

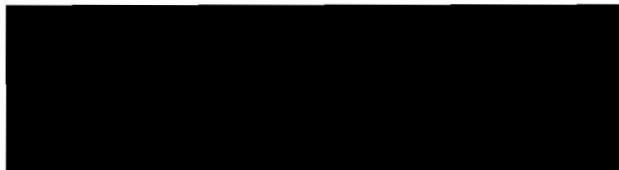
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE: WAC 06 169 50421 Office: CALIFORNIA SERVICE CENTER

Date: NOV 02 2009

IN RE: Petitioner:
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:

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, as required by 8 C.F.R. 103.5(a)(1)(i).

Perry Prew
Chief, Administrative Appeals Office

DISCUSSION: The director of the service center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

To continue to employ the beneficiary in what the petitioner designates as a Computer Systems Analyst, the petitioner seeks to continue his classification and extend his stay 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 director denied the petition on four grounds, namely, her findings that the evidence of record failed to establish: (1) that the petitioner is qualified to file an H-1B petition, that is, as either (a) a U.S. employer as defined at 8 C.F.R. § 214.2(h)(4)(ii), or (b) a U.S. agent, in accordance with the regulation at 8 C.F.R. § 214.2(h)(2)(i)(F); (2) that the petitioner “has submitted a valid LCA (Labor Condition Application) covering all of the locations where the beneficiary will be employed”; (3) that the proffered position is a specialty occupation; and (4) that the petitioner has complied with the terms and conditions of employment as required by its attestations to do so in the Form I-129s and related LCAs that it has filed on behalf of other beneficiaries.

In this decision, the AAO will only address the specialty occupation and the LCA grounds of the director’s decision, in that order. As will be discussed, the AAO finds that the director was correct to deny the petition on each of these two grounds. The AAO bases this determination on its review of the entire record of proceedings, as supplemented by the Form I-290B, the petitioner’s appellate brief, and all the other documents submitted on appeal. As the AAO’s findings on each of these issues are dispositive of the appeal, the AAO will not address and therefore not disturb the director’s negative determinations regarding the petitioner’s standing to file the petition or the petitioner’s compliance with the terms and conditions of employment.

THE SPECIALTY OCCUPATION ISSUE

H-1B Analytical Framework

In deciding whether a proffered position qualifies as a specialty occupation, the AAO analyzes the evidence of record according to the statutory and regulatory framework below.

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 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) (hereinafter referred to as *Defensor*.) 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.

Discussion of the Merits

The AAO recognizes the Department of Labor’s *Occupational Outlook Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹ As will now be discussed, the *Handbook* indicates that computer systems analysts do not constitute an occupational group that categorically requires a specialty-occupation level of education, that is, at least a U.S. bachelor’s degree, or the equivalent, in a specific specialty closely related to computer systems analysis. Consequently, qualifying the petitioner’s computer systems analyst position as a specialty occupation depends upon the record’s evidence regarding the services that the beneficiary will most likely perform in this particular position.

The “Nature of the Work” segment of the *Handbook*’s “Computer Systems Analysts” chapter includes this information regarding the general scope of work characteristic of this occupational category:

Computer systems analysts solve computer problems and use computer technology to meet the needs of an organization. They may design and develop new computer systems by choosing and configuring hardware and software. They may also devise ways to apply existing systems’ resources to additional tasks. Most systems analysts work with specific types of computer systems—for example, business, accounting, or financial systems or scientific and engineering systems—that vary with the kind of organization. . . .

To begin an assignment, systems analysts consult managers and users to define the goals of the system. Analysts then design a system to meet those goals. They specify the inputs that the system will access, decide how the inputs will be processed, and format the output to meet users’ needs. Analysts use techniques such as structured analysis, data modeling, information engineering, mathematical model building, sampling, and cost accounting to make sure their plans are efficient and complete.

¹ All references are to the 2008-2009 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

They also may prepare cost-benefit and return-on-investment analyses to help management decide whether implementing the proposed technology would be financially feasible.

When a system is approved, systems analysts determine what computer hardware and software will be needed to set it up. They coordinate tests and observe the initial use of the system to ensure that it performs as planned. They prepare specifications, flow charts, and process diagrams for computer programmers to follow; then they work with programmers to “debug,” or eliminate errors, from the system. . . .

In some organizations, programmer-analysts design and update the software that runs a computer. They also create custom applications tailored to their organization’s tasks. Because they are responsible for both programming and systems analysis, these workers must be proficient in both areas. . . .

The information on educational requirements in the *Handbook’s* “Computer Systems Analysts” chapter indicates a bachelor’s or higher degree in computer science, information systems, or management information systems is a general preference, but not an occupational requirement, among employers of computer systems analysts. That this occupation accommodates a wide spectrum of educational credentials is reflected in the following paragraph that opens the “Training, Other Qualifications, and Advancement” section of the *Handbook’s* “Computer Systems Analysts” chapter:

Training requirements for computer systems analysts vary depending on the job, but many employers prefer applicants who have a bachelor’s degree. Relevant work experience also is very important. Advancement opportunities are good for those with the necessary skills and experience.

The AAO notes that the paragraph’s statement that “many employers prefer applicant’s who have a bachelor’s degree” is not indicative of a pervasive requirement for a specific major or academic concentration. As such, the preference noted by the *Handbook* is not an endorsement of the occupation as one for which all of its included jobs qualify as specialty occupation positions. The “Education and Training” subsection of the *Handbook’s* “Computer Systems Analyst” chapter continues this theme. It states:

Education and Training. When hiring computer systems analysts, employers usually prefer applicants who have at least a bachelor’s degree. For more technically complex jobs, people with graduate degrees are preferred.

The level and type of education that employers require reflects changes in technology. Employers often scramble to find workers capable of implementing the newest technologies. Workers with formal education or experience in information

security, for example, are currently in demand because of the growing use of computer networks, which must be protected from threats.

For jobs in a technical or scientific environment, employers often seek applicants who have at least a bachelor's degree in a technical field, such as computer science, information science, applied mathematics, engineering, or the physical sciences. For jobs in a business environment, employers often seek applicants with at least a bachelor's degree in a business-related field such as management information systems (MIS). Increasingly, employers are seeking individuals who have a master's degree in business administration (MBA) with a concentration in information systems.

Despite the preference for technical degrees, however, people who have degrees in other majors may find employment as systems analysts if they also have technical skills. Courses in computer science or related subjects combined with practical experience can qualify people for some jobs in the occupation.

Employers generally look for people with expertise relevant to the job. For example, systems analysts who wish to work for a bank should have some expertise in finance, and systems analysts who wish to work for a hospital should have some knowledge of health management.

Technological advances come so rapidly in the computer field that continuous study is necessary to remain competitive. Employers, hardware and software vendors, colleges and universities, and private training institutions offer continuing education to help workers attain the latest skills. Additional training may come from professional development seminars offered by professional computing societies.

With regard to educational requirements, the *Handbook's* "Computer Systems Analysts" chapter indicates that, while employers prefer applicants with a bachelor's degree and often seek applicants who have at least a bachelor's degree in a technical field, their employment practices have not established a bachelor's degree in a specific specialty as the norm for hiring.

In light of the *Handbook* comments noted above, it is incumbent on the petitioner to provide sufficient evidence to establish not only that the beneficiary would perform the services of a computer systems analyst, but also that he would do so at a level requiring the theoretical and practical application of at least a bachelor's degree level of knowledge in a computer-related specialty. This the petitioner has failed to do.

Next, the AAO acknowledges the petitioner's viability, remarkable pace of growth, and standing in its industry, as reflected in the petitioner's submissions, particularly the Deloitte & Touche and Inc. 500 rankings. However, neither the petitioner's vitality nor financial standing is an issue. Further, the petitioner's ability to attract clients, which is reflected in the evidence of its growth, is not

probative on the issue of whether the beneficiary will be employed in a specialty occupation position. That is a determination to be made on the basis of the evidence of record regarding the particular position that is the subject of this petition.

Filed on April 19, 2006, this petition seeks to continue the beneficiary's classification as an H-1B temporary employee for the period May 10, 2006 to May 9, 2009. The related LCA was certified for the same employment period. Both the Form I-129 and the LCA identify the beneficiary's job title as Systems Analyst. According to item 5, Part 5 of the Form I-129, the beneficiary will work in "Deerfield, Illinois" and in "Burlington, Vermont" (the petitioner's location). This information accords with the LCA statements about work locations. On the LCA, the petitioner claims that \$62,462.00 is the prevailing wage in Deerfield, Illinois, and that \$54,517 is the prevailing wage in Burlington, Vermont. On the Form I-129, the petitioner specified the beneficiary's wages as \$62,462.00 per year.

The documents submitted with the Form I-129 include an April 17, 2006 letter from the petitioner in support of this extension petition. Here the petitioner described itself as "a well-established software services company located in South Burlington, VT and Sterling, VA," with over 250 employees and a gross revenue of approximately \$23,000,000 in 2005. This letter also includes the following comments on the petitioner's business:

[The petitioner] provides solutions to sophisticated companies with specific custom software needs. Often, these needs arise from projects that strain the existing technologies. In such cases, [the petitioner] supplies the software/systems solutions and programming knowledge to tailor existing resources enabling clients to meet new challenges efficiently and cost effectively. . . .

Thus, it is clear that the specific projects to which the petitioner's personnel are assigned are client generated.

The "Terms of Proposed Employment" section of this March 17, 2006 letter states that the beneficiary "may provide onsite professional services to [the petitioner's] clients at additional locations, always in accordance with a Department of Labor certified Labor Condition Application." However, the letter provides no information about any particular project upon which the beneficiary would work. Also, neither the letter nor any other documents submitted into the record identify any work locations other than the petitioner's address and the Deerfield location address specified in the Form I-129.²

The documents filed with the Form I-129 do not include any documentary evidence from any business entity relating to work the beneficiary would perform for it.

² It is noted that, contrary to the instructions on Form I-129, the petitioner did not provide the street number, street name, or the zipcode where the beneficiary would be employed.

The aforementioned April 17, 2006 letter of support states that the beneficiary will “develop business requirements for software programs for [the petitioner’s] clients and will gather document and freeze business requirements so that Programmers can code test, implement, and maintain existing programs.” The AAO acknowledges that this summary of the beneficiary’s duties generally comports with the *Handbook’s* general information about computer systems analyst work. However, as reflected in this decision’s earlier observations about the *Handbook’s* “Computer Systems Analysts” chapter, this does not indicate that the beneficiary would be performing specialty occupation services.

Qualification as a specialty occupation is not determined by the position’s title or how closely a petitioner’s descriptions of the position approximate the narrative about an occupational category in the *Handbook*. Rather, specialty occupation classification is dependent upon the extent and quality of the evidence of record about the actual work to be performed, the associated performance requirements, and the nature and educational level of specialized knowledge in a specific specialty necessary for or normally associated with such performance requirements. As the AAO will now discuss, the evidence of record in these areas are materially deficient and do not provide a sufficient foundation for the AAO to determine that the proffered position is a specialty occupation.

The service center issued an RFE which, in pertinent part, requested documentation with regard to 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. That part of the RFE reads as follows:

- **Consultants and Staffing Agencies:** If the petitioner is, in any way, engaged in the business of consulting, employment staffing, or job placement 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 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.

The petitioner's reply to the RFE includes the following documents related to the section of the RFE quoted above: (1) a July 27, 2007 memorandum from human resources manager of MGL Americas Inc (hereinafter referred to as the MGL Americas memo; (2) a Statement of Work (SOW) executed by the petitioner and Mascon IT Limited (hereinafter referred to as Mascon) on March 23, 2006; and (3) a statement from the beneficiary, signed on September 9, 2007; and (4) an excerpt from Mascon's Internet site. On appeal, the petitioner explains the association of these documents as follows:

[O]n September 10, 2007, Petitioner responded to the [RFE] on the petition, among other things submitting the following documentation from the regarding the beneficiary's physical work location: A letter . . . from [an] intermediate contractor, MGL Americas Inc, confirming that the beneficiary was working at Walgreens Health Initiatives in Deerfield, IL and was performing Specialty Occupation duties; petitioner's contract with MGL Americas ("Mascon") . . . showing that the intent of the contract was that the petitioner send [the] beneficiary to work at Walgreens Health Initiatives; an affidavit from the beneficiary . . . confirming his work location and duties, and that [the petitioner] is his employer. In addition, corporate information about Walgreens Health Initiatives, printed from their website and confirming their location, and also a page from the Mascon website confirming that "Mascon" and MGL are the same companies, were also provided.

Addressed "To Whomever It May Concern," the MGL Americas memo states:

This is the certify that [the beneficiary] is working full-time at [REDACTED] in a Contractor Capacity. He is working on Projects Designing, Developing, and Coding Applications in JAVA, J2ERE on Applications Servers ATG, Websphere, etc. His on-site supervisor is [REDACTED]. As we are not his employer, we do not pay him a salary nor do we provide him benefits.

In case of any clarification, please feel free to contact the undersigned at [phone number].

The Mascon SOW opens with a statement that the SOW “is hereby made a part of that certain Independent Contractor Agreement [ICA] . . . dated 23rd March 2004.” The SOW specifies that the petitioner will assign the beneficiary to perform work for Mascon’s client “Walgreens Co.” at “\$49/hr (all inclusive) for the period April 30, 2006 to June 30, 2006. The SOW identifies the Scope of Work as “ATG Dynamo, Java development work as directed by the Manager.” The SOW allows for automatic extension on a month-to-month basis, “on the same terms and conditions stated herein and in the [ICA],” until such time as the project to which the beneficiary is assigned is completed or “Contractor,” the petitioner, provides 15 days prior notice of a refusal to extend the SOW.

The ICA further provides that the petitioner (1) “will discuss its hours and location with the Client [i.e., Walgreens Co.], including notification to the Client if Contractor [i.e., the petitioner] cannot be present”; and (2) “agrees to complete the assignment within the guidelines as provided by the Client or within any reasonable changes in the guidelines as provided by the Client.”

The SOW also includes instructions regarding the submission of invoices and “client’s authorized timesheets” to Mascon; and the SOW commits Mascon to “pay within 30 business days after receipt of invoice.”

Although provided the RFE’s opportunity to supplement the record with such documents, the petitioner has not submitted copies of any of the following: (1) the ICA; (2) whatever contracts and contract-related documents govern Mascon’s securing the petitioner to provide persons to work for Walgreens; (3) “the guidelines provided by the Client”; and (4) “reasonable changes” that may have been made to those guidelines. The AAO finds that the absence of such documents is a material evidentiary deficiency, as they all likely have a role in determining the substantive nature of the beneficiary’s work. In this regard, the AAO notes in particular that the SOW indicates that the ICA includes terms and conditions governing the beneficiary’s assignment to Walgreens, and that the ICA points to Walgreens as determining the beneficiary’s performance requirements through its “guidelines” with which the beneficiary is bound to comply.

Documents provided in response to the RFE also include a statement by the beneficiary. This statement is dated September 6, 2007; is addressed “To Whom Ever It May Concern; and bears a notary’s and official seal.”³ The portion of the statement that is relevant to the nature of the beneficiary’s work for the period of employment specified in the petition reads:

³ Contrary to the petitioner’s characterization, the beneficiary’s statement is not an affidavit, as it bears no indication that it was made under oath or affirmed under the penalty of perjury. The AAO further notes that the notary’s signature and stamp add little to no weight to the beneficiary’s statement, as they do not accompany any statement by the notary as to the import of his signature beyond identifying the beneficiary as having made the statement.

This affidavit is to certify that I am currently working as an Itech US Inc. employee at the worksite of [REDACTED]

I am working full-time, from 8.00 to 5.00, as a consultant Systems Analyst, and my job duties are:

- Designing, Developing and Coding Java, J2ee Applications.
- Using application servers like ATG Dynamo, Websphere, Tomcat, etc.
- Attending meetings and doing code reviews.
- Gathering requirements and Converting them into functional designs.

The AAO finds that the beneficiary's statement does not merit any significant weight. The beneficiary is a self-interested witness, as he stands to gain materially by approval of this extension petition, and to lose materially if the extension is denied. Furthermore, the interests of the beneficiary and the petitioner are to an extent inseparable, as the beneficiary is employed by the petitioner and dependent upon the petitioner's employment for pay and H-1B status. Moreover, the petitioner has declined to take advantage of the opportunity afforded by the RFE to substantiate the concrete nature of the work that the beneficiary is to perform for Walgreens by providing contracts, contract-related business documents, and affidavits or letters from that end-client entity that are relevant to the beneficiary's assignment to perform work for it.

Further, the AAO finds little substantive content in the beneficiary's description of his duties. The duties are described in generalized terms that do not relate any substantive information regarding the actual work that they involve and the educational credentials required to perform such work. The beneficiary provides no concrete information about the specific designing, developing, and coding work in which he is involved; about his use of the application servers that he names; about his substantive contributions at the meetings he attends; or about the requirement-gathering and conversion work that he does. Further, neither he nor the petitioner provides substantive explanations or documentary support to establish a correlation between the work proposed for the beneficiary and any particular level of academic attainment in a specialized discipline directly related to the proffered position. Therefore, even if taken at face value, the beneficiary's statement does no more than establish that he will be working as a programmer analyst. The statement does not distinguish the proffered position from the range of systems analyst positions not requiring or usually associated with a level of computer-related technical knowledge attained by at least a bachelor's degree in a specific specialty.

The record's descriptions of the duties comprising the proffered position generally comport with the Computer Systems Analyst occupational category as discussed in the 2008-2009 edition of the *Handbook*. However, neither those descriptions nor any other evidence of record distinguish the proffered position from those computer systems analyst positions which do not require at least a bachelor's degree or the equivalent in a specific specialty closely related to their duties. Given the lack

of evidence about the particular client projects designated for the beneficiary, the actual performance requirements of those projects, and the correlation of such requirements with any particular level of academic attainment in a specific specialty, the petitioner has failed to establish both the substantive nature of the actual services that the beneficiary would perform and the nature and educational level of knowledge required to perform them.

As the evidence of record does not indicate that this petition's particular position is one that normally requires at least a bachelor's degree, or the equivalent, in a specific specialty, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The first alternative prong assigns specialty occupation status to a proffered position whose asserted requirement for at least a bachelor's degree in a specific specialty is common to positions in the petitioner's industry that are both (1) parallel to the proffered position and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The AAO here reiterates that the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a U.S. bachelor's or higher degree, but such a degree in a specific specialty that is directly related to the specialty occupation claimed in the petition.

As reflected in this decision's earlier comments, the *Handbook* does not indicate that a computer systems analyst position as so generally described in this petition would require at least a bachelor's degree in a specific specialty. Thus, the *Handbook* does not support a favorable finding under this criterion. The AAO also notes that the record does not include submissions from a professional association or from individuals or other firms in the petitioner's industry attesting to routine employment and recruiting practices.

As the evidence of record does not establish a bachelor's degree or higher in a specific specialty as an industry-wide requirement for positions substantially similar to the one proffered in this petition, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "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." The evidence of record does not develop

relative complexity or uniqueness as an aspect of the position. The information about the position and the duties comprising it is limited to generalized functional descriptions. This generalized information is not supplemented by documentation identifying specific projects in which the duties would be applied, describing the particular components of those projects that are so complex or unique as to satisfy this criterion, and explaining why those components are so complex or unique that their performance necessitates a person with at least a bachelor's degree in a specific specialty.

Next, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), by establishing that the employer normally requires a degree or its equivalent for the position.

To merit approval of the petition under this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency in its prior recruiting and hiring for the position. This petition's record of proceeding does not contain such evidence.

It is important to note that, to satisfy this criterion, the record must also establish that a petitioner's historical imposition of a degree requirement in its recruiting and hiring is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. This requirement resides in section 214(i)(1) of the Act, 8 U.S.C. § 1184 (i)(1), which defines the term "specialty occupation" as requiring both "(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." The petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See Defensor*, 201 F. 3d at 387-388.

The critical element is not the title of the position or an employer's self-imposed standards, but whether the position actually requires or will require the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388. To satisfy this third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) in the context of the present petition, which involves the beneficiary's performing work on client projects, the petitioner must establish that performance of those projects requires or will require the theoretical and practical application of at least a bachelor's degree level of knowledge in a particular specialty.

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance

requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty.

As noted earlier in this decision, the petitioner has limited the record's duty descriptions to generalized and generic terms. They lack the specificity necessary to establish whatever level of specialization and complexity resides in the proposed duties. Consequently, the AAO can reasonably determine no more than that the duties of the proffered position generally comport with those of the Computer Systems Analysts occupation as described in the *Handbook*. The educational requirements for positions in this occupation are so varied, as noted in this decision's earlier discussion of the relevant *Handbook* observations, and the record's duty descriptions are so generalized and non-specific, that there is no basis for the AAO to find the degree association required by this criterion.

For the reasons discussed above, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the appeal will be dismissed, and the petition will be denied.

In reaching its determination on the specialty occupation issue, the AAO found no merit in the petitioner's arguments against the scope of the RFE and against the director's position that an H-1B may not be approved for speculative employment.

The AAO will first address the merits of the petitioner's stance that USCIS overstepped its authority when it requested contract documents. Not knowing the nature of the documents that the petitioner may have submitted if it chose to comply with the RFE request for contract documents, the AAO will not speculate on the possible evidentiary impact that those documents would have had if they had been submitted. It is important to note, however, that separate and apart from the issue of the service center's authority to request contract documents, the director was constrained to base her decision exclusively on the evidence in the record of proceeding, and this evidence was insufficient for approval of the petition.

For the proposition that requests for contracts exceed the scope authorized for RFEs, the petitioner relies, mistakenly, on the memorandum from [REDACTED] INS Office of Examinations, *Supporting Documentation for H-1B Petitions*, HQ 214h-C (November 13, 1995) (hereinafter referred to as the Crocetti memo). While the Crocetti memo states that requests for contracts between the employer and the alien worksite should not be a normal requirement for the approval of an H-1B petition from an employment contractor, the memo does not prohibit such RFE requests. Read as a whole, the memo counsels against issuing RFEs for contracts from employment contractors without a specific need that the requesting officer can articulate for requesting the documents. The memo, the AAO notes, does not require the requesting officer to actually articulate the need. Nor does the memo purport to bar agency officers from issuing RFEs as a matter of policy on any category of H-1B petitioners. Further, this internal memo 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 exercise of their responsibility to adjudicate H-1B petitions in accordance with the applicable statutes and regulations.

The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that “[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation.” Moreover, the regulations at 8 C.F.R. §§ 103.2(b)(8) and 214.2(h)(9)(i) provide the director broad discretionary authority to require such evidence as contracts to establish that the services to be performed by the beneficiary will be in a specialty occupation. A service center director may issue an RFE for evidence that he or she may independently require to assist in adjudicating an H-1B petition, and his or her decision to approve a petition must be based upon consideration of all of the evidence as submitted by the petitioner, both initially and in response to any RFE that the director may issue. *See* 8 C.F.R. § 214.2(h)(9). The purpose of an RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(1), (b)(8), and (b)(12).

The record reflects that clients contracting for the services to be provided by the beneficiary generate the projects upon which the beneficiary would work. It is important to note that the substantive nature of the work actually to be performed by the beneficiary of this petition would be determined by the specific requirements generated by client entities contracting for the beneficiary’s services. Those client entities ultimately determine what the beneficiary would do, and, by extension, whatever practical and theoretical knowledge the beneficiary would have to apply. In these circumstances, documentary evidence from client entities generating the projects upon which the petitioner would work are relevant and material to establishing the specific work that the beneficiary would perform, and, consequently, whether the proffered position is a specialty occupation. However, when the RFE was issued for contract documents, the record was devoid of any substantive evidence from client entities, although their needs directly determine what the beneficiary would actually do on a day-to-day basis. In this context, the AAO finds that the RFE request for contract documents was a proper exercise of the director’s discretionary authority reflected in the above referenced regulations.

Specialty occupation classification is dependent upon the extent and quality of the evidence of record about the actual work to be performed, the associated performance requirements, and the nature and educational level of specialized knowledge in a specific specialty necessary for or usually associated with such performance requirements. Thus, where, as here, the substantive nature of the work to be performed is determined not by the petitioner but by its clients [or its client’s clients], the AAO focuses on whatever documentary evidence the client entities generating the work have issued or endorsed about the work, such as specifications, performance timelines, contract amendments, work orders, and correspondence about performance expectations, to name a few examples.

In support of this approach, USCIS routinely cites *Defensor*, in which an examination of the ultimate employment of the beneficiary was deemed necessary to determine whether the position constitutes a specialty occupation. 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 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 in *Defensor* 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 legacy INS 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.*

Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has 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. Further, the AAO finds that, in the context of the record of proceedings as it existed at the time the RFE was issued, the scope of the RFE was appropriate, in that it addressed 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 AAO finds that the RFE’s request for contractual documents was a reasonable measure towards remedying a material evidentiary deficiency.

Next, the AAO finds no merit in the petitioner’s argument that the director erred to the extent that she based her decision on a finding that the petition is based upon speculative employment. There are two prongs to the petitioner’s argument: (1) that speculative employment is not a basis for denying an H-1B petition; and (2) that “[i]n any case, there is nothing speculative about employment with this petitioner.”

Employment not demonstrated by the record to have been definite for the beneficiary at the time the H-1B petition is speculative employment that does not support approval of the petition. The petitioner’s reliance on a May 23, 2000 decision of the Administrative Appeals Unit (AAU), as the AAO was previously known, bearing receipt number LIN-99-243-50365 is misplaced. As the AAU decision cited on appeal was not published as a precedent for future proceedings, it has no precedential value (*see*, 8 C.F.R. § 103.3(c)). Further, that cited AAU decision is erroneous to the extent that it suggests that the apparently speculative nature of proposed H-1B employment is not a proper subject for USCIS inquiry or a proper reason to deny a 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 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 AAO notes that the Aytes memo, which the petitioner cites but only partly quotes, includes this sentence, not quoted by the petitioner, confirming that an H-1B petition may not be approved on the basis of speculative employment: “The purpose of this particular regulation is to insure that alien beneficiaries accorded H status have an actual job offer and are not coming to the United States for speculative employment.” Memorandum from [REDACTED] INS Office of Adjudications, *Interpretation of the Term “Itinerary” Found in 8 C.F.R. 214.2(h)(2)(i)(B) as it Relates to the H-1B Nonimmigrant Classification*, HQ 70/6.2.8 (December 29, 1995).

Neither the petitioner’s references to the vitality and growth of its business; its assertions that “when it says it has a position, it has a position available”; its claims about its H-1B employment record and its popularity as an employer; its evoking how long the beneficiary has been working for it; nor its assurances and the assurances of its counsel that it will always have H-1B caliber work for the beneficiary establish that, at the time the petition was filed, the petitioner had definite H-1B employment for the beneficiary for the period sought in the petition. 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)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner’s burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Beyond the decision of the director, the AAO also finds that the petition must be denied for the petitioner’s failure to provide an itinerary. The AAO notes that the RFE expressly requested such documentation, in the section asking that the petitioner provide:

- 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[.]

Moreover, independent of any RFE request, the petitioner was obligated to provide an itinerary pursuant to the unambiguous language of the regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) which 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.

The language of the regulation, with its use of the mandatory “must,” indicates that an itinerary is a material and necessary document for a petition involving employment at multiple locations, and that such a petition may not be approved for any employment for which there is not submitted at least the employment dates and locations.

For the mistaken proposition that the itinerary requirement at 8 C.F.R. § 214.2(h)(2)(i)(B) is discretionary or is satisfied by address entries on the Form I-129 and the LCA, the petitioner relies on the memorandum from [REDACTED] INS Office of Adjudications, *Interpretation of the Term “Itinerary” Found in 8 C.F.R. 214.2(h)(2)(i)(B) as it Relates to the H-1B Nonimmigrant Classification*, HQ 70/6.2.8 (December 29, 1995)(hereinafter referred to as the Aytes memo). First and foremost, an agency guidance document, such as the Aytes memo, does not have the force and effect to preempt or countermand the clear mandate of an agency regulation, such as the one at 8 C.F.R. § 214.2(h)(2)(i)(B), that has been properly promulgated in accordance with the Administrative Procedures Act (APA). Further, the AAO notes that the memorandum has no precedential value and, therefore, no binding effect as a matter of law upon USCIS. See 8 C.F.R. § 103.3(c) (types of decisions that are precedent decisions binding on all USCIS officers). Courts have consistently supported this position. See *Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000) (holding that legacy Immigration and Naturalization Serviced (INS) memoranda merely articulate internal guidelines for the agency’s personnel; they do not establish judicially enforceable rights. An agency’s internal personnel guidelines “neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely”); see also *Noel v. Chapman*, 508 F.2d 1023 (2nd Cir. 1975) (finding that policy memoranda to legacy INS district directors regarding voluntary extended departure determinations to be “general statements of policy”); *Prokopenko v. Ashcroft*, 372 F.3d 941, 944 (8th Cir. 2004) (describing a legacy INS Operating Policies and Procedures Memorandum (OPPM) as an “internal agency memorandum,” “doubtful” of conferring substantive legal benefits upon aliens or binding the INS); *Romeiro de Silva v. Smith*, 773 F.2d 1021, 1025 (9th Cir. 1985) (describing an INS Operations Instruction (OI) as an “internal directive not having the force and effect of law”). Further, the Aytes memo qualifies its guidance as being subject to the exercise of the adjudicating officer’s discretion. This is evident in the memo’s statements that the itinerary requirement has been met “[a]s long as the officer is convinced of the bona fides of the petitioner’s intentions with respect to the alien’s employment,” and that “[s]ervice officers are encouraged to use discretion in determining whether the petitioner has met the burden of establishing that it has an actual employment opportunity for the alien.”

Based upon comments in the appeal, it appears that the petitioner subscribes to the erroneous proposition that the itinerary requirement at 8 C.F.R. § 214.2(h)(2)(i)(B) applies only to employment locations and dates known to the petitioner when the petition is filed.

The petitioner’s views on the itinerary requirement is not supported by the language of 8 C.F.R. § 214.2(h)(2)(i)(B). Further, the regulation requires that the itinerary be filed with the petition and that, at petition filing, it specify the dates and locations where the beneficiary is to perform his or her services. Contrary to the petitioner’s view, the regulation does not qualify the itinerary as covering only such locations as known at the time of the petition’s filing. Also, as the regulation states that

the itinerary “must” be filed and provides no exception, the itinerary requirement is not conditional or contingent. Likewise, the Form I-129 Instructions (Revised April 1, 2006) which were current at the time this petition was filed in March 2007 dovetail with the regulation. Page 2 of the Instructions includes this direction:

Multiple locations. A position for aliens to perform services or labor or receive training in more than one location must include an itinerary with the dates and locations where the services or training will take place.

General requirements for filing immigration applications and petitions are set forth at 8 C.F.R. § 103.2(a)(1) as follows:

[E]very application, petition, appeal, motion, request, or other document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions . . . being hereby incorporated into the particular section of the regulations requiring its submission.

Further discussion of the filing requirements for applications and petitions is found at 8 C.F.R. § 103.2(b)(1) which states in part the following :

Demonstrating eligibility at time of filing. An applicant or petitioner must establish that he or she 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.

The petitioner provides no precedential authority for its claim that addresses on the Form I-129 and LCA satisfy the regulatory requirements to file with the petition “an itinerary” and that the itinerary include both the date and the locations where the services will be performed.

Contrary to the petitioner’s view, the clear import of the regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) and the instructions incorporated into the regulation is that an H-1B petition involving employment at multiple locations may not be approved for any part of the employment period specified in the petition for which the location and employment dates are not provided.

The AAO further observes that the attestations from the petitioner and its counsel that H-1B caliber work will always be available for the beneficiary do not satisfy the H-1B itinerary requirement. They are not supported by documentary evidence of definite H-1B caliber work having been specifically reserved for the beneficiary at specific locations and for specific dates. 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. at 165 (Comm. 1998). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's

burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. 506.

Finally, the petitioner's position that it need identify only locations and dates known at the time it files the petition runs counter to the requirement that the petitioner establish eligibility for the H-1B benefit at the time the petition is filed. See 8 C.F.R. §103.2(a)(1). As previously noted, 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; *Matter of Katigbak*, 14 I&N Dec. at 49. In this particular petition, the record of proceeding indicates that the beneficiary will be subject to assignment to additional locations and dates and to project work for additional business entities other than those identified in the petition. To the extent that such clients or clients' clients will generate projects determining the substantive nature of the services that the beneficiary will perform, those clients and their project work for the beneficiary were required to be identified at the time that the petition was filed. Allowing the petitioner to forgo naming such clients at the time the petition is filed would waive the aforementioned petition requirements for whatever part of the employment period the petitioner has no definite information.

THE LCA ISSUE

The AAO makes several preliminary findings with regard to the LCA, namely: (1) that, by its terms, the LCA in this proceeding petition supports the H-1B petition to the extent that the petition seeks employment for the beneficiary (a) for the period specified in the LCA (May 10, 2006 to May 9, 2009); (b) at the locations specified in the LCA (Deerfield, Illinois and Burlington); and (c) at wages that are no less than the Prevailing Wage rates specified in the LCA (that is, \$62,462.00 per year for work in the Deerfield, Illinois area, and \$54,517.00 per year in the Burlington, Vermont area).

The record reflects that the beneficiary has been working in the proffered position in Deerfield, Illinois, from the beginning of the employment period specified in the petition until January 25, 2008, the date of the petitioner's faxing of the appellate brief. The director did not number the beneficiary among the beneficiaries whom she identified as having been paid less than their required wages. On the basis of these facts, the AAO concludes that the LCA supports this petition for the period for which the petitioner appears to have been complying with its terms, that is, the period May 10, 2006 to January 25, 2008.⁴ However, as there is insufficient information in the record for a determination of the locations where the beneficiary would work beyond this period, the AAO will affirm the director's decision on the LCA issue only for the period January 26, 2008 to May 9, 2009, but will withdraw the director's decision to the extent that it found that the petition was not supported by an LCA for the period May 10, 2006 to January 25, 2008.

⁴ Of course, the fact that a petition is accompanied by an LCA appropriate for the whole or part of the employment period does not establish the validity of the petition itself.

The AAO accords no weight to the petitioner's assurance, in its April 17, 2006 letter, that any assignments of the beneficiary to additional client locations will "always [be] in accordance with a Department of Labor certified Labor Condition Application." 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)).

The petitioner errs in contending that an H-1B petition may be approved for the entire employment period for which it is filed, provided that it is filed with an LCA certified for the work location(s) known to the petitioner at the time of filing. The petitioner argues that, if circumstances later develop requiring the beneficiary to be assigned to a location outside the geographical area(s) specified in the LCA, the petitioner need only then supplement the petition with an additional LCA certified for the new location and time anticipated for the beneficiary's work there.

The petitioner's brief on appeal asserts that (1) there is no requirement that [the] petitioner know at the time of petition filing at what locations the beneficiary may work in the future"; (2) that "the [proffered] position exists even without knowledge of future worksites; and (3) "USCIS considers the initial petition to remain valid even when the beneficiary is moved to a location covered by an LCA that was not included with the original petition, and an amended petition is not required." Each assertion will be separately addressed below.

With regard to the first assertion above, the AAO here incorporates its earlier discussion of the requirement at 8 C.F.R. § 214.2(h)(2)(i)(B) that a petition which requires services to be performed 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 petition is located." Pursuant to this regulation, if, as here, an H-1B petition requires services to be performed at more than one location, those locations must be identified, with the related dates of service, in an itinerary filed with the petition. It follows that, at the time of petition filing, the petitioner specify, and therefore know, whatever locations for which it requests petition approval. The petitioner's assertion that "the [proffered] position exists even without knowledge of future worksites" is not persuasive, in light of this regulatory requirement for identification of the multiple work locations at the time the petition is filed. Further, the Form I-129 requires that the petitioner provide the addresses where the beneficiary will work, not the addresses where it is anticipated that the beneficiary will work.

The AAO will now address the two prongs of the petitioner's third assertion, namely, that (1) "USCIS considers the initial petition to remain valid even when the beneficiary is moved to a location covered by an LCA that was not included with the original petition"; and (2) that in those circumstances "an amended petition is not required."

The AAO first notes that the petitioner does not provide any statute, regulation, or precedent decision in support of this third assertion. Instead, it relies upon a legacy INS 1996 internal policy memorandum and two letters from a legacy INS officer, Effren Hernandez III (hereinafter referred to

as the Hernandez letters), responding to inquiries from persons outside the agency. The memorandum is from T. Alexander Aleinikoff, Executive Associate Commissioner, INS Office of Programs, *Amended H-1B Petitions*, HQPGM (August 22, 1996) (hereinafter referred to as the Aleinikoff memo). Mr. Hernandez authored the first letter, dated April 24, 2002, as the Director of Business and Trade Service, INS Office of Adjudications; and he authored the second, dated October 23, 2003, as the Director, Business and Trade Branch.

The AAO's earlier comments about the lack of precedential weight and binding effect of the Aytes memo apply equally to the Aleinikoff memo, and, therefore, for economy's sake are hereby adopted with reference to that memo. As the Hernandez letters, as correspondence, carry even less weight than the Aleinikoff memo, those earlier comments are adopted for the Hernandez letters also. Furthermore, letters and correspondence issued by the Office of Adjudications are not binding on USCIS. Letters written by the Office of Adjudications do not constitute official USCIS policy and will not be considered as such in the adjudication of petitions or applications. Although the letter may be useful as an aid in interpreting the law, such letters are not binding on any USCIS officer as they merely indicate the writer's analysis of an issue. *See* Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, *Significance of Letters Drafted by the Office of Adjudications* (December 7, 2000).

Second, the petitioner's assertion is refuted by the regulation at 8 C.F.R. § 214.2(h)(2)(E), which states:

Amended or new petition. 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.

It is self-evident that a change in the location of a beneficiary's work to a geographical area not covered by the LCA that supported approval of an H-1B petition is a material change in the terms and conditions of employment. Because work location is critical to the petitioner's wage rate obligations, the change deprives the petition of an LCA supporting the period of work to be performed at the new location. It is worth noting that the Aleinikoff memo recognizes the materiality of a change of location requiring a new LCA, as it states in pertinent part, not quoted by the petitioner: "An amended H-1B petition must be filed in a situation where the beneficiary's place of employment changes subsequent to the approval of the petition and the change invalidates the supporting labor condition application."

Moreover, while DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the

content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part:

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

[Italics added]. As 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary, this regulation inherently necessitates the filing of an amended H-1B petition to permit USCIS to perform its regulatory duty to ensure that the new LCA actually supports the H-1B petition filed on behalf of the beneficiary. In addition, as 8 C.F.R. § 103.2(b)(1) requires eligibility to be established at the time of filing, it is factually impossible for an LCA approved by DOL after the filing of an initial H-1B petition to establish eligibility at the time the initial petition was filed. Therefore, in order for a petitioner to comply with 8 C.F.R. § 103.2(b)(1) and USCIS to perform its regulatory duties under 20 C.F.R. § 655.705(b), a petitioner must file an amended petition whenever a beneficiary's job location changes such that a new LCA is required to be filed with DOL.

The AAO recognizes that this is an extension petition. The director's decision does not indicate whether she reviewed the prior approvals of the previous nonimmigrant petitions filed on behalf of the beneficiary. If the previous nonimmigrant petitions were approved based on the same unsupported and contradictory 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 CIS 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). The prior approvals do not preclude USCIS from denying an extension of the original visa based on reassessment of petitioner's qualifications. *See Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

Next, as a cautionary note, the AAO will comment on the petitioner's statement on appeal that two of the letters from the Business and Trade Services section of the INS Office of Adjudications,

“confirm that an H-1B [beneficiary] is not even required to be physically working at all times – the employee may take leave from work or be “benched,” i.e.,] be in an inactive working status . . . and the employer-employee relationship may be seen as continuing to exist.” The AAO makes this comment in light of the petitioner’s use of the word “benching,” which is commonly used in the H-1B context to refer to the illegal practice of reducing or not paying the required wage in response to downturns in available work. As one of the Business and Trade Services letters cited by the petitioner states, “in the ‘benching’ context, an employer must either continue to pay the alien the required wage or, if not, then terminate the alien.” Under the INA’s “no benching” provisions, the employer is obligated to pay the required wage even if the H-1B nonimmigrant is in “nonproductive status” (i.e., not performing work) “due to a decision by the employer” (e.g., because of the lack of work to assign). *See* 8 U.S.C. § 1182(n)(2)(C)(vii)(I); 20 C.F.R. § 655.731(c)(7)(i).

Beyond the decision of the director, the AAO finds that the record does not include the itinerary of the dates and locations of the beneficiary’s services, as required by the regulation at 8 C.F.R. § 214.2(h)(2)(i)(B). **For this reason also, the petition must be denied. The AAO bases this determination on the facts that no such itinerary was filed; that there is no statement as to the duration of the beneficiary’s project work for Walgreens; and that the petitioner indicates that assignments to additional, but as yet unidentified, locations are possible, as in the statement in its April 17, 2006 letter that the beneficiary “may provide onsite professional services to [the petitioner’s] clients at additional locations.”**

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *affd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.