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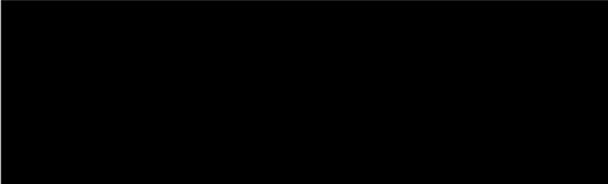
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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

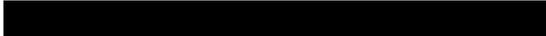
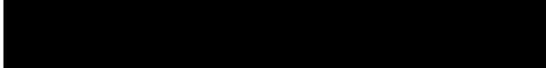


**U.S. Citizenship
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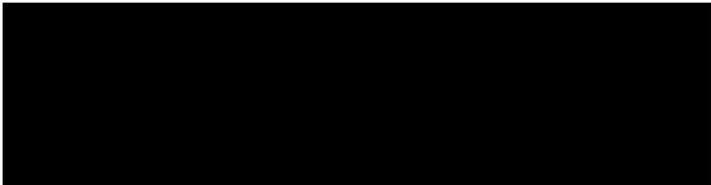


FILE: EAC 08 006 53474 Office: VERMONT SERVICE CENTER Date: **APR 30 2010**

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 consulting company. It seeks to employ the beneficiary as a software engineer and to classify her 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 independent grounds: (1) the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation; and (2) the petitioner failed to establish that the U.S. Department of Labor's Form ETA 9035E Labor Condition Application (LCA) corresponds to the petition.

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, an appeal brief, and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

In the documentation submitted with the petition on October 9, 2007, the petitioner described itself as being engaged in the business of software consulting. The petitioner listed seven employees in the Form I-129 and stated in its support letter that it also employs two contractors. In the Form I-129, the petitioner indicated that it wished to employ the beneficiary as a software engineer from October 9, 2007 through August 23, 2009 in Durham, NC, at an annual salary of \$60,000. However, the petitioner states in the nontechnical job description section of the Form I-129 that the beneficiary will work as a quality assurance and test analyst.

The duties of the position are described as follows in the support letter the petitioner submitted with the H-1B petition on behalf of the beneficiary:

- Analysis, design, development, configuration, preparation and execution of test plans / test cases, using Mercury Test Suites, Win Runner, Load Runner, Quick Test Pro, Clear Case, Clear Quest etc[.]
- Develop automation scripts, system testing, bug fixing / defect logging[.]
- Plan out scope of testing work after defining business processes as well as software processes[.]
- Provide System design, analysis, development, modifications, system enhancement, quality assurance and maintenance of new and existing information applications systems and programs[.]
- Act as a Project Manager / Team Lead during development phase of projects and system developments, providing on going evaluation and testing to ensure adherence specifications and business needs.
- Make changes to existing systems to increase efficiency of operations and incorporate system and software enhancement.
- Develop Quality Control Modules and implement quality support procedures,

- enhancements and strategy development plans as required[.]
- Troubleshoot and evaluate any problem arising in connection with networking, system integration, systems development, and user implementation.
- Use Java platform for Distributed/Concurrent programming concepts and C++ on UNIX system[.]
- Upgrade system and correct errors to maintain system after implementation[.]
- Mentor junior engineers.

The petitioner states that a minimum of a bachelor's degree in computer science, engineering, management information systems, or a closely related field, with applicable experience, is required to perform the duties of the proffered position.

The submitted Labor Condition Application (LCA) was filed for a software engineer to work in Durham, NC or Atlanta, GA from October 9, 2007 to October 8, 2010. The LCA lists a prevailing wage of \$60,000 in both locations.

With respect to the proposed worksite where the beneficiary will be assigned, the petitioner's support letter states as follows:

[O]ur clients now want to use [the beneficiary's] skills for another project in NC and hence we intend to hire her as our full time employee. A contract has already been signed with the end clients though [sic] one of their Prime Vendor [sic]. . . .

The support letter lists the end-client as [REDACTED], with an address in Durham, NC, and indicates that the beneficiary will not be assigned to [REDACTED] directly by the petitioner, but instead will be assigned to [REDACTED] through a company called [REDACTED] located in Irvine, CA. The start date of the project is listed as October 9, 2007. The Form I-129 indicates that the beneficiary will work in Durham, NC.

The petitioner also included a copy of a Master Contractor Agreement between the petitioner and [REDACTED] signed September 26, 2007, which states that [REDACTED] is in the business of "[l]ocating consultants for computer systems and programming projects of its customers. Contractor desires to fill such consulting needs ("Services") for one or more selected customers of [REDACTED]. . ." The contract indicates that the petitioner will be a subcontractor for [REDACTED] that sends workers to third-party client sites. Attached to the Master Agreement is an Addendum, signed by the petitioner and [REDACTED]. The Addendum lists the beneficiary by name and indicates that she will be assigned as a software quality engineer to [REDACTED], which has operations in *North Carolina, California, and Connecticut*. *The estimated start date of the project is listed as October 9, 2007 and the estimated completion date of the project in the Addendum is listed as May 30, 2008.* Therefore, the project is expected to last less than seven months.

The beneficiary's education documents, indicating that she has a foreign degree, were submitted with the petition, along with a credential evaluation, which states that the beneficiary has the equivalent of a U.S. bachelor's degree in business administration and a U.S. bachelor's degree in science.

On May 2, 2008, the director issued an RFE requesting, in part, additional evidence that the proffered position qualifies as a specialty occupation as well as an organizational chart, tax returns, an itinerary, and documentary evidence of the petitioner's business activities. The RFE further states:

[A]lso provide a copy of the contract with the end user which specifically mentions the beneficiary and the duties [s]he will perform with that end user. If it is your claim that the beneficiary will be working on in-house projects, submit evidence describing the in-house projects, the length of time the beneficiary will work on those projects, invoices showing the sale of that product to customers of the petitioner, and a letter from the clients which are using that product. . . .

Counsel for the petitioner responded to the RFE, providing, in pertinent part, the following documents:

- Copies of a Home Mortgage for the petitioner's address issued to an individual, not the petitioner, and photos of the petitioner's offices, indicating that the petitioner is located in a residential home.
- The petitioner's organizational chart, listing the names of 13 consultants, including the beneficiary. It is not apparent from the chart who is managing these consultants. The only other names listed on the chart besides the 13 consultants are those of the President and Vice President, but there are other job titles on the chart for which the names are not provided.
- A letter from [REDACTED] a company with operations in Durham, NC, dated June 12, 2008, after the petition's filing date.
- Copies of the petitioner's contracts and SOWs for the petitioner's contractors (other than the beneficiary), many of which demonstrate that the petitioner assigns its contractors to various client sites on a short-term basis throughout the United States.

The letter from [REDACTED] states as follows:

This is to confirm that [the beneficiary] has been associated with our project since Oct, 2007 till the present date. She has been performing her duties as a QA & Test Analyst for our software applications. She has gone above and beyond the call of duty to ensure that the work is done accurately and efficiently. *Her services were contracted through* [REDACTED]

(Emphasis added.) No copies of contracts between [REDACTED] were provided. The documentation also does not include a more detailed description of the project with [REDACTED] to which the beneficiary allegedly would be assigned or the beneficiary's role in that project. It is not clear that [REDACTED] is aware of the petitioner's role, if any, in the project. The letter from [REDACTED] also does not specify where the beneficiary will work, even though the Addendum lists three locations of operation for [REDACTED]

In the response to the RFE, the petitioner declined to provide an itinerary and 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 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"). Nevertheless, as a matter of policy, 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 legacy INS 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 may not be interpreted as countermanding or contradicting the regulations authorizing USCIS to request additional documentation. As discussed in greater detail, *infra*, an itinerary detailing the dates and locations of the services to be provided by the beneficiary is considered initial required evidence. 8 C.F.R. § 214.2(h)(2)(i)(B). 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.

On appeal, for the first time, counsel provides a copy of the Computer Consulting and Programming Services Agreement between [REDACTED] and [REDACTED], a document dated January 2, 2006 and valid for one year. Attached to this document is an Employment Search Agency Agreement, which lists a consultant by name who is not the beneficiary. The Employment Search Agency Agreement is dated October 26 (although the year is illegible) and is valid for one year. Counsel also includes a letter from Atrilogy, dated July 31, 2008, which states that the beneficiary started her assignment with [REDACTED] on October 9, 2007 and is expected to

continue there on a long term basis. Atrilogy also states, “[T]he contract period for her assignment has already been extended until September 2008 and possibly further. [REDACTED] needs her services as a Quality Test Analyst; for their ongoing assignments / activities and she may continue there with our client for quite some time. . . .”

Counsel also provides a Statement of Work (SOW) prepared by [REDACTED] for a Software Quality Engineer to work on a Port Migration Project. This document was prepared on November 27, 2007, after the petitioner’s filing, and will therefore not be considered by the AAO. 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). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). However, in any event, the SOW is not probative for these proceedings as it is not signed by [REDACTED] does not list the beneficiary by name, and indicates an estimated completion date for the project of February 28, 2008.

On appeal, counsel states the following:

It is submitted that in our response to the RFE we did provide a contract between the petitioner and its client [REDACTED], Group and also a letter from the end client [REDACTED] of America. Due to the confidentiality of the terms of the agreement and since the petitioner is not a party to the contract between [REDACTED] and [REDACTED] the petitioner was unable to obtain a copy of it until today but the letter from [REDACTED] that was submitted was signed by *the beneficiary’s manager* [REDACTED] in which he certified that the beneficiary, [name], was employed with it as a Systems (Q A & Test) Analyst.

(Emphasis added.) [REDACTED] letter states that the beneficiary is a consultant of [REDACTED] and counsel states that [REDACTED] letter is written by the beneficiary’s manager, a [REDACTED] employee, to whom she presumably reports. [REDACTED] does not mention the petitioner in its letter. No documentation was submitted to demonstrate that [REDACTED] is even aware that the petitioner contracted the beneficiary to [REDACTED]. It is not clear that the petitioner would have control over the beneficiary’s proposed assignments and, consequently, the work that she would perform. 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)).

Moreover, the proffered duties as described by the petitioner, which include acting as a team lead and system design, are substantially different from [REDACTED]’s description of the beneficiary’s work as a Systems (Q A & Test) Analyst. A few errors or minor discrepancies are not reason to question the credibility of an alien or an employer seeking immigration benefits. *See, e.g., Spencer Enterprises Inc. v. U.S.*, 345 F.3d 683, 694 (9th Cir., 2003). However, anytime a petition includes numerous errors and discrepancies, and the petitioner fails to resolve those errors and discrepancies after USCIS provides an opportunity to do so, those inconsistencies will raise serious concerns about the veracity of the petitioner’s assertions. Doubt cast on any aspect of the

petitioner's proof may undermine 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 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 field 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 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

In addressing whether the proposed position is a specialty occupation, the AAO agrees with the director’s determination that the record is devoid of documentary evidence as to where and for whom the beneficiary would be performing her services, and therefore whether her services would actually be those of a software engineer.

To determine whether a particular job qualifies as a specialty occupation position, the AAO does not solely rely on the job title or the extent to which the petitioner’s descriptions of the position and its underlying duties correspond to occupational descriptions in the Department of Labor’s *Occupational Outlook Handbook (Handbook)*. Critical factors for consideration are the extent of the evidence about specific duties of the proffered position and about the particular business matters upon which the duties are to be performed. In this pursuit, the AAO must examine the evidence about the substantive work that the beneficiary will likely perform for the entity or entities ultimately determining the work’s content.

As mentioned above, the evidence indicates that the petitioner would subcontract the beneficiary to [REDACTED] which in turn would subcontract the beneficiary to [REDACTED] to work on a project potentially located in three different locations, according to the Addendum. It does not appear that [REDACTED] is aware of the petitioner’s role, if any, in the project and the documentation indicates that [REDACTED] not the petitioner, will supervise and control the beneficiary’s work. The evidence must show specialty occupation work for the beneficiary with the actual end-client company where the work will ultimately be performed. As mentioned above, the SOW between [REDACTED] and [REDACTED] is dated after the petition was filed and, moreover, is not probative for these proceedings.

Additionally, the Addendum indicates that the beneficiary’s assignment at [REDACTED] would only be for approximately seven months, which does not cover the duration of the petition. The letter from [REDACTED] states that the beneficiary is working as a QA & Test Analyst, in contrast to the proffered position of software engineer as described in the petitioner’s support letter. As the record lacks documentary evidence of any work beyond the short-term project with [REDACTED], and as the project with [REDACTED] is not described in sufficient detail and, moreover, appears to be a different position than the one described in the petition, the AAO cannot determine the beneficiary’s day-to-day responsibilities. The petitioner has not established a foundation by which USCIS can reasonably determine either the level of knowledge in any specific specialty that would be required by or

associated with the proffered position or that the petitioner had any specific employment designated for the beneficiary at the time the petition was filed.

In addition to failing to provide sufficient documentary evidence that the proffered position is a specialty occupation, the position description for a software engineer provided by the petitioner conflicts with [REDACTED] titling the proffered position as a QA & Test Analyst, further supporting the conclusion that the petitioner had not secured specific employment for the beneficiary at the time the petition was filed. As mentioned previously, 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) and 103.2(b)(12). 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).

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. *Id.* at 387-88. 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. As discussed above, 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. In short, the petitioner has failed to establish the existence of H-1B caliber work for the beneficiary.

The petitioner's failure to establish 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.

As the record does not contain sufficient evidence of the specific duties the beneficiary would perform for the client of the petitioner's client, the AAO cannot analyze whether her placement is related to the provision of a product or service that requires the performance of the duties of a software engineer. Applying the analysis established by the Court in *Defensor*, which is appropriate in an H-1B context, like this one, where USCIS has determined that the petitioner is not the only relevant employer for which the beneficiary will provide services, USCIS has found that the record does not contain any documentation from the end user client(s) for which the beneficiary will provide services that establishes the specific duties the beneficiary would perform. Without this information, 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.

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.

Next, the AAO also affirms the director's finding that the petitioner failed to establish that the LCA corresponds to the petition. For this additional reason, the petition cannot be approved.

In pertinent part, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B) states:

The petitioner shall submit the following with an H-1B petition involving a specialty occupation: (1) A certification from the Secretary of Labor that the petitioner has filed a labor condition application

The regulation at 8 C.F.R. § 103.2(b)(1) states, in pertinent part:

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.

In addition, the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1), states, as part of the general requirements for petitions involving a specialty occupation, that:

Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

Further, 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 filed with the Form I-129 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.

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.*

(Emphasis added).

The LCA and Form I-129 in this matter, which indicate the proffered position's location as being either in Durham, NC or in Atlanta, GA for the duration of the petition, do not correspond with the documentation provided by the petitioner, which indicate that the project length would be approximately seven months, that there may be at least three locations for the project, and that the petitioner is located in a residential home, the zoning laws for which may not permit the employment of the beneficiary at that location. Moreover, in response to the RFE, the petitioner provided copies of many contracts and SOWs, a large number of which demonstrate that the petitioner assigns its contractors to various client sites on a short-term basis throughout the United States. In light of the fact that the record of proceeding indicates that the beneficiary will likely work at locations and in different occupations not identified in the Form I-129 and the LCA filed with it, USCIS cannot ascertain that this LCA actually supports and corresponds to the H-1B petition. Again, a petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

Therefore, the director's conclusion that the petitioner failed to establish that the LCA corresponds to the petition by encompassing all of the work locations and related wage requirements for the beneficiary's full employment period is affirmed.

Beyond the decision of the director, the AAO finds that the petition must be denied for the additional reason that it was filed without an itinerary of the dates and locations where the beneficiary would work, as required by 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, which appears under the subheading "Filing of petitions" and uses the mandatory "must," indicates that an itinerary is 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.

Finally, the AAO does not need to examine the issue of the beneficiary's qualifications because the petitioner has not provided sufficient documentation to demonstrate that the position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, it cannot be determined what the actual proffered position is in this matter and, therefore, the issue of whether it will require a baccalaureate or higher degree, or its equivalent, in a specific specialty also cannot be determined. Therefore, the AAO need not and will not address the beneficiary's qualifications further, except to note that, in any event, the petitioner stated that the proffered position requires someone who has attained, at a minimum, a bachelor's degree in computer science, engineering, management information systems or a closely related field. As the beneficiary has the U.S. equivalent of a bachelor's degree in business administration and science, which are not closely related fields to computer science, engineering or management information systems, the beneficiary does not qualify for the proffered position under the petitioner's stated requirements.

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.