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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
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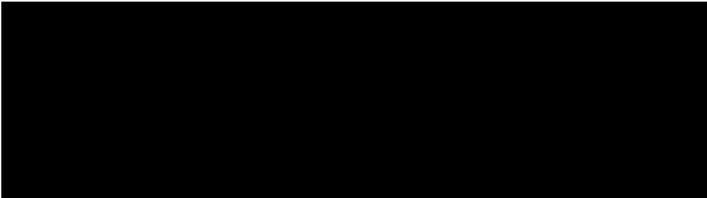


FILE: EAC 08 035 51396 Office: VERMONT SERVICE CENTER Date: **APR 30 2010**

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

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the  
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



**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 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 November 16, 2007, the petitioner described itself as being engaged in the business of software consulting. The petitioner listed ten employees in the Form I-129 and stated in its support letter that it also employs three contractors. In the Form I-129, the petitioner indicated that it wished to employ the beneficiary as a software engineer from November 19, 2007 through November 19, 2010 at the offices of ██████████ in Louisville, KY, 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 mainframe programmer and in its support letter the petitioner gives the proffered position four different titles: (1) software engineer/analyst; (2) computer and systems-specialized computer consultant; (3) computer and systems analyst; and (4) mainframe programmer.

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, modifications, manage, mentor, lead quality assurance, system enhancement, system maintenance in regard to Main Frame Programming/Applications[.]
- To use in depth knowledge in Mainframe Programming and MVS/OS3090 in financial software Banking and billing processes Applications as well as in health insurance related software applications[.]
- Use COBOL, JCL, CICS, VSAM, DB2, SQL, IDMS, DFSORT, EASYTRIEVE, INTEREST, XPEDITOR and ENDEVOR for software application build up.
- To review the current processes in search of potential pitfalls and improving processes to assure long term benefits for clients[.]
- To coordinate between off-shore and onsite activities (if any) involved in the project[.]

- Provide System design, analysis, development, modifications, enhancement[.] quality assurance and maintenance of new and existing information applications systems and programs[.]
- Act as Project Manager/Team Lead during development phase of projects/system developments, providing on going evaluation & 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.
- Upgrade system and correct errors to maintain system after implementation[.]
- Mentor junior software engineers.

The petitioner makes two separate statements in the support letter with respect to the minimum qualifications for the proffered position. First, the petitioner states that the proffered position requires a minimum of a bachelor's degree in engineering, computer systems analysis, or a related field. Later, the petitioner states that the proffered position requires at least a bachelor's degree in computer science, an engineering discipline, management information systems, or a closely related field, with applicable experience.

The submitted Labor Condition Application (LCA) was filed for a software engineer to work in Louisville, KY or Atlanta, GA from November 19, 2007 to November 19, 2010. The LCA lists a prevailing wage of \$60,000 in both locations.

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

**[O]ur clients namely [REDACTED], now want to use her skills for another project in KY 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 Vendors. . . .**

The support letter lists [REDACTED] address as being in Louisville, KY 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 Southfield, MI. The start date of the project is listed as November 19, 2007 and the duration as, "[L]ong term, extendable with mutual consent after each 6 months . . . ." The Form I-129 indicates that the beneficiary will work at [REDACTED] offices in Louisville, KY.

The petitioner also submitted a copy of its offer letter to the beneficiary, dated November 2, 2007, which states, in pertinent part, "[Y]ou will be required to work on assignments *at client sites as well as on in-house projects at Company's offices. . . .*" and "[Y]our employment will commence upon your arrival at a Company designated site on a mutually agreed upon date – most likely it will be 11/19/2007 (Monday) and the location

will be *office [sic] of our end-clients namely* [REDACTED] at Louisville, KY 40202. It is a long term assignment. . .” (Emphasis added.)

Additionally, the petitioner included a copy of a Master Agreement between the petitioner and [REDACTED] dated March 6, 2007, which states that [REDACTED] is in the business of “[r]ecruiting, and supplying engineers, programmers, computer consultants, management consultants, technical data processing, and other technical personnel on a contract basis to various businesses, and organizations . . . .” The contract indicates that the petitioner will be a subcontractor for Technosoft that sends workers to third-party client sites. Attached to the Master Agreement is a Statement of Work (SOW) dated November 7, 2007, signed by the petitioner and [REDACTED]. The SOW lists the beneficiary by name and indicates that she will be assigned as a mainframe developer to [REDACTED] in Louisville, KY. *The expected duration of the project in the SOW is listed as being for six 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 of Science Degree in Electronics Engineering.

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:

*Also 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 Syntel, a company headquartered in Troy, MI, 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 Syntel states as follows:

[REDACTED], headquartered at Troy, MI is a global provider of IT and BPO services with offices in several countries. [REDACTED] Global Delivery model has onsite (at customer location), offsite (at Syntel owned offices near customer location) and offshore (from one of our delivery centers in India) components. The onsite component consists of a team of specialists who act as coordinators between client and our offsite or offshore based team members in addition to participating in development activities for critical applications. [REDACTED], a major Healthcare service provider based out of Louisville, KY is one of [REDACTED]'s top 5 customers.

This letter is to confirm that [REDACTED] has been using the services [sic] [REDACTED] [REDACTED] by hiring some of *their* consultants on *contingent basis*. [REDACTED] has been using the services of [the beneficiary], a *contract consultant* of [REDACTED] since Nov 19, 2007. [The beneficiary] has been working as part of *our onsite team* for *our client* [REDACTED]. She has been performing her duties as a Main Frame Programmer / Analyst using COBOL and other related skills like JCL, CICS and VSAM etc as a part of her assignment. This is a long term assignment and we will [sic] like to continue to use her skills and services *till end of year 2009 subject to her keeping up the performance at current levels or better*.

[REDACTED] is the reporting manager for [the beneficiary]. . . .

(Emphasis added.) No copies of contracts between [REDACTED] or [REDACTED] were provided. Moreover, no documentation from [REDACTED] was 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.

In the response to the RFE, the petitioner also 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 countermanning 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, 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] and also a letter from the end client [REDACTED]. Due to the confidentiality of the terms of the agreement and since the petitioner is not a party to the contract between [REDACTED], the petitioner has been unable to obtain a copy of it but as mentioned in the RFE, we once again inform you that [REDACTED] is NOT a STAFFING COMPANY for the purposes of this project.

Given the evidence of record, counsel’s statements are incorrect and misleading. [REDACTED]’s letter indicates that [REDACTED], and not [REDACTED] the end user. Moreover, [REDACTED]’s letter states that the beneficiary is a consultant of [REDACTED] and reports to a manager at [REDACTED]. [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]. 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, 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).

Additionally, 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 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 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] which in turn would assign the beneficiary to a project for [REDACTED] client, [REDACTED] located in Louisville, KY. It does not appear that [REDACTED] is aware of the petitioner’s role, if any, in the project and Syntel’s letter indicates that [REDACTED], not the petitioner, will supervise and control the beneficiary’s work. Contrary to the petitioner’s and counsel’s statements, [REDACTED] the company where the beneficiary would perform her services, appears to be [REDACTED]’s client, not the petitioner’s. The evidence must show specialty occupation work for the beneficiary with the actual end-client company where the work will ultimately be performed. Merely providing contracts between the petitioner and other consultants or employment agencies that provide consulting or staffing

services to other companies is not sufficient. There must be a clear contractual path shown from the petitioner, through any other consultants or staffing agencies, to an ultimate end-client.

Additionally, the SOW provided by the petitioner indicates that the beneficiary's assignment at [REDACTED] would only be for six months, which does not cover the duration of the petition. The letter from [REDACTED] which states that it would like to use the beneficiary on the project for [REDACTED] through the end of 2009, is dated after the petition was filed and therefore is not probative for determining the length of the beneficiary's proposed assignment. However, even if the beneficiary were assigned to [REDACTED] project for [REDACTED], as the record lacks documentary evidence of any work beyond the short-term project listed in the SOW, and as the project listed in the SOW is not described in sufficient detail to determine the beneficiary's day-to-day responsibilities and role in that project, 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 petitioner made conflicting statements in the support letter with respect to the position's title and the minimum qualifications for the proffered position, further supporting the conclusion that the petitioner had not secured specific employment for the beneficiary at the time the petition was filed. 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 387-388. 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 petitioner's client(s), 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 at [REDACTED] in Louisville, KY or in Atlanta, GA for the duration of the petition, do not correspond with the SOW provided by the petitioner, which was only valid for six months, or the evidence provided that the petitioner is located in a residential home, over which the zoning laws may not even 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. 8 C.F.R. § 103.2(b)(1). As discussed above, a 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).

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, adding that the LCA also fails to correspond to the petition due to its certification for an occupational classification not established to be that in which the beneficiary will actually be placed.

The AAO notes that the record indicates that the petitioner currently holds H-1B status. The director's decision does not indicate whether he reviewed the prior approval of the other nonimmigrant petition. 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. If the previous nonimmigrant petition was approved based on the same unsupported assertions that are contained in the current record, the approval would constitute material 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).

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.

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).

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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.