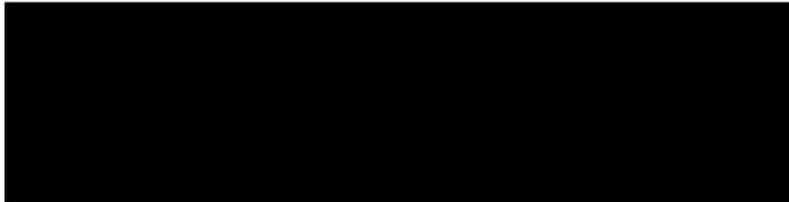


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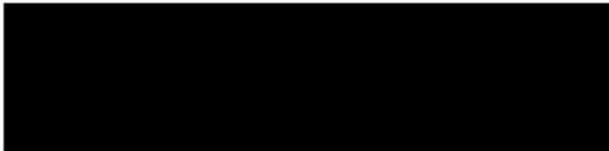
FILE: WAC 07 130 53058 Office: CALIFORNIA SERVICE CENTER Date: **NOV 04 2008**

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:



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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is a software consulting company that seeks to employ the beneficiary as a programmer analyst. The petitioner, therefore, endeavors to extend the beneficiary's classification 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 record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

Section 214(i)(1) of the Immigration and Nationality Act (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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

[A]n occupation which 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 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.

Citizenship and Immigration Services (CIS) 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 proposed position.

The term “employer” is defined at 8 C.F.R. § 214.2(h)(4)(ii):

United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
- (3) Has an Internal Revenue Service Tax identification number.

The director denied the petition on the basis of her determination that the petitioner had failed to establish that it had not misrepresented itself before CIS. In pertinent part, the director stated the following in her July 13, 2007 denial:

The issue to be discussed is whether the petition and all evidence submitted with it is credible and sufficient to establish that the petitioner has complied with the terms and conditions of employment. . . .

* * *

[W]hen a petitioner signs the petition, he or she is certifying that the petition and all evidence submitted with it, either at the time of filing or thereafter, is true and correct. . . .

The petitioner’s aberrant employment of the aliens approved for H-1B work, the discrepancies and the conflicting statements regarding wages paid to H-1B beneficiaries versus those actually paid raises legitimate concerns about all evidence submitted by the petitioner to establish that it will comply with the terms and conditions as stated in the petition. . . .

* * *

Discrepancies encountered in the evidence call into question the petitioner’s ability to document the requirements under the statute and regulations. The discrepancies in the petitioner’s submissions have not been explained satisfactorily. . . .

* * *

The evidence is insufficient [to establish] that the petitioner has not misrepresented itself.

The director identified nine specific areas of concern in her denial, and the AAO will address each finding in turn. In her first area of concern, the director stated that although the petitioner asserted that the beneficiary would not work as a software consultant for any other company, the record indicated otherwise. Newly-retained counsel states the following in his September 11, 2007 appellate brief:

Among other services which the company provides, as described in the company's letter in support of its original petition, is software consulting services. The petitioner has been clear throughout this process that it provides software consulting services and in no way attempted to conceal this nor would it have any reason to do so. The Petitioner has been equally clear that the beneficiary will not act as a consultant or, in other words, be sub-contracted out to a third party. At that time, the Petitioner had been hired by the Early College Academy for a software development project which was to be performing services under that agreement. Substantial documentation of the project was provided to the Service in response to its RFE. This was not, nor was it ever, intended to be an off-site project to which the beneficiary was to be assigned. . . .

The work order was for an in-house software development project . . . not to place the beneficiary on an off-site project . . . [T]he evidence supports precisely the conclusion that the Petitioner has been asserting. The beneficiary was to be hired to perform services under the Early College Academy agreement which was in place at that time and that said services were to be performed in-house at [the petitioner].

While the AAO does agree with newly-retained counsel that the "work order" submitted by previous counsel in his response to the director's request for additional evidence is not evidence that the beneficiary would perform services for third-party clients, as it was prepared by the petitioner itself and was not issued pursuant to a consulting services agreement, the AAO nonetheless disagrees with his contention that the petitioner has been "clear that the beneficiary will not act as a consultant."

In its March 19, 2007 letter of support, the petitioner stated that the beneficiary's duties would consist of providing services to its clients. Specifically, the beneficiary would design, program, and implement software applications and packages for the petitioner's clients; review, repair, and modify software programs; analyze the petitioner's clients' communication, informational, database, and programming requirements; review the petitioner's clients' information systems to determine their compatibility with projected or identified client needs; train the petitioner's clients on the use of information systems; and provide technical and de-bugging support to the petitioner's clients. The petitioner also stated the following:

We partner with clients in providing high quality, cost-effective software solutions and consulting services. With our combined IT services experience, we help our customers compete and achieve their goals of competitive advantage, manage change and transform their businesses through high-quality, cost-effective business information solutions.

However, at the time it responded to the director's request for additional evidence, the petitioner amended the proposed job duties for the beneficiary. According to the employment agreement submitted by the petitioner at that time, the beneficiary would perform the following tasks:

Analyze computer and business problems of existing and proposed systems as well as initiate and enable specific technologies that will maximize our company's ability to deliver

more efficient and effective technological and computer related solutions to our business clients.

According to the "Work Itinerary," also submitted in response to the request for additional evidence, the petitioner stated that the beneficiary would spend 12 months on web development, analysis, and testing, and product customization; and 24 months on functional enhancements, modifications, performance evaluation criteria, custom reports, images, and website navigation.

At the outset of its analysis of whether the evidence of record indicates that the petitioner would in fact place the beneficiary at multiple work locations to perform services for the petitioner's clients, the AAO notes that the record establishes that the petitioner will act as the beneficiary's employer in that it will hire, pay, fire, or otherwise control the work of the beneficiary.¹ See 8 C.F.R. § 214.2(h)(4)(ii).

The AAO turns next to the question of whether the record indicates that the beneficiary would perform services for the petitioner's clients, as found by the director, or that the beneficiary would perform in-house services for the petitioner, as asserted by counsel.

The AAO agrees with the director's findings in this regard. In making this determination, the AAO relies primarily on the duties proposed for the beneficiary in the petitioner's Mach 19, 2007 letter of support. Those proposed duties, which were delineated above, are consistent with those of a programmer analyst who would provide consulting services to the petitioner's clients pursuant to consulting agreements between those clients and the petitioner. As noted previously, the petitioner amended the job duties between the time the petition was filed and its response to the director's request for additional evidence. At the time the petition was filed, the proposed job duties centered around such tasks as programming and implementing software applications and packages to meet specific client needs; analyzing the petitioner's clients' communications, informational, and database requirements; researching and selecting appropriate systems for the petitioner's clients; providing technical support, etc. At the time of its response to the director's request for additional evidence, the petitioner altered the duties so that the beneficiary would focus on one product: the petitioner's "Performance Monitoring Solutions" software program, to be designed for unidentified early college academies. These are not the same duties that existed at the time the petition was filed.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits approval. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather altered the job description in a material fashion. Therefore, the AAO's analysis of this criterion will be based upon the job description submitted with the initial petition.

¹ See also Memorandum from Michael L. Aytes, Assistant Commissioner, 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).

The duties proposed for the petitioner at the time the petition was filed strongly indicate that the petitioner intends to place the beneficiary at work locations pursuant to consulting agreements with third-party clients. Given the nature of these duties, as initially proposed, the nature of the petitioner's business, and remaining questions regarding the petitioner's credibility,² the AAO concludes that, although the petitioner will act as the beneficiary's employer, the evidence of record establishes that the petitioner is an employment contractor in that the petitioner will place the beneficiary at work locations to perform services established by contractual agreements for third-party companies.

Pursuant to the language at 8 C.F.R. § 214.2(h)(2)(i)(B), employers must submit an itinerary with the dates and locations of employment if the beneficiary's duties will be performed in more than one location. While the Aytes memorandum cited at footnote 1 broadly interprets the term "itinerary," it provides CIS the discretion to require that the petitioner submit the dates and locations of the proposed employment. As the evidence contained in the record at the time the petition was filed indicated that the beneficiary would be placed at various work locations to perform services established by contractual agreements for third-party companies, and did not establish that the petitioner had three years of work for the beneficiary to perform, the director properly exercised her discretion to require an itinerary of employment for the three-year period of requested employment in her April 16, 2007 request for additional evidence.³

The evidence contained in the record does not satisfy 8 C.F.R. § 214.2(h)(2)(i)(B) as the AAO does not accept the "Work Itinerary" submitted in response to the request for additional evidence. This document was not signed by any early college academy. There is no evidence that the project was accepted by any early college academy or that any work is underway. There is evidence of a proposal for new products, some evidence of past work for a different client, the Dayton Early College Academy, through MicroStrategy, but the petitioner was not the primary developer on the Dayton Early College Academy project. Rather, it was simply part of that project, as reflected by the submitted press release. The details of the proposal for new products are unclear: it appears as though the petitioner would be developing a product for use by others, but there is no evidence of the project's existence. As such, the petitioner has not complied with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B) and the petition cannot be approved. The petitioner has failed to submit an itinerary of services to be performed covering the entire period of requested employment.

Moreover, the record does not establish that the proposed position is a specialty occupation. The court in *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000) held that for the purpose of determining whether a proposed 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." 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.

As the record does not contain any documentation that establishes the specific duties the beneficiary would perform under contract for the petitioner's clients, the AAO cannot analyze whether these duties 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

This issue will be discussed more fully later in the decision.

³ As noted by Assistant Commissioner Aytes in the cited 1995 memorandum, "[t]he purpose of this particular regulation is to [e]nsure that alien beneficiaries accorded H status have an actual job offer and are not coming to the United States for speculative employment."

position qualifies for classification 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).

In her second area of concern, the director noted differing salary figures for the beneficiary contained in the record. As noted by the director, the petitioner stated on the Form I-129 and certified labor condition application (LCA) that the beneficiary would be compensated at a rate of \$50,086 per year. However, in the employment agreement, the petitioner and the beneficiary agreed to a salary figure of \$52,000. Specifically, the director stated the following:

Additionally, these varying annual rates do not appear to be firm offers because they are subject to adjustments. Part 2, item b of this agreement states in part, "Employer may at times adjust salaries depending on overall company performance [emphasis by director]..." There is no explanation [as to] whether the adjustments are decreases or increases especially when the evidence indicates significant fluctuations in the petitioner's gross yearly incomes. Without explanation, it appears that the alien's annual compensation may be subjected to decreases during years of bad performance.

The AAO notes that, according to its tax returns, the petitioner's gross income in 2004 was \$144,970, its gross income in 2005 was \$457,190, and its gross income in 2006 was \$180,424. The petitioner reported to the Internal Revenue Service (IRS) that it paid \$66,720 in wages in 2004, \$31,296 in wages in 2005, and no wages in 2006.⁴ The AAO notes further that, although the petitioner paid no wages in 2006, it claims that it employed [REDACTED] pursuant to the American Competitiveness in the Twenty-First Century Act⁵ (AC-21) beginning on November 7, 2006.

In rebuttal, counsel states the following on appeal:

The beneficiary is to be paid \$52,000 per year pursuant to the employment agreement . . . This is a guaranteed rate as the contract states that this salary "shall be paid." The wage rate of \$50,086, which is enumerated on the petition reflects the prevailing wage for the position, not the actual wage. This wage was errantly enumerated by prior counsel as the actual wage, which may have resulted from a simple mis-communication with the petitioner.

The offer of \$52,000 per year is a firm offer pursuant to Part Two, Paragraph A of the employment agreement with the beneficiary. The language of that paragraph states specifically, "employee shall receive a salary of \$52,000 per year payable in equal installments each month." The use of the word "shall" indicates an absolute agreement to pay the stated salary. Paragraph B of Part Two of that same employment agreement only permits the employer to adjust the beneficiary's pay upward based upon merit, upon the companies [sic] overall performance or upon cost-of-living changes. This paragraph does

⁴ Although the petitioner reported on its tax return that it paid no wages in 2006, the AAO notes that it also informed the IRS, via its Form W-3, that it employed two individuals in 2006 and paid them \$61,841.40 in wages, tips, and/or other compensation. It also reported two employees on its Forms 941 and quarterly wage reports to the State of Ohio: [REDACTED] and [REDACTED]

⁵ American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251 (2000).

not permit the employer to adjust the employees [sic] salary downward. Otherwise it would render the meaning of the word "shall" in Paragraph A meaningless.

The AAO finds counsel's assertions unconvincing. Although counsel asserts that revising the beneficiary's salary downward would render the meaning of the word "shall" meaningless, adopting counsel's interpretation would also render meaningless the phrase "[e]mployer may at times adjust salaries." The employment agreement does not state that the beneficiary's salary cannot be adjusted downward. The plain language of the document does not preclude a downward adjustment of the beneficiary's salary: it simply states that it may be adjusted depending upon the petitioner's performance. Given the petitioner's sharp increase and decrease in the gross revenue reported to the IRS, as well as the sharp increase and decrease in the amount of wages reported to the IRS, the record in this particular case does not support counsel's reading of the employment agreement. The petitioner has not established that it will comply with the terms and conditions of the certified LCA, as required by 8 C.F.R. § 214.2(h)(4)(iii)(B)(2). It has not overcome the concerns of the director.

In her third area of concern, the director noted significant annual fluctuations in the petitioner's income, stating the following:

When the petitioner's Federal Income Tax Returns, Form 1120S were reviewed, it indicates [sic] a significant fluctuation in the gross annual income. In 2005, the petitioner earned a gross income of \$457,190.00 and paid \$31,296.00 in wages [and] salaries. The 2006 tax return indicates significant drop in gross annual income to \$180,424.00 in 2006 with no salaries and wages paid. During these two tax years, the petitioner claims to have employees . . . The pattern by which this petitioner pays salaries in relation to its annual performance raises legitimate concerns as to whether the proffered position and wages are bona fide.

The AAO agrees with the director, and incorporates here its earlier discussion regarding the petitioner's tax returns and payment of salaries and other compensation. In light of its contractual provision with the beneficiary that the petitioner may adjust the salary depending upon company performance, the petitioner has not established that it will comply with the terms and conditions of the certified LCA. It has not overcome the concerns of the director in this regard.

In her fourth area of concern, the director noted that the evidence of record contradicted one of the petitioner's claims:

It is noted that in Part 5 of the petition, Form I-129, the petitioner certified that the company's gross annual income is \$600,000.00. However, the record does not support its claim, nor has the petitioner offer[ed] explanation.

As noted previously, according to its tax returns, the petitioner's gross income in 2004 was \$144,970, its gross income in 2005 was \$457,190, and its gross income in 2006 was \$180,424. The instant petition was filed on April 2, 2007, so 2006 would have been the most recent year from which to draw data at the time the petition was filed. Given that the petitioner reported to the IRS that its gross income in 2006 had been \$180,424, it is unclear to the AAO why the petitioner certified to CIS that its gross income was \$600,000.

On appeal, counsel states the following:

The gross annual income figure of \$600,000 provided on the H-1B petition reflects the company's projected gross income for 2007, the tax year during which the petitioner intended to employ the beneficiary. The petitioner was advised by prior counsel that the \$600,000 figure was an appropriate figure to provide to the Service because the Service's interest is in the petitioner's ability to pay the stated wage at the time the petition was filed, not during a prior year.

The Form I-129 does not request a projected gross annual income. The Form I-129 specifically requests the petitioner's "gross annual income." The petitioner's gross annual income was clearly not \$600,000 at the time the petition was filed. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Counsel states that the petitioner did not provide the \$600,000 projection in an attempt to deceive, but on the advice of prior counsel. However, an appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). None of these items has been provided.

Moreover, the petitioner did not inform CIS that the figure it was providing was a projection. The petitioner has failed to overcome the concerns of the director in this regard that it will employ the beneficiary in a specialty occupation during the period of requested employment.

The director went beyond the record of proceeding in her fifth, sixth, and seventh areas of concern without first placing the petitioner on notice that she was doing so. As such, these three areas of concern are not valid grounds for denial (although the other evidence establishes that this petition is not approvable). As the director made them part of the record, and counsel responded to them on appeal, the director's fifth, sixth, and seventh areas of concern will be addressed in this decision, but will not be considered independent grounds for denial.

The petitioner certified, on the Form I-129 (filed on April 2, 2007), that it has four employees. In her fifth area of concern, the director noted that, in its response to the director's request for additional evidence, the petitioner stated that it had had five employees since November 13, 2006. The director stated the following:

[Sowmya Rao Inna] is declared as being hired on November 13, 2006. However[,] [the] Service record indicates this petition was denied [o]n May 10, 2007. . .

Counsel offers the following rebuttal:

The petitioner filed a petition to transfer employment to the petitioner on November 7, 2006. Ms. [REDACTED] was lawfully employed with the petitioner under the AC-21 rules from that date until the petition was denied [on May 10, 2007]. During this time the Petitioner properly recognized her as an employee. . .

The record does not support counsel's assertion that [REDACTED] was an employee of the petitioner between November 7, 2006 until May 10, 2007. The petitioner reported to the IRS on its 2006 tax return that it had paid no wages in 2006. Although the petitioner did report payment of wages to the IRS on the Forms 941 and W-3, as well as to the State of Ohio in 2006, it reported only two employees throughout 2006. In the quarterly wage reports submitted to the State of Ohio, those two employees were identified as [REDACTED] (identified in the record as the petitioner's vice president) and [REDACTED] (identified in the record as the petitioner's president).⁶ The record does not indicate that the petitioner paid any wages to [REDACTED] in 2006. Nor does the record indicate that the petitioner paid any wages to its other two claimed employees in 2006: (1) [REDACTED] and (2) [REDACTED]. The petitioner claims that it employed [REDACTED] and [REDACTED] in 2006 in H-1B status in 2006, yet the record indicates that it did not pay wages to any of them.⁷ Beyond the director's concern, the AAO notes that a similar issue existed in 2005: its Form W-3 for that year indicates three employees, but the petitioner told the director that it had four employees in 2005 ([REDACTED], [REDACTED], and [REDACTED]).⁸ It does not appear that [REDACTED] was paid any wages in 2005. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* The AAO agrees with the director that the petitioner failed to establish that it employed [REDACTED] as claimed.

In her sixth area of concern, the director noted the discrepancies outlined by the AAO in the preceding paragraph regarding the petitioner's apparent failure to compensate its H-1B employees in 2005 and 2006. The director provided a chart for the petitioner's reference, and stated that, according to her analysis, it did not appear that the petitioner's statements regarding its H-1B beneficiaries' status, wages, and hours worked were not true and correct.

On appeal, counsel states the following:

The simple explanation for the lack of wages paid to [REDACTED] in 2005 and 2006 is that [REDACTED] did not join the company until July 23, 2007 . . . He was unable to come to the United States for personal reasons. Furthermore, the company does not represent that [REDACTED] was in their employ during 2005 and 2006. The only reference to [REDACTED] as an employee of the company is from a cover letter written by prior counsel in response to the Service's request for additional evidence. However, the company simply provided prior counsel with a list of individuals for whom it had applied for H-1B

⁶ Of the \$76,841 that the petitioner stated on the Form W-3 it had paid to its employees in salaries in 2006, the Forms W-2 indicate that [REDACTED] received \$45,341, and that [REDACTED] received \$31,500. These two individuals together earned \$76,841, the total amount that the petitioner paid out in salaries that year (reported as "compensation of officers" on the tax return).

⁷ As such, the record indicates that the petitioner violated the terms and conditions of the certified LCA's pertaining to the H-1B petitions of those individuals.

⁸ Of the \$162,296 that the petitioner stated on the Form W-3 it had paid to its employees in salaries in 2005, the Forms W-2 indicate that [REDACTED] received \$55,500, that [REDACTED] received \$75,500, and that [REDACTED] received \$31,296.

status and never intended that said list would be represented as its current employees. It was the Petitioner's understanding that the Service wanted a list of those individuals on behalf of whom it had filed petitions in the past.⁹ Thus, the representation that Mr. [REDACTED] was a current employee was made by [previous] counsel in his cover letter and was never intended to be represented as such by the company. The petitioner applied for and received approval for an H-1B for [REDACTED], however, [REDACTED] did not join the petitioner until July of this year [2007].

The simple explanation for the lack of compensation for [REDACTED] in 2006 is that [REDACTED] left the petitioner and joined another company at the end of 2005. Thus, he was compensated for the time he worked with the Petitioner which was less than one year which is why his wages do not reflect the annualized salary he was to be paid under his approved H-1B petition.

It is evident, therefore, that the lack of compensation in no way reflects fluctuations in pay based upon the performance of the company as suggested by the Service. Rather, the lack of compensation reflects appropriate compensation for those who actually worked for the petitioner during the time that they worked.

Counsel's assertions conflict with the evidence submitted previously. In her April 16, 2007 request for additional evidence, the director specifically requested a "[l]ist of all nonimmigrant employment employees." The petitioner submitted a list entitled "[l]ist of all employees, each persons education, job title and receipt number," and previous counsel's June 23, 2007 letter referred to this list as a "[l]ist of non immigrant employees." As noted previously, counsel now claims that the petitioner did not intend to represent these two individuals as current employees. The AAO will not accept counsel's assertion. An appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). None of these items has been provided. The record, as currently constituted, contains inconsistent information from current and previous counsel. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* Further, the AAO notes that current counsel provides no documentation, such as copies of the petitioner's letters to CIS and the Department of Labor withdrawing the H-1B petitions and

⁹ CIS records indicate that the petitioner has filed at least seven H-1B petitions. If previous counsel and the petitioner believed that the director sought a list of "those individuals on behalf of whom it had filed petitions in the past," and not a list of current employees, as asserted by current counsel, then the list would have included those individuals as well. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

certified LCA's, in support of his contention that that [REDACTED] and [REDACTED] in fact quit working on the dates asserted.¹⁰ 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). The petitioner has failed to overcome the concerns of the director that it has previously complied with the terms and conditions of approved H-1B employment.¹¹

In her seventh area of concern, the director stated the following:

While the two aliens mentioned above [REDACTED] and [REDACTED] have not been compensated according to their stated annual rates of pay, the petitioner's Tax Returns indicate deductions were claimed as expenses in software development in 2006 and deductions on expenses in 2005 paid to independent contractors. It does not appear in the past, that the petitioner has had employer to employee relationships with these two previously approved H-1B aliens.

On appeal, counsel states the following with regard to the deductions at issue:

The company also took deductions in the amount of \$54,530.00 for outside services/independent contractors . . . These deductions are wholly unrelated to [REDACTED] and represent deductions for the use of offshore software development services in India and for individuals who were hired as independent contractors who were already permanent residents of the United States.

In 2006, all deductions represent deductions for services of offshore development companies that the petitioner hired to assist with software development projects. . .

While the AAO finds counsel's assertions regarding the deductions reasonable as they pertain to its use of offshore software development services in India, it does not accept them as conclusive resolution of whether [REDACTED] and [REDACTED] were actually employees of the petitioner during this time, pursuant to the AAO's analysis of this matter in its discussion of the director's sixth area of concern. There are too many unanswered questions for the AAO to accept the petitioner's assertions at face value. Again, doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). The AAO finds that the petitioner has failed to overcome the concerns of the director that it had an employment relationship with either of these beneficiaries.

In her eighth area of concern, the director stated the following:

¹⁰ The regulation at 8 C.F.R. § 214.2(h)(11)(i)(A) requires that the petitioner "immediately notify the Service of any changes in the terms and conditions of employment of a beneficiary which may affect eligibility . . . If the petitioner no longer employs the beneficiary, the petitioner shall send a letter explaining the change(s) to the director who approved the petition."

¹¹ As noted by the director, these petitions are subject to revocation on notice.

The petitioner failed to submit evidence of a business license requested in the RFE. There also are two addresses in the record, one in Columbus City and another in Lewis Center, Ohio.

Counsel states the following on appeal:

The fact of the matter is that the [S]tate of Ohio does not issue business licenses, period. This office contacted the State of Ohio and confirmed this fact. Therefore, it was impossible for the petitioner to provide that document.

The AAO finds counsel's response deficient. First, counsel elected not to address the director's statement that the record contained two addresses for the petitioner. Second, counsel offers no explanation of the petitioner's failure to address the issue of licensure in response to the director's request for additional evidence. Third, the AAO notes that the director's April 16, 2007 request for additional evidence requested copies of the petitioner's "current valid city, county, state and federal government business licenses." Counsel has not addressed the issue of the petitioner's city and/or county business license. If such licenses do not exist, counsel has failed to indicate as such. The petitioner has failed to overcome the concerns of the director in this regard.

Finally, the AAO turns to the director's ninth area of concern. The director stated the following:

In the support letter, the petitioner declares itself a software development, training and . . . staffing company. The petitioner's website states that it operates a training facility 7 days a week with instructors. The record, without documentary evidence, is not persuasive of the petitioner's ability to produce all the services and products it alleges.

On appeal, counsel offers the following rebuttal:

In item 9 the Service states that it is not persuaded of the petitioner's ability to produce all the services it alleges. We respectfully submit that this conclusion is based upon the aggregate effect of its erroneous beliefs about items 1-8. The Petitioner provided a signed lease agreement with plans and layouts for the space. In addition to that information, the company's website provides an abundance of information about the training offered and downloadable information about the program.

The "signed lease agreement with plans and layouts for the space" referenced by counsel are not contained in the record of proceeding. However, the AAO finds that other evidence of record, such as the petitioner's tax returns, payroll information, and website printouts, though deficient in other respects, are indicative of a company that is actually conducting business. As such, the AAO finds that the petitioner has overcome this concern of the director.

Pursuant to the previous discussion, the AAO finds that the petitioner has failed to establish that the proposed position qualifies for classification as a specialty occupation, that the beneficiary would be performing services in a specialty occupation, or that the employer has submitted an itinerary of employment.

For all of these reasons, the petition may not be approved. 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), *aff'd*. 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.