’s descriptions of the proffered position. For example, the Petitioner did not list any sales or “pre-sales” related duties for the Beneficiary. Furthermore, the Petitioner indicated that the Beneficiary would report to the Petitioner’s President, who would serve as his supervisor and “Project Manager.” However, the SOW states that the Petitioner’s President would be “[a]ssisting the project manager.” The Petitioner has not reconciled these apparent inconsistencies nor identified the “project manager” referenced in the SOW. Absent reliable and detailed work orders, statements of work, or similar documentation describing the specific duties the Beneficiary would perform, as those duties relate to specific clients and projects, USCIS is unable to discern the nature of the position and whether the position indeed requires the theoretical and practical application of a body of highly specialized knowledge attained through a baccalaureate program.

There are other discrepancies and deficiencies with the Petitioner’s job descriptions that further preclude us from discerning the nature of the proffered position. For example, despite the Petitioner’s statements that the Beneficiary will work “in conjunction with functional teams” and “will also lead and manage multiple-member team(s),” the Petitioner claims to have only one employee, the Petitioner’s President, who will purportedly lead and manage the Beneficiary. In addition, despite the Beneficiary’s purported duties to “lead and manage” others in his position as a “senior technical lead,” the Petitioner designated the position at a Level II wage rate, which indicates that the Beneficiary is only expected to “perform moderately complex tasks that require limited judgment.”⁴ Thus, without meaningful job descriptions within the context of non-speculative

³ As recognized by the court in *Defensor v. Meissner*, 201 F.3d 384, 387-88 (5th Cir. 2000), where the work is to be performed for entities other than the Petitioner, evidence of the client companies’ job requirements is critical. The court held that the former Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary’s services. *Id.* Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work. Here, the MSA and SOW do not identify the end-client’s job requirements to perform the contracted work.

⁴ The “Prevailing Wage Determination Policy Guidance” issued by the U.S. Department of Labor (DOL) provides a description of the wage levels. A Level II wage rate is for a petitioner who expects its employee to perform moderately complex tasks that require limited judgment. For additional information, see U.S. Dep’t of Labor, Emp’t & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

employment, the evidence of record is insufficient to establish the substantive nature of the work to be performed by the Beneficiary.

We are therefore precluded from finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for entry into the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

Accordingly, as the Petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position qualifies for classification as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

II. LCA

We will now discuss the Director's decision that the Petitioner does not comply with the LCA requirement.

A. Legal Framework

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).⁵

DOL guidance further indicates that a position requiring "lead" or supervisory duties would appear to indicate at least a Level III wage level ("experienced") or a Level IV position ("fully competent"). *See id.*

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 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.

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 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 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 that a petitioner file an amended or new petition, with fee, to reflect any material changes in the terms and conditions of employment as specified in the original petition. 8 C.F.R. § 214.2(h)(2)(i)(E). For an H-1B petition, this requirement includes a new labor condition application. *Id.* Furthermore, a petitioner 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 it will continue to employ the beneficiary, file an amended petition. 8 C.F.R. § 214.2(h)(11)(i)(A).

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 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).

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

B. Analysis

In this matter, the Petitioner claimed in both the Form I-129 and the certified LCA that the Beneficiary's sole place of employment would be located in [REDACTED] Metropolitan Statistical Area).⁸ The Petitioner did not request other worksites on the LCA.

Thereafter, in response to the RFE, the Petitioner indicated that the Beneficiary would work out of its owner's home office located in [REDACTED], Washington ([REDACTED], WA Metropolitan Division). The worksite is located in a metropolitan area differing from the worksite listed on the original petition. This new work location constitutes a material change, and required the Petitioner to file a new or amended petition to properly notify USCIS of the new worksite and change in the terms and conditions of employment.

The Petitioner also indicated that the Beneficiary would work on "various client projects" and would "be required to spend a specific number of hours at the client site." On appeal, the Petitioner asserts that it was not required to submit a new LCA for these client sites because "these potential travel destinations would be 'casual and on a short-term basis.'" However, the Petitioner has not submitted additional information, corroborated by objective evidence, to support its assertions. As such, the Petitioner has not established that the client site(s) would be a short-term placement or a "non-worksite" such that a new LCA would not be required. *See generally* 20 C.F.R. §§ 655.715, 655.735.

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

⁸ With certain limited exceptions, the applicable 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).

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.⁹

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). The Petitioner has not done so here, and thus, has not complied with the LCA requirement.¹⁰ For this additional reason, the appeal will be dismissed and the petition denied.

III. EMPLOYER-EMPLOYEE AND PAYMENT OF REQUIRED WAGE

Since the identified grounds for denial are dispositive of the Petitioner's appeal, we need not address other grounds of ineligibility we observe in the record of proceedings. Nevertheless, we will briefly note and summarize them here with the hope and intention that, if the Petitioner seeks again to employ the Beneficiary or another individual as an H-1B employee in the proffered position, it will submit sufficient independent objective evidence to address and overcome these additional grounds in any future filing.

Upon review, we find that the Petitioner has not demonstrated that it qualifies as a United States employer. As detailed above, the record of proceedings lacks sufficient documentation evidencing what exactly the Beneficiary would do for the period of time requested or where exactly and for whom the Beneficiary would be providing services. Given this specific lack of evidence, the Petitioner has not corroborated who has or will have actual control over the Beneficiary's work or duties, or the condition and scope of the Beneficiary's services. In other words, the Petitioner has not established whether it has made a bona fide offer of employment to the Beneficiary based on the evidence of record or that the Petitioner, or any other company which it may represent, will have and maintain the requisite employer-employee relationship with the Beneficiary for the duration of the requested employment period. *See* 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer" and requiring the Petitioner to engage the Beneficiary to work such that it will have and maintain an employer-employee relationship with respect to the sponsored H-1B nonimmigrant worker). Again and as previously discussed, there is insufficient evidence detailing where the

⁹ 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.

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.

¹⁰ The Petitioner also did not submit an itinerary with the petition listing all the dates and locations of the Beneficiary's work. 8 C.F.R. § 214.2(h)(2)(i)(B) (requiring an itinerary for services performed in more than one location); 8 C.F.R. § 103.2(b)(1).

Beneficiary will work, the specific projects to be performed by the Beneficiary, or for which company the Beneficiary will ultimately perform these services.

Finally, the Petitioner has not established that it is in full compliance with the applicable statutory and regulatory provisions regarding payment of the required wage, fees, and costs. More specifically, the Petitioner's offer letter to the Beneficiary states: "If you leave [the Petitioner] before one year of continuous employment, you are required to return the total amount of H1-B visa and other related administrative expenses."

Under the H-1B program, however, the Petitioner is prohibited from deducting an H-1B employee's wages with regard to recouping a business expense of the employer, which includes "attorney fees and other costs connected to the performance of H-1B program functions which are required to be performed by the employer (e.g., preparation and filing of LCA and H-1B petition)." *See* section 101(a)(15)(H)(i)(b) of the Act; 20 C.F.R. § 655.731(c)(9)(iii). The Petitioner also may not recoup any part of the ACWIA additional filing fee, whether directly or indirectly, voluntarily or involuntarily, from the Beneficiary. *See* section 214(c)(12)(A) of the Act; 20 C.F.R. § 655.731(c)(10)(ii). The Petitioner is further prohibited from requiring an H-1B employee to pay a penalty for ceasing employment with the Petitioner prior to a contracted date. *See* section 101(a)(15)(H)(i)(b) of the Act; 20 C.F.R. § 655.731(c)(10)(i). The Petitioner's offer letter imposes conditions that appear to violate statutory and regulatory provisions related to the Petitioner's payment of the required wage and fees. *See generally* 20 C.F.R. § 655.731(a), (b), (c).

IV. CONCLUSION

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.

Cite as *Matter of AX-S- LLC*, ID# 16746 (AAO May 4, 2016)