U. S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W. MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

[redacted]

Date: JUN 2 1 2013 Office: VERMONT SERVICE CENTER File: [redacted]

IN RE: Petitioner: [redacted]
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:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

N. R
for

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The director of the Vermont Service Center denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be summarily dismissed. The petition will be denied.

The petitioner, self-described as a software business, seeks to employ the beneficiary in a position to which it assigned the job title "programmer analyst." Accordingly, the petitioner endeavors to classify the beneficiary 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).

The AAO will first note the factual basis upon which the director decided to deny the petition, namely, the difference between the addresses where the beneficiary would work as specified at the time of the petition's filing and as later specified in the petitioner's response to the service center's request for additional evidence (RFE).

The Labor Condition Application (LCA) accompanying the Form I-129 at the time of its filing was certified for two work addresses, namely: (1) Tulsa, Oklahoma and (2) Fremont, California The Form I-129 identified the Tulsa, Oklahoma address as the petitioner's office address, and the petitioner's letter of support, dated November 17, 2011, identified the Fremont, California address as the location of a client named

However, according to the petitioner's RFE-reply, the beneficiary was actually assigned to work at neither of the addresses identified in the LCA nor the address listed in the petition, but rather for a previously unidentified firm and at an address that had not been specified in any document that had been filed with the petition.[1] Also, the evidence in the record of proceeding did not establish that the beneficiary had performed any work at the addresses and business entities specified in the Form I-129 and in the LCA. On the basis of these facts, the director concluded that, at the petition's filing, the petitioner had not yet secured for the beneficiary the work that the petition attested that the beneficiary would perform during the period for which the petition had been filed.

The basis upon which the director denied the petition conforms to the applicable regulatory requirements. U.S. Citizenship and Immigration Services (USCIS) regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248.

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[1] In the RFE response letter, dated May 30, 2012, the petitioner asserts - for the first time - that the beneficiary will be working for a client of named located in Santa Clara, California.

Consequently, the basis of the director's denial of the petition was his determination that the petitioner had failed to establish eligibility as of the time of the petition's filing. This is communicated by the following paragraphs of the director's decision, which are quoted verbatim:

> The evidence contained in the record does not support your claim that the beneficiary would be performing services at the location originally indicated on the petition. The change in work location after the filing date of the petition is not supported by persuasive documentation that a work assignment ever existed in Fremont[,] California at the time of the filing of the petition.
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> The petitioner must establish eligibility at the time of filing the visa petition: a visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak.* 14 I&N Dec. 45 (Comm. 1971). Furthermore, your petition fails to meet the requirements of 8 CFR 103.2(b) in that the evidence does not establish the availability of specialty occupation work as a programmer analyst at the time the Form I-129 petition was filed.

The AAO notes that the petitioner anchors its appeal upon the director's mistaken citation to *Matter of Katigbak,* which in fact - as the petitioner correctly claims - does not address H-1B specialty occupation petitions. Indeed, the case predates the initiation of the H-1B specialty occupation program. However, the principle for which that decision was cited is embedded in the regulation at 8 C.F.R § 103.2(b)(1), which is within the compass of the director's reference to 8 C.F.R § 103.2(b), as compelling denial of the petition because, in the director's words, "the evidence does not establish the availability of specialty occupation work as a programmer analyst at the time the Form I-129 was filed." Accordingly, the AAO finds that the director's cite to *Matter of Katigbak* was harmless error.

The appeal in this matter consists of a Form I-290B (Notice of Appeal or Motion) that was filed without a brief or evidence. The petitioner's only comment about the nature of the appeal is the following statement, quoted verbatim, at Part 3 of the Form I-290B:

> Our I-129 nonimmigrant petition was denied inappropriately, specifically by USCIS adjudicator quoting: As explained below, the facts and circumstances of the *Matter of Katigbak* are not similar to this petition. In that particular case it was an immigrant petition where the beneficiary did not meet the criteria of the education/experience of the ETA 9089. If applied similarly to this petition, then it would have been a grounds for denial if the beneficiary did not meet the education requirements (which as required by 8 C.F.R. § 214.2(h) is simply a bachelor[']s degree). However, the beneficiary met the education requirement. The case was approvable when filed because the labor condition application used in the instant

> petition covered the originally intended work location and the change in work location.
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> *Matter of Katigbak*, 14 I&N Dec. 45 (Comm'r 1971).
>
> *Katigbak* held that an I-140 beneficiary must meet all requirements specified on her employer's labor certification application as of the date of the application's submission. Specifically, the *Katigbak* case found: You must determine whether the beneficiary has met the minimum education, training, and experience requirements of the labor certification at the time the application for labor certification was filed with DOL. You cannot approve a petition for a preference classification if the beneficiary was not fully qualified for the preference by the priority date of the labor certification.
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> We have overcome the denial and respectfully request approval of this petition.

The AAO finds that, as conveyed in the director's decision in the excerpts below, the record of proceeding fails to establish that, at the time of the petition's filing, the petitioner had secured actual, non-speculative work for the beneficiary for the duration of intended employment from December 1, 2011 through April 19, 2014. The director stated:

> The evidence contained in the record does not support your claim that the beneficiary would be performing services at the location originally indicated on the petition.

The director also stated:

> The petitioner must establish eligibility at the time of filing the visa petition; a visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts.

As will be reflected in the following review of salient aspects of the record, the petitioner indeed failed to establish that, at the time of filing, it had secured actual work for the beneficiary to perform in the claimed position of programmer analyst at the location for the ultimate end-client, located at Santa Clara, California

The petition was accompanied, in relevant part, by a letter from the petitioner, explaining that it would be serving as an agent and outsourcing the beneficiary to its client, as a programmer analyst with a work location at Fremont, CA The petitioner's letter indicated that the beneficiary would work as a programmer analyst utilizing Software, without any discussion of the proposed duties, for the duration of the requested employment period.

Pursuant to 8 C.F.R. § 103.2(b)(1), the petitioner must demonstrate eligibility at the time of filing the petition:

> An applicant or petitioner must establish that he is eligible for the requested benefit at the time of filing the application or petition. All required application or petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form's instructions.

USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). Thus, even if it were found that the petitioner would be the beneficiary's United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii), the petitioner has not demonstrated that it would maintain such an employer-employee relationship for the duration of the period requested.[2]

Although the petitioner checked box A at section 2 of the Form I-290B, indicating that a brief in support of the appeal was enclosed, the Form I-290B was filed without a brief or any other enclosure. As the petitioner failed to submit a brief or any other document to supplement the Form I-290B, the record of proceeding is deemed complete as currently constituted.

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[2] The agency made clear long ago that speculative employment is not permitted in the H-1B program. 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. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. See section 214(i) of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998). While a petitioner is certainly permitted to change its intent with regard to non-speculative employment, e.g., a change in duties or job location, it must nonetheless document such a material change in intent through an amended or new petition in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E).

An officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal. 8 C.F.R. § 103.3(a)(1)(v).

The petitioner fails to specify how the director made any erroneous conclusion of law or statement of fact in denying the petition. As the petitioner does not present any evidence on appeal to overcome the decision of the director, the appeal will be summarily dismissed in accordance with 8 C.F.R. § 103.3(a)(1)(v).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is summarily dismissed.