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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
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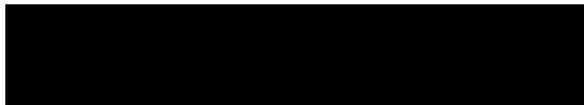
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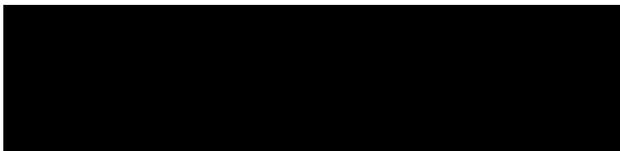
FILE: EAC 09 088 51701 Office: VERMONT SERVICE CENTER Date: **APR 30 2010**

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 in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

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

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a software development services company. It seeks to employ the beneficiary as a software engineer and to classify him 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 the following grounds: (1) the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation; and (2) the petitioner failed to submit a credible itinerary.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) Form I-290B with counsel's brief and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

In the petition submitted on February 3, 2009, the petitioner stated it has over 430 employees and a gross annual income of over \$51 million. The petitioner indicated that it wished to employ the beneficiary as a software engineer from February 11, 2009 to February 10, 2010 at an annual salary of \$60,000.

The support letter states that the person in the proffered position will be responsible for performing the following duties:

- Research, design, develop and test software/systems applications with product development and enhancement in a client/server environment using Oracle, Siebel, DB2, EIM, EAI and Actuate Developer Workbench on Windows NT and UNIX operating systems.

The letter also states that specific projects may include:

- Design, development, implementation and testing of Siebel Sales, Siebel eCommunications and Siebel Finance (eFinance) applications;
- Design and maintenance of Siebel data models using Siebel tools;
- Modify software designs and specialized utility programs and provide status reports to project manager; and
- Coordinate application development with project team under the closer supervision of project manager.

The petitioner describes the minimum degree requirements for the proffered position as follows:

[t]his position of Software Engineer requires the services of a skilled professional who possesses the minimum of a Bachelor's Degree. American Solutions is committed to providing our clients with innovative and sound solutions to meet their technology needs. Our clients expect our technical professionals servicing their needs to be the best in the

field, highly educated and well trained. We therefore require that our Software Engineers possess the minimum of a Bachelor's Degree or equivalent in one of a variety of industry-recognized areas including Computer Science, Engineering, Computer Applications, CIS, Management, Electronics, Technology, Mathematics, Business, Communications or a related field. Such an educational background is a pre-requisite with our company, and would be required for analogous positions within [the petitioner]. Please note, we would also consider a foreign degree if it was determined to be equivalent to a degree earned by an accredited college or university in the United States. .

The Form I-129 indicates that the beneficiary will work at the petitioner's offices in Newark, DE as well as Chatham, IL and Cumming, GA. Two Labor Condition Applications (LCA) were submitted for a software engineer to work in Newark, DE, Chatham, IL, and Cumming, GA from February 11, 2009 to February 10, 2012. The LCAs list a prevailing wage of \$55,515 for Newark, DE, \$59,758 for Chatham, IL, and \$59,176 for Cumming, GA. According to the Form I-129, the beneficiary has been working for the petitioner based on a previously approved H-1B petition and resided in Cumming, GA at the time the petition was filed.

The petitioner submitted the beneficiary's education documents, certificates, and reference letters, indicating that he has a foreign degree. Additionally, the petitioner submitted a credential evaluation, which states that the beneficiary's foreign education is equivalent to a bachelor of science degree in computer science from an accredited U.S. institution of higher education in the United States.

The petitioner also submitted a copy of a certified Labor Certification Application filed on behalf of the beneficiary. The Labor Condition Application states in Part H, box 14, regarding the beneficiary's proposed employment, "Position requires extended travel and/or relocation to project sites/locations throughout the United States."

On March 9, 2009, the director issued an RFE stating, in part, that the evidence of record is not sufficient to demonstrate that a specialty occupation exists. The petitioner was advised to submit additional evidence establishing that the beneficiary will perform the proffered duties, an itinerary of where the beneficiary will work, copies of contracts between the petitioner and the end client(s), and a clarification of the beneficiary's assignment with any end user client(s).

The petitioner responded, in pertinent part, as follows:

[W]e submit a detailed end client letter as requested for the consultant's current assignment, signed by someone in management who can be contacted for confirmation, with currently scheduled end date and mention of the likelihood of extension. . . .

We have supplied the contract with our immediate client, but not our client's contract with its client or further down any chain of contracting to the end client. Our clients consider these contracts confidential and generally will not share them with us. We do not believe those documents are important to your analysis, as the end client letters are

complete concerning the duties and location, and you can confirm this information as necessary with the end client contact identified. . . .

[F]or consultants for whom we filed to extend existing H-1B with our company, we filed this LCA with the petition but are supplying another copy now, and we are supplying for those consultants an LCA also for any location to which we have moved them since filing the I-129. For consultants who at time of I-129 filing were in OPT status . . . we filed with the I-129 an LCA for our Delaware headquarters (not knowing for sure where they would be by October 1, 2008 when H-1B requirements would take effect and planning to follow our normal past practice of filing an LCA for their current location immediately upon H-1B approval), and we are in this response supplying an LCA for the current location, now that we understand that you are newly insisting on a specific location.

* * *

[T]he end client or its agent manages the specific technology project to which our consultant is assigned at the end client location.

* * *

[T]he end client identifies and manages the specific technology project and assigns specific tasks to the consultant. We provide support through computers, training, backup expertise, benefits, pay, administration, etc. . . .

[Emphasis added.]

In response to the RFE, the petitioner included a signed letter from [REDACTED] at a company called COMSYS, located in Atlanta, GA. The letter, which is dated April 14, 2009 and is addressed "To Whom It May Concern," indicates that the beneficiary is a subcontractor of COMSYS and is working in Alpharetta, GA at the site of COMSYS's client, Alltel Communications. The letter further states that the beneficiary's contract has an end date of June 30, 2009.

No contracts were provided to support the information provided in the letter from COMSYS. 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 director denied the petition on June 2, 2009.

On appeal, counsel submits additional documentation regarding the beneficiary's work on the project with Alltel, including:

- A time sheet for the beneficiary's work. The time sheet indicates the project with Alltel started January 1,

2009 and will end on December 31, 2009, although the beneficiary's work performed in the time sheet is only for the period of June 7, 2009 to June 13, 2009. The beneficiary's title listed in the job posting is Senior Application Support Analyst. The Time Sheet also indicates that Verizon Wireless is the client/buyer for this project with COMSYS being the supplier.

- Two supplier Purchase Orders issued in accordance with a Subcontractor Services Agreement between COMSYS and the petitioner, a copy of which is not provided. The first Purchase Order, which is dated May 8, 2009, states that the term of employment starts May 10, 2009 and ends June 30, 2009 for the beneficiary to work on the Alltel project. The second Purchase Order, which is dated June 15, 2009, states that the term of employment starts May 11, 2009 with an anticipated end date of June 30, 2009 for the beneficiary to work on the Alltel project.
- Two IT Contractor Resource Extension/Updates. The first indicates that the beneficiary's job title is a Client Server Dev/Analyst III and that his work on the project for Alltel in Alpharetta, GA would be extended to December 31, 2008 (from June 30, 2008). The second indicates that the beneficiary's work on the project for Alltel in Alpharetta, GA would be further extended to June 30, 2009.
- A copy of an email from [REDACTED] from Verizon Wireless, dated June 16, 2009, which states, "I was wondering if you could help me with this request from several of the contractors [including the beneficiary]. Evidently they need some employment validations for their visas. Is this something that we can do? I know [the beneficiary] went to *his agency* for this, but the immigration department would not accept the letter that they had prepared. . . ." [Emphasis added.]
- A copy of the beneficiary's badge, which indicates that he is an Associate at Alltel.
- An affidavit from a co-worker of the beneficiary, confirming that he is working on a project at Alltel/Verizon Communications in Alpharetta, GA.

Based on the documents submitted, it appears that, at best, the beneficiary would be assigned to the project for Alltel in Alpharetta, GA until June 30, 2009, or between four and five months of the period of time requested in the H-1B petition, which does not cover the petition's duration. The petitioner has not provided any evidence to support what work the beneficiary would perform for the remaining seven to eight months.

Counsel does not submit any contracts on appeal, such as the Subcontractor Services Agreement, stating that "[T]he mere fact that a petitioner is an employment contractor is not a reason to request such contracts." Counsel further argues that the petitioner is not required to provide contractual evidence under *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000), because the position at issue in *Defensor*, a nurse, is non-professional, whereas the present petition is for a software engineering position, which is a professional occupation. However, the application of *Defensor* is not determined by whether the proffered position is professional. Instead, an analysis of whether the proffered position is a specialty occupation under *Defensor* is appropriate whenever the petitioner intends to have the beneficiary work on a project for another entity.

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

specialized knowledge in a specific discipline that is necessary to perform that particular work. The record of proceedings lacks such substantive evidence from any end-user entities that may generate work for the beneficiary and whose business needs would ultimately determine what the beneficiary would actually do on a day-to-day basis.

Counsel further asserts that the standard of proof to be met by the petitioner is a preponderance of the evidence, which means that it only has to demonstrate that the matter asserted is more likely than not true. The AAO agrees that the petitioner's standard of proof is based on a preponderance of the evidence standard, however the petitioner did not meet its burden with regard to this standard. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965).

The burden of proof is on the petitioner to either demonstrate that the petitioner does not intend to contract the beneficiary to another entity or, if, as in this case, the petitioner intends for the beneficiary to perform work on behalf of another entity, to demonstrate that the petitioner will directly control the beneficiary's work and conditions of employment. By not submitting a copy of the petitioner's employment contract with the beneficiary and/or copies of contracts with the petitioner's client(s) for the project(s) on which the beneficiary would allegedly work, the petitioner has precluded U.S. Citizenship and Immigration Services (USCIS) from following a line of material inquiry to determine where and for which entity the beneficiary would actually work.

Under a preponderance of the evidence standard, given the inconsistencies in the petitioner's statements and the lack of documentation regarding where the beneficiary would work after the Alltel project ends on June 30, 2009, the petitioner has not demonstrated that the beneficiary would more likely than not work at the locations performing the job duties as outlined in the documents submitted with the petition. Moreover, the documentation presented in response to the RFE indicates that the petitioner intends to contract the beneficiary to another company, which will then contract the beneficiary to yet another entity. However, the petitioner did not present any documentation, such as contracts, to show that it will control the beneficiary's work and conditions of employment. In fact, the petitioner's statement, "[T]he end client identifies and manages the specific technology project to which our consultant is assigned at the end client location," indicates that it is the third party client, and not the petitioner, which controls the beneficiary's work and conditions of employment. Therefore, the petitioner did not satisfy its burden of proof under a preponderance of the evidence standard.

Having discussed the primary evidentiary deficiencies in the record, the AAO will first consider whether the proffered position is a specialty occupation. 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 regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

Specialty occupation means an 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, a proposed position must also meet one of the following criteria:

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary and sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d at 387. 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), USCIS consistently interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the

occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

To make its determination whether the proffered position qualifies as a specialty occupation, the AAO first turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations, or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Factors considered by the AAO when determining these criteria include: whether the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty 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)).

As discussed above, the petitioner indicates that the beneficiary will work at a third party client's offices in Alpharetta, GA. Therefore, under *Defensor v. Meissner*, 201 F.3d at 387, the failure to provide copies of contracts establishing the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines: (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner's normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

However, even if the petitioner had credibly demonstrated that the beneficiary's work and terms of employment would be controlled by the petitioner for the duration of the petition, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which assigns specialty-occupation status to a position for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties.

Although the petitioner characterizes the proffered position as that of a software engineer, the AAO finds that the petitioner did not provide sufficient evidence, such as contracts, to demonstrate that the beneficiary would perform the duties of a software engineer. Therefore, the petitioner has not provided sufficient evidence for the AAO to compare the proffered position with the description of a Software Engineer provided in the *Handbook*.

Additionally, as mentioned previously, the petitioner requires a minimum of a bachelor's degree in a wide variety of fields, including computer science, engineering, computer applications, CIS, management, electronics, technology, mathematics, business, communications or a related field. Therefore, the petitioner

does not appear to require a bachelor's degree in a *specific specialty* for the proffered position.

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 first 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). This prong assigns specialty occupation status to a proffered position with a requirement for at least a bachelor's degree, in a specific specialty, that is common to the petitioner's industry in positions that are both (a) parallel to the proffered position and (b) located in organizations that are similar to the petitioner.

Again, 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 at 1165 (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. at 1102).

As already discussed, the petitioner has not established that its proffered position is that of a software engineer or that it requires a bachelor's degree in a specific specialty. Indeed, the petitioner's stated requirements indicate that it does not require a bachelor's degree in a specific specialty for the proffered position, but instead will accept a bachelor's degree in a wide variety of fields. Also, there are no submissions from professional associations, individuals, or firms in the petitioner's industry.

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.

Next, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). The record has not established a prior history of hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty.¹ The petitioner did not provide any information about the credentials of its other positions similar to the one proffered in this petition.

¹ To satisfy this criterion, the record must establish that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. See generally *Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires 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

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. The evidence of record would indicate no specialization and complexity as the proffered position is not sufficiently detailed or documented, and as mentioned previously, the petitioner does not require a bachelor's degree in a specific specialty for the proffered position.

For the reasons discussed above, the AAO finds that the petitioner has not established that the proffered position qualifies as specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). The AAO therefore affirms the director's finding that the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation and denies the petition for this reason.

Second, the petitioner stated in response to the RFE that the beneficiary will work at another company's offices in Alpharetta, GA, but did not provide documentation to support that the beneficiary would work in Alpharetta, GA for the petition's duration. Moreover, the petitioner indicated in the labor certification application filed on behalf of the beneficiary that the job requires extended travel and/or relocation to project sites/locations throughout the United States. Therefore, the AAO affirms the director's finding that the petitioner failed to submit an itinerary, as required under 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, which appears under the subheading "Filing of petitions" and uses the mandatory "must," indicates that an itinerary is material and required initial evidence 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 the time of the petition's filing, at least the employment dates and locations. USCIS may in its discretion deny an application or petition for lack of initial evidence. 8 C.F.R. § 103.2(b)(8)(ii).

Counsel cites to a Michael L. Aytes internal memorandum to support its assertion that the itinerary requirement can be met by providing a general statement of the proposed or possible employment. *See* INS Central Office

lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

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) (hereinafter Aytes memo).

With respect to the Aytes memo, unpublished and internal opinions can not be cited as legal authority and they are not precedent or binding on USCIS as a matter of law. *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"). Regardless, 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."

In addition, the Aytes memo was written to provide guidance to USCIS in situations where the documentation submitted by the petitioner indicates that the petitioner is the actual employer and not a contractor or agent. Regardless, the Aytes memo must not be interpreted as countermanding or contradicting the regulations authorizing USCIS to request additional documentation. Under 8 C.F.R. § 103.2(b)(8)(ii), "if all required initial evidence is not submitted with the application or petition *or does not demonstrate eligibility*, USCIS in its discretion may deny the application or petition for lack of initial evidence or for ineligibility or request that the missing initial evidence be submitted within a specified time as determined by USCIS." (Emphasis added). Title 8 C.F.R. § 214.2(h)(9)(i) also states, "The director shall consider all the evidence submitted and such other evidence as he or she may independently require to assist his or her adjudication."

Therefore, under the regulations, USCIS has broad discretionary authority to require additional documentation, especially in a case, like this, where the petitioner has not demonstrated eligibility at the time of filing the petition or where it is needed for a material line of inquiry. The fact that the petitioner's business is established is not sufficient in and of itself to demonstrate a bona fide offer of employment. In a situation where the beneficiary is likely to be contracted out to a third party worksite, the petitioner must provide detailed evidence with respect to the contractual relationship between the petitioner, its clients, and any other third party end users, in order to establish which entity will actually control the work to be performed by the beneficiary. Such documentation was not provided. As discussed above, the petitioner appears to be a contractor. The AAO hereby exercises its discretion and denies the petition for this additional reason.

Beyond the decision of the director, the AAO finds that the petitioner failed to establish that it had one year worth of H-1B level work for the beneficiary to perform when the petition was filed. As discussed above, by not

submitting any contracts, the petitioner precluded the director from establishing whether the petitioner has made a bona fide offer of employment to the beneficiary and that it has sufficient work for the beneficiary to perform for the duration of the petition. Moreover, the conflicting evidence provided by the petitioner, which indicated, on the one hand, that the beneficiary would be working in Alpharetta, GA on a project until June 30, 2009, which did not cover the petition's duration, and on the other, that the beneficiary would be working as a contractor at various client sites, further indicates that the petitioner did not know that the beneficiary would work on the project in Alpharetta, GA through February 10, 2010.

Counsel argues on appeal that the petitioner is not required to submit contracts. However, it is the petitioner's burden of proof to demonstrate that it has sufficient work and resources for the beneficiary at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1) (requiring that eligibility be established at the time of filing). 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). Moreover, without such documentation, the AAO cannot establish whether the petitioner has made a bona fide offer of employment to the beneficiary such that it could be found that it will fully comply with the terms and conditions of employment as attested to in the instant petition. *See generally* 8 C.F.R. § 214.2(h)(4). The AAO thereby finds that the petitioner does not qualify as a United States employer as it has failed to establish that it has sufficient work and resources for the beneficiary such that it has demonstrated that it will have and maintain an employer-employee relationship on a full-time basis as claimed in the petition and as required by 8 C.F.R. § 214.2(h)(4)(ii). The AAO therefore denies the petition on this additional ground.

Finally, the AAO notes that the record indicates that prior H-1B petitions have been approved for the beneficiary. The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. However, 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. A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). If any of the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, it would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). A prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). 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 nonimmigrant petitions on behalf of a 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).

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 appeal will be dismissed and the petition denied 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.