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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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FILE: WAC 07 222 54600 Office: CALIFORNIA SERVICE CENTER Date: NOV 02 2009

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


Perry Prew
Chief, Administrative Appeals Office

DISCUSSION: The Director of the California Service Center denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner, which describes itself as a computer consulting firm, filed this nonimmigrant petition seeking to employ the beneficiary in the position of programmer analyst as an H-1B nonimmigrant 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 director's decision specified several grounds for denying the petition, namely: (1) the petitioner's failure to establish itself as an entity authorized to file an H-1B petition, by failing to establish that it meets the regulatory definition of (a) an intending United States employer as defined at 8 C.F.R. § 214.2(h)(4)(ii) or (b) an "agent" as defined at 8 C.F.R. § 214.2(h)(2)(i)(F); (2) the petitioner's failure to establish that the proffered position is a specialty occupation; and (3) doubt as to the credibility of the petition generated by the petitioner's failure to provide all of the contract and itinerary documentation requested in the service center's request for additional evidence (RFE) and by "the additional discrepancies and inconsistencies revealed in the record that are not explained or clarified." The director's decision specifies seven such discrepancies and inconsistencies, namely: (1) the different rates of compensation specified for the beneficiary in the Form I-129 (\$57,100 per year), the related Labor Condition Application (LCA) (\$38,334), and the letter offering employment to the beneficiary (\$65,000 per year); (2) the absence of the beneficiary's signature on the petitioner's employment offer, dated August 9, 2007, 16 days after the petition was filed; (3) the absence of the beneficiary's signature on the employment agreement submitted by the petitioner, which is also dated August 9, 2007; (4) the petitioner's failure "to comply with the RFE's request to provide copies of the quarterly wage reports that were filed and accepted for the State of Arizona for all quarters of 2006 and [the] first two quarters of 2007 that include name, social security numbers, etc."; (5) the petitioner's failure to comply with the RFE's request for W-2s for 2006; (6) the petitioner's non-compliance with the RFE's request for copies of the beneficiary's filed and signed individual tax returns for 2005 and 2006; and (7) discrepancies, specified in the director's decision, in the beneficiary's 2007 pay records from the petitioner and [REDACTED]. In discussing the reason for the RFE's request for contracts, the director's decision notes that the petitioner's Form I-129 specified that it has 325 employees, but contains no entries at the sections provided for the petitioner's gross and net annual incomes. The decision further states that the petitioner "files an extraordinarily high number of petitions in relation to the number of employees it claims on the petition," and it asserts that the petitioner has filed 2,035 petitions in 2005, although it was not established until 2004.

On appeal, the petitioner submits a brief in the form of a letter divided into four sections that argue that the director's decision is erroneous because (1) the petitioner is a U.S. employer; (2) the proffered position is a specialty occupation; (3) the high number of petitions cited by the director is explainable by the fact that it includes petitions filed by the petitioner, an affiliated company, and the petitioner's parent company; and (4) there are no discrepancies in the payroll records related to the beneficiary. With regard to the discrepancies in the statements of the beneficiary's compensation in the Form I-129, the LCA, and the employment offer letter, the petitioner states that it is currently

paying the beneficiary \$65,000 (the amount stated in the employment offer letter), which, the petitioner states, "is over and above the minimum level" of \$38,334 that it specified as the "minimum prevailing wage" in the LCA.

The appeal also includes the following documents, in addition to the Form I-290B and the petitioner's letter brief: (1) a Resource Strategy Schedule (RSS) executed by [REDACTED] and its Affiliated Companies" and American Express Travel Related Services Company, Inc. (hereinafter referred to as "AMEXCO"); (2) the Statement of Work (SOW), which the RSS identifies as an attachment; (3) copies of an "IT Opportunities" advertisement published by the petitioner's parent company, [REDACTED] in the *Computerworld* editions of July 31, 2006; September 25, 2006; November 27, 2006; January 29, 2007; and May 28, 2007; (4) copies of Form I-797B approval notices and diplomas, which the petitioner submits as evidence of prior approvals of H-1B petitions for positions similar to the position that is the subject of this appeal; (5) a copy of a job vacancy announcement from an employer other than this petitioner, submitted as evidence that the petitioner's degree requirement for the proffered position comports with an industry-wide practice; (6) copies of the previously submitted employment offer letter and employment agreement, which now include signatures of the beneficiary and the petitioner's authorized representative; (7) copies of the quarterly wage reports for 2006 that had been requested in the RFE but not previously provided; (8) copies of the petitioner's payroll records for the period ending December 15, 2007; and (9) copies of pay records, W-2 Forms, and tax return information pertaining to the beneficiary.

As a preliminary note, the AAO observes that, beside [REDACTED] (the petitioner), two other similarly named business entities in the computer consulting business are prominently mentioned in the record of proceedings. They are [REDACTED]. The record reflects that both the petitioner [REDACTED] are wholly owned subsidiaries of [REDACTED].

The record also reflects that the petition was filed in order to transfer the beneficiary from an H-1B position at [REDACTED] to the proffered position with the petitioner.

As will be discussed below, the AAO finds that the director's determination to deny the petition for failure to establish the proffered position as a specialty occupation is correct. As this finding is dispositive of the appeal, the AAO will not address and therefore not disturb the director's negative determinations regarding the petitioner's status as a U.S. employer or agent and the credibility of the petition.

The following statutory and regulatory framework governs whether a proffered position qualifies as a specialty occupation.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation.

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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation “which [1] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [2] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.”

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must also meet one of the following criteria:

- (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.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to

meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets 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 proffered position. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

The petition in this proceeding was filed on July 23, 2007. It specifies the work site as American Express, Phoenix, Arizona and the dates of intended employment as July 23, 2007 to April 1, 2010.

The following statements comport with the assertions in petitioner’s letter of July 18, 2007, filed with the Form I-129. The petitioner and Syntel Ltd. are affiliates and wholly owned subsidiaries of [REDACTED] which is described as a publicly held (NASDAQ) global software systems company. The present petition was filed in order that the beneficiary may change his H-1B employment from [REDACTED] to the petitioner, which is a global software systems services company with clients throughout the United States. As a programmer analyst, the beneficiary “will develop, implement, and enhance customized applications; modify existing applications to meet [the] user’s changing need, and train users in the application as necessary.”

The July 18, 2007 letter describes a typical work cycle of the petitioner’s programmer analysts as follows:

[The petitioner] employs Programmer Analysts to analyze our client’s information technology requirements and computer hardware to design a system, which will best process the client’s data in the most timely and inexpensive manner. [The petitioner’s] Programmer Analysts then implement this design by overseeing the installation of the necessary software and its customization to the client’s unique requirements. Our clients have an ongoing need for Programmer Analysts qualified in specific skill sets. After a client’s business requirements are analyzed and their systems are designed, developed, and implemented, the Programmer Analyst is then subject to immediate reassignment to another client. Occasionally the Programmer Analyst will continue maintaining a system after the system is implemented.

The July 18, 2007 letter further asserts that the worksite specified in the Form I-129, which is AMEXCO's location in Phoenix, Arizona, is "the only known work site" as of the date of the letter. However, the letter also states that, "if for some unknown reason his services should no longer be required at the initial work site, [the petitioner] has a need for Programmer Analysts with the beneficiary's qualifications at many other [of its] worksites where [it] currently ha[s] job openings." However, the material filed with the Form I-129 does not include any documents identifying specific projects, contracts, or worksites to which the beneficiary would be assigned after the AMEXCO project.

The only document submitted with the Form I-129 that relates to arrangements between the petitioner and AMEXCO is a Master Service Agreement (MSA) between [REDACTED] and its Affiliated Companies" and the client, AMEXCO. By its terms, this document, signed by both parties in November 2002, was still in effect at the time the petition was filed in July 2007. The AAO notes that the MSA is not a contract for the performance of work. Rather, the MSA is only a framework of terms, conditions, and types of documents that must be included in any contract that may be executed during the effective period of the MSA. As such, it is not evidence of any work that the beneficiary would perform during the period of employment specified in the petition. The AAO further notes that the MSA neither identifies the entities that comprise the "Affiliated Companies" nor specifies which entity or entities of the consultant party to the contract, identified as [REDACTED] and its Affiliated Companies," would provide workers for any contract that may be formed by the integration of the MSA with the type of contractual documents that it identifies as necessary components of any contract with AMEXCO.¹ Therefore, the MSA does not establish its relevance to any specific work to be performed by the petitioner. For this additional reason also, the MSA is not evidence of work to be assigned to the beneficiary.

It is in the above described evidentiary context that the service center issued the RFE on September 27, 2007.

The AAO observes that the RFE requested, *inter alia*, the following evidence bearing on the relationship between the petitioner and the beneficiary, the beneficiary's work itinerary, and the contractual obligations generating the work that the beneficiary would perform:

- **Consultants and Staffing Agencies:** The petitioner is engaged in the business of consulting, that contracts short-term employment for workers who are traditionally self-employed[.] Submit evidence that a specialty occupation exists for the beneficiary.

Regardless of whether the beneficiary will be working within the employment contractor's operation on projects for the client or at the end-client's place of business – USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. Please clarify the petitioner's

¹ In this regard, the AAO notes that pp. 73-74 of lists 13 wholly owned subsidiaries.

employer-employee relationship with the beneficiary and, if not already provided, submit the following evidence:

- copies of signed contracts between the petitioner and [the beneficiary];
- a complete itinerary of services or engagements that specifies the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed for the period of time requested; and
- copies of signed contractual agreements, statements of work, work orders, service agreements, and letters written between the petitioner and the authorized officials of the ultimate end-client companies where the work will actually be performed that specifically lists [the beneficiary] on the contract and provides a detailed description of the duties the beneficiary will perform, the qualifications that are required to perform the job duties, salaries or wages paid, hours worked, benefits, a brief description of who will supervise the beneficiary and their duties, and any other related evidence.

NOTE: The evidence must show specialty occupation work for the beneficiary with the actual end-client company where the work will ultimately be performed. Merely providing contracts between the petitioner and other companies or employment agencies that provide consulting or staffing services to other companies may not be sufficient. There must be a clear contractual path shown from the petitioner, through any other consultants or staffing companies, to an ultimate end-client.

As evident in the excerpt above, the RFE placed the petitioner on notice as to the USCIS finding that the Form I-129 and the allied documents filed with it failed to establish that the petitioner had H-1B caliber work for the beneficiary. The RFE also clearly conveyed the USCIS determination that, to remedy this deficiency, the petitioner needed to supplement the record with (1) a complete itinerary of the work engagements identified for the beneficiary, including “the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed for the period of time requested”; and (2) contracts and contract-related documents, correspondence between the petitioner and its clients regarding the work that the beneficiary would perform, and any other documents that would demonstrate the duties that the beneficiary would perform and the qualifications required to perform them. The petitioner, however, declined to provide such evidence. Instead, it submitted another copy of the MSA and protested as follows against the USCIS request for itinerary and contract evidence:

[The petitioner] has received the Director’s request for the contract between [it] and [its] client, an itinerary listing locations and organizations where [the petitioner] will be providing services, and any contract addenda. As the [US]CIS has concluded on several occasions in the past with regard to [the petitioner’s] employees, this request

does not fall within Service guidelines. (See enclosed opinion from [REDACTED] of Administrative Appeals Unit [AAU].) In this decision the Director of the [AAU] held the request for contracts improper and relied on a memorandum dated November 13, 1995 from the Associate Commissioner of Examinations, which indicates, "The submission of such contracts would not be a normal requirement for the approval of an H-1B petition filed by an employment contractor." As the Associate Commissioner for Examinations concluded[,] there is no basis for introducing the concept of "speculative employment" in either statute or regulation. This position was reinforced by the Administrative Appeals office in Matter of X, decided on May 23, 2000. (Exhibit A)

The cited AAU decision refers to the Memorandum from Louis D. Crocetti, Jr., Associate Commissioner, Office of Examinations, *Supporting Documentation for H-1B Petitions*, HQ 214h-C (November 13, 1995). While it states that requests for contracts should not be a normal requirement for the approval of an H-1B petition from an employment contractor, the memorandum does not prohibit such RFE requests. Read as a whole, the memorandum counsels against issuing RFEs for contracts from employment contractors without a specific need that the requesting officer can articulate for requesting the documents. The memorandum, the AAO notes, does not require the requesting officer to actually articulate the need. Nor does the memorandum purport to bar agency officers from issuing RFEs as a matter of policy on any category of H-1B petitioners. Further, this internal memorandum must be read in the context of the current regulations that invest USCIS officers with broad authority to pursue such evidence as they determine necessary in the reasonable exercise of their responsibility to adjudicate H-1B petitions in accordance with the applicable statutes and regulations. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the legal authority as well as the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Also, the AAO finds that the language of the RFE in the present petition and the context of the record of proceedings as it existed at the time the RFE was issued demonstrate that the RFE was issued on a basis relevant to the proper adjudication of the petition, namely, the petitioner's failure to submit documentary evidence substantiating the petitioner's claim that it had H-1B caliber work for the beneficiary for the period of employment requested in the petition.

The unpublished AAU decision issued cited on appeal has no precedential value (*see*, 8 C.F.R. § 103.3(c)), and the AAO does not find its content helpful to the consideration of the matter here before it, the outcome of which the AAO is determining by application of the relevant and current regulations to the particular facts of the present case. The AAO also notes that the cited AAU decision is erroneous to the extent that it suggests that the apparently speculative nature of the proposed employment is not a proper subject for USCIS inquiry or a proper reason to deny a petition. 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. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Further, the petitioner submits no precedential decisions or statutory or regulatory authority for the proposition that this internal agency memorandum cited in the referenced AAU decision

prohibits USCIS adjudicating officers from requesting the contractual documents sought by the RFE issued on the present petition.

Next, the AAO notes that neither the AAO decision cited on appeal nor the memorandum to which it refers addresses the issue of a USCIS request for an itinerary in situations where the petitioner indicates that the beneficiary is to provide services in more than one location. Also, the pertinent regulation, at 8 C.F.R. § 214.2(h)(2)(i)(B) expressly requires an itinerary when, as here, a record of proceeding indicates that the beneficiary's services will likely be performed in more than one location. The regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) states, in pertinent part:

Service or training in more than one location. A petition which requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with the Service office which has jurisdiction over I-129H petitions in the area where the petitioner is located. The address which the petitioner specifies as its location on the I-129H petition shall be where the petitioner is located for purposes of this paragraph.

Accordingly, an itinerary is a material and necessary document without which the petition may not be approved for any employment for which there is not submitted an itinerary of at least the employment dates and locations. The petitioner's refusal to submit an itinerary precludes approval of the petition for any services to be performed at a location other than the AMEXCO site specified in the petition.

For the reasons just discussed, neither the AAU decision cited by counsel nor the internal memorandum that it references supports counsel's suggestion that the RFE issued on the present petition was improper.

The petitioner's letter brief on appeal contains the following description of the beneficiary's duties, which the AAO quotes verbatim:

- Analyze the clients business requirement and designed their systems as per the said requirement
- Develop, implement and enhance customized application, modify existing applications, and train users in the application if required
- Prepare functional specification documents, coding new programs, enhance existing systems using detailed design, prepare test cases on the basis of required document.
- Perform peer to peer program review and unit test strategy
- Develop and maintain Web Application

- Develop proof of concepts based on such specifications and test the same
- Maintain application architecture code once it is developed with support of other developers

The evidentiary weight of these generic descriptions is insignificant, as they are not supplemented by contractual and other documentary evidence that establish the particular projects upon which the beneficiary would exercise these general duties, the specific performance requirements of each project, and the nature and educational level of whatever specialized computer-related knowledge would be required to meet those requirements. Neither the Act nor the implementing regulations support a formulistic approach that would permit a finding of specialty occupation status without substantive evidence of specific work into which a position's duty descriptions would translate when actually executed in the context of the petitioner's business. To determine whether a particular job qualifies as a specialty occupation, USCIS focuses on the record's evidence of specific work involved in actual performance of the job. *See generally Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000).

The petitioner in *Defensor*, Vintage Health Resources (Vintage), was a medical contract service agency that brought foreign nurses into the United States and located jobs for them at hospitals as registered nurses. The decisive factor in *Defensor* was examination of the substantive nature of the beneficiary's work not as claimed by the petitioner but as set by the petitioner's client who determined the actual scope of that work. The court in *Defensor* found that Vintage had "token degree requirements," to "mask the fact that nursing in general is not a specialty occupation." *Id.* at 387. The court held that for the purpose of determining whether a proffered position is a specialty occupation, the petitioner acting as an employment contractor is merely a "token employer," while the entity for which the services are to be performed is the "more relevant employer." *Id.* at 388. The *Defensor* court recognized that evidence of the client companies' job requirements is critical where the work is to be performed for entities other than the petitioner. The *Defensor* court held that the legacy 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.* In *Defensor*, the court found that that evidence of the client companies' job requirements is critical if the work is to be performed for entities other than the petitioner. *Id.*

The beneficiary employment situation in the present matter is analogous to the one in *Defensor*, for the substantive requirements of the actual work to be performed by the beneficiary will be determined not by the petitioner, but by whatever clients provide the projects to which the beneficiary be assigned. Therefore, the same analytical approach of *Defensor* is appropriate. Because the present petitioner failed to provide documentary evidence sufficient to establish the substantive nature of the work that the beneficiary would perform and the clients for whom the work would be performed, the petitioner's claim that the beneficiary will be employed in H-1B caliber work is not credible. The record lacks sufficient evidence for the AAO to determine whether the beneficiary's duties at each worksite would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation. Accordingly, the

petitioner has not established that the proposed position qualifies as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(A) or that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(1)(B)(1).

The “IT Opportunities” advertisements, which the petitioner submits on appeal as evidence that it “normally requires a bachelor’s degree for the position of a programmer analyst,” include these job descriptions:

Programmer Analyst: Analyze, design, develop, code test and maintain database management systems. Must have a bachelor’s degree in Computer Science, Engineering or related [field] + 3 years experience and the ability to use Mainframe, DBA, AS 400 and Client-Server Tools.

Project Managers/Leaders: Lead a team of programmer analysts & data base administrators on development and maintenance of hardware and software applications as well as be responsible for project planning and quality assurance. Must have a bachelor’s degree in Computer Science, Engineering or related [field] + 5 years experience and the ability to use Mainframe, DBA, AS 400 and Client-Server Tools.

The AAO accords little evidentiary weight to the “IT Opportunities” advertisements. Their relevance to the proffered position is not evident, as they were issued by Signal, Inc. and contain no reference to either the petitioner or the particular position that is the subject of this petition. Moreover, because of the record of proceeding’s lack of documentary evidence establishing the substantive nature and educational requirements of the actual work that the beneficiary would perform, the AAO cannot reasonably deduce that the advertised positions are substantively similar to the position that is the subject of this appeal.

For the reasons discussed above, the AAO finds that the RFE’s request for contracts and an itinerary were a proper exercise of USCIS discretion. As will now be explained, the AAO also finds that the USCIS regulatory provisions on the RFE process precludes the AAO from considering the RSS, executed by “██████████ and its Affiliated Companies,” and the related SOW, which the petitioner submits on appeal as evidence of a contract that would generate work for the beneficiary. Such evidence was requested in the RFE but not included in the petitioner’s RFE response. The regulation at 8 C.F.R. § 103.2(b)(11) provides that a petitioner has three options during the response period specified in the RFE: submission of a complete response containing all of the requested information; submission of a partial response with a request for a decision based on the record; or withdrawal of the petition. Submission of only some of the requested evidence will be considered a request for a decision on the record. Materials in response to the RFE must be submitted together at one time, along with the original RFE, and they must be filed within the period afforded in the RFE. Further, the regulation at 8 C.F.R. § 103.2(b)(8)(iv) states that in no case shall the maximum response period provided in an RFE exceed 12 weeks, and that additional time to respond may not be granted. Thus, the petitioner is afforded only one opportunity to file materials in response to the

RFE. Operation of this provision precludes the petitioner from submitting on appeal any type of documentation requested in the RFE but not provided within the time specified in the RFE. Also, precedential decisions support the AAO's refusal to accept evidence offered for the first time on appeal after a petitioner has been put on notice of the deficiency that the evidence addresses and has been given an opportunity to respond to that deficiency. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.*

Additionally, the AAO observes that the RSS and the SOW would not be probative even if their contents were considered, as they were executed after the petition was filed and after the beginning of the period of employment requested in the petition. 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 at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

The AAO finds that, as earlier noted in this decision, the MSA is not probative of any H-1B caliber work that the beneficiary would perform if this petition were granted. As the AAO has further found that the RSS and SOW are not proper subjects for consideration on appeal, the record contains no documentary evidence substantiating the petitioner's claim that it has clients providing H-1B caliber work for the beneficiary. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). 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 at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Accordingly, the petition must be denied for its failure to establish the substantive nature of the work for which it was filed.

The record before the director contained no documentary evidence of any contractual commitment for the petitioner to assign the beneficiary, or any other person, to programmer analyst duties at AMEXCO or any other entity during the period of employment sought in the petition. Consequently, as reflected in her decision, the evidence of record before the director lacked an evidentiary basis upon which she could reasonably conclude that the beneficiary would be employed in H-1B caliber work if the petition were granted. The petitioner declined the opportunity to establish such an evidentiary basis by providing the documentation that the RFE requested regarding the itinerary of work for the beneficiary and the specific duties and performance requirements generated for the beneficiary by contracts and correspondence between the petitioner and its clientele. As earlier discussed, in light of the petitioner's refusal to provide that documentary evidence within the time specified for RFE response, the AAO need not and will not now consider any such evidence now submitted on appeal. The record before the AAO does not affect the correctness of the director's decision to deny the petition for lack of evidence that the petitioner is

proffering a specialty occupation position. Therefore, the appeal will be dismissed, and the petition will be denied.

The AAO acknowledges the copies of Form I-797B approval notices and diplomas which the petitioner submits as evidence of prior approvals of H-1B petitions for positions similar to the position that is the subject of this appeal. The director's decision does not indicate whether she reviewed the prior approvals of the other nonimmigrant petitions. If the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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 dismissed. The petition is denied.