

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

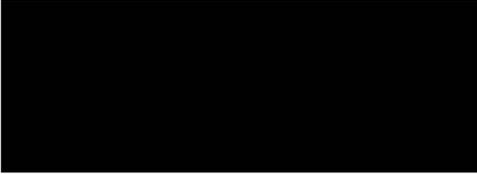
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

DL



FILE: WAC 08 148 53409 Office: CALIFORNIA SERVICE CENTER Date:

JAN 05 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 and consulting company. It seeks to employ the beneficiary as a programmer analyst 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; (2) the petitioner does not qualify as a United States employer or agent; and (3) the petitioner is not likely to comply with the terms and conditions of the Labor Condition Application (LCA).

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 April 14, 2008, the petitioner described itself as providing information technology services and solutions to a diversified customer base, including training, consulting and staffing services. The petitioner listed 80 employees in the Form I-129. The petitioner indicated that it wished to employ the beneficiary as a programmer analyst from October 1, 2008 through September 30, 2011 at an annual salary of \$60,000.

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

As a part of responsibilities, [the beneficiary] will continue to design, develop and utilize software systems for customized business applications. She will continue to analyze the communications, informational and programming requirements of their projects, and plan and design programs and systems to meet such needs. She will also debug, troubleshoot and modify software programs to ensure their technical accuracy and reliability, as [sic] also provide end-user support and training.

The beneficiary will analyze software requirements to determine feasibility of design within time and cost constraints and consult with hardware engineers and other engineering staff to evaluate interface between hardware and software. She will formulate and design software system, using analysis and mathematical models to predict and measure outcome and consequences of design. She will develop and direct software system testing procedures, programming, and documentation.

[The beneficiary] will hold technical discussions with personnel of appropriate organizational units to analyze current operational procedures and identify problems. She

will analyze business procedures and problems to redefine data and convert them into programmable form of EDP. Further, she will plan and prepare technical reports, memoranda and instructional manuals to document program development. She will be responsible for developing and programming software systems using various hardware and operating systems.

Also, the beneficiary will utilize her knowledge and experience in the field of various business sectors of the industry to design, develop, enhance, integrate, create, and implement applications and systems based on business and user needs. Her duties entail working with, C, C++, UNIX, Data Structures & [sic] Algorithms, HTML, Java, PL/SQL, Visual Basic, C#, ASP.NET, Enterprise Java Beans, JSP, J2EE, Java Servlets, JavaScript, Struts, Tomcat Web Server, VBScripts, Web Logic, MS Access, MySQL, Oracle, Sybase, .NET Framework, Eclipse, MS Visio, MS Visual SourceSafe, OOAD, UML, Lotus Notes, MS Office, MS Project, SQL *Plus, Visual Studio.NET, Turbo C++, JUnit, Windows NT/XP/2000. [The beneficiary] will study existing information processing systems to evaluate effectiveness and developing new systems based on user needs.

[The beneficiary] will provide training and support in the installation, implementation and utilization of new systems, enhancements and modifications. She will also provide solutions for various software problems of compatibility of various systems.

The position of Programmer Analyst requires a theoretical and practical application of highly specialized knowledge. An individual having a Bachelor's degree in Computer Science, Engineering, Business, Math, Science, Technology, MIS, CIS, Finance, Economics, a related analytic or scientific discipline, or the equivalent thereof, as well as working experience in the field could discharge the duties of this professional position.

The submitted Labor Condition Application (LCA) was filed for a programmer analyst to work in Shawnee, KS and covers the period requested by the petitioner. The LCA lists a prevailing wage of \$43,264.

With respect to the proposed worksite where the beneficiary will be assigned, the petitioner's support letter does not state where she will be employed, but the forms indicate that she will work at the petitioner's offices in Shawnee, KS. This appears to conflict with the petitioner's statement in its petition support letter that it assigns workers pursuant to third-party client contracts. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The beneficiary's education documents, indicating that she has a foreign degree, were submitted with the petition, but the petitioner did not include an education evaluation. An education evaluation was later submitted in response to the RFE issued on June 20, 2008, and indicates that the beneficiary's foreign degree is equivalent to a Bachelor of Science degree in Computer Science and Engineering from an accredited institution of higher education in the United States.

In addition to requesting the foreign educational credentials evaluation, the director's RFE asked for additional documentation evidencing that the proffered position is a specialty occupation, including a more detailed job description, a clarification of the workplace, and copies of any contracts and itinerary of definite employment for the beneficiary. The RFE specifically states, "If the beneficiary will perform some work for clients outside the petitioner's work site, evidence must be provided of the conditions of employment." The director also requested documentation evidencing the petitioner's business.

Counsel for the petitioner responded to the RFE. The RFE response includes a letter from the petitioner dated July 24, 2008. This letter provides additional generic duties for the proffered position, with no description of the project on which the beneficiary will work or the third party client that is generating the work. The petitioner also states in this letter that the beneficiary will spend 100% of her time as an employee of the petitioner and states in an itinerary that the beneficiary will be located at its head offices in Shawnee, KS for the entire period of the petition. This is in contradiction to the statement made in the same letter by the petitioner that "[a]n individual may be temporarily located at a project site"

The petitioner states that it has no formal employment agreement with the beneficiary, but includes an undated and unsigned summary of an oral agreement under which the beneficiary will be employed. The summary does not provide any information regarding the location of employment or any details about the beneficiary's duties or the project on which she will be assigned. No copies of third-party contracts were provided.

On appeal, counsel for the petitioner cites to *Matter of Chawathe*, A74254994 (AAO, Jan. 11, 2006), a USCIS Adopted Decision, in claiming that the petitioner satisfied the standard of proof. *Matter of Chawathe* provides:

Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought. *See e.g. Matter of Martinez*, 21 I & N Dec. 1035, 1036 (BIA 1977) (noting that the petitioner must prove eligibility by a preponderance of the evidence in visa petition proceedings). . . .

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of E-M-*, 20 I & N Dec. 77, 79-80 (Comm. 1989)

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "probably true" or "more likely than not," the applicant or petitioner has satisfied the standard of proof. *See U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (defining "more likely than not" as greater than 50 percent probability of something occurring.)

Counsel asserts that the evidence provided would reflect by the preponderance of the evidence that the proffered position constitutes a specialty occupation. We disagree. As discussed above, the record contains conflicting statements with respect to whether the beneficiary will be working in-house at the petitioner's offices in Shawnee, KS, or whether the beneficiary will be working at different third-party client sites. In the RFE, the director requested evidence that might satisfy the independent objective criteria standard. The petitioner should have submitted independent supporting documentation, such as contracts and work orders with third-party clients, with respect to the projects on which the beneficiary would work. The petitioner alleges that the beneficiary will work at the petitioner's headquarters, but it did not provide any objective evidence to demonstrate that the work will be performed at the petitioner's headquarters for the dates listed in the petition, in contrast to the petitioner's business model of primarily performing work generated by third-party client contracts.

More importantly, the petitioner does not deny that the beneficiary will perform work pursuant to a third-party client contract. Counsel and the petitioner instead argue that USCIS cannot require the petitioner to provide copies of third-party contracts. However, 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. This is especially true in a situation where, as here, the petitioner states that the beneficiary will work at its headquarters, but the evidence provided about the nature of the petitioner's business indicates that it is likely that the beneficiary will be assigned out to third-party client sites pursuant to contracts the petitioner has with those third-party clients. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Moreover, 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)).

Based on the evidence of 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 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 with respect to the end-client firm, and therefore whether her services would actually be in a specialty occupation. However, the AAO disagrees with the director's statement that "USCIS does not dispute that a bona fide position of Programmer Analyst requires a beneficiary to have a baccalaureate degree." The section on Computer Systems Analysts, which

encompasses programmer analysts, in the 2008-09 Department of Labor's *Occupational Outlook Handbook (Handbook)* states "when hiring computer systems analysts, employers *usually prefer* applicants who have at least a bachelor's degree." (Emphasis added.) The use of the word "prefer" means that some employers do not require programmer analysts to have a bachelor's degree. Moreover, similar to the petitioner's statement that the proffered position requires "a Bachelor's degree in Computer Science, Engineering, Business, Math, Science, Technology, MIS, CIS, Finance, Economics, a related analytic or scientific discipline, or the equivalent thereof, as well as working experience in the field," the *Handbook* section on Computer Systems Analysts reads: "Despite the preference for technical degrees, however, people who have degrees in other majors may find employment as systems analysts if they also have technical skills." Therefore, the *Handbook* does not indicate that programmer analyst positions normally require at least a bachelor's degree in a specific specialty.

The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by (A) [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation." Moreover, the regulation at 8 C.F.R. § 214.2(h)(4)(iv)(A)(1) specifically lists contracts as one of the types of evidence that may be required to establish that the services to be performed by the beneficiary will be in a specialty occupation.

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 *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.

No documentation was submitted with respect to the third party client(s) that would have been probative in determining whether the proffered position justified the performance of duties normally associated with a specialty occupation. For example, as stated above, such evidence might have included a copy of the contract with the third party client and a detailed description of the project to be performed for the third party client. Without documentary evidence to support the claim, the assertions of the petitioner 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).

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. 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.

On appeal, counsel argues that *Defensor* does not apply to this petition because the petitioner is not employed in job contracting and the beneficiary will remain under the direct control of the petitioner.¹ However, as mentioned above, the petitioner states in the support letter that "[t]he assignment of our computer professionals basically depends on our business needs and projects undertaken by the company. Therefore, many of our contracts take the form of what is routinely referred to as third-party contracts." If the petitioner's business is, as it states, based on third-party contracts then the petitioner is, by definition, a job contractor. Moreover, the petitioner has not provided any evidence that demonstrates the beneficiary's work will not be pursuant to a third-party contract, unlike many of its workers. There is no explanation as to what project will occupy the beneficiary at the petitioner's offices for the entire duration of the petition. Instead, the petitioner and counsel argue that the petitioner is not required to provide copies of third-party contracts, which implies that the beneficiary's work will be pursuant to such a contract. In the petitioner's letter submitted in response to the RFE, it states "[the petitioner] is a provider of skilled IT professionals on a project and full-time basis." (Emphasis added.) Without evidence to the contrary, the AAO finds that the petitioner is a job contractor and, therefore, *Defensor* applies.

As the record does not contain sufficient evidence of the work the beneficiary would perform for the third party 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 specialty occupation. 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 requires that the record contain 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.

¹ When making this argument in the brief, counsel mistakenly refers to the petitioner by the name of another company.

Next, the AAO will address the issue of whether or not the petitioner qualifies as a United States employer. In the RFE response letter and in the appeal brief, counsel and the petitioner argue that the petitioner is the actual employer.

By not submitting any information regarding the project that demonstrates the beneficiary will perform duties in a specialty occupation, such as a copy of a third-party contract and work order, the petitioner precluded the director from establishing whether the petitioner has made a bona fide offer of employment to the beneficiary or that it has sufficient control over the beneficiary to establish an employer-employee relationship based on the evidence of record. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The petitioner has indicated that the beneficiary will work at its offices in Shawnee, KS for the duration of the petition. This does not seem likely given the evidence provided that directly contradicts this assertion and the utter lack of explanation with respect to the project on which the beneficiary would work that allegedly requires the performance of duties in a specialty occupation. Given that the stated nature of the petitioner's business is to provide IT professionals to clients pursuant to third-party contracts, and given that the petitioner did not provide any evidence with respect to the specific project(s) the beneficiary allegedly would work on at the petitioner's offices, the AAO concludes that the petitioner's client(s) are likely the actual end-user entity that would generate work for the beneficiary and whose business needs would ultimately determine what the beneficiary would actually do on a day-to-day basis. Therefore, by not submitting any documentation justifying the assignment of the beneficiary to the projects for third party client(s) requiring the performance of duties in a specialty occupation, the petitioner precluded the director from establishing whether the petitioner has made a bona fide offer of employment to the beneficiary or that it has sufficient control over the beneficiary to establish an employer-employee relationship based on the evidence of record.

The petitioner asserts that it will be the employer of the beneficiary. However, the documentation submitted when reviewed in its entirety does not support this conclusion. As mentioned above, the statements made by the petitioner indicate that the beneficiary will work pursuant to third-party contracts. Therefore, even if the petitioner will directly pay the salary and benefits to the beneficiary, the client will control and supervise the work of the beneficiary, potentially provide the space and tools necessary to perform the duties, terminate her work on a project, and ultimately pay the beneficiary's salary and benefits, albeit indirectly through the petitioner. This does not indicate that the petitioner has a controlling interest in the beneficiary's employment.

Without seeing a copy of the contract between the petitioner and the client company, it is unclear what role the petitioner has in the beneficiary's assignment. However, assuming that the petitioner's client does have a project on which the beneficiary will work, no independent evidence was provided to indicate that the petitioner would control whether there is any work to be performed or that the petitioner would even oversee the beneficiary's work. The petitioner did not even provide a copy of its employment contract with the beneficiary, stating that it had none.

Therefore, the information provided is insufficient to determine whether the beneficiary will be an "employee" having an "employer-employee relationship" with a "United States employer." It has not been

established that the beneficiary will be "controlled" by the petitioner or that the termination of the beneficiary's employment is the ultimate decision of the petitioner. Moreover, whether there is any work to be performed by the beneficiary as well as the nature of that work is unclear. Therefore, based on the tests outlined above, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii). As stated above, 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 AAO therefore affirms the director's finding that the petitioner does not qualify as a United States H-1B employer or agent as it failed to establish that it has sufficient work and resources for the beneficiary.

Next, the AAO finds that the petitioner is not likely to comply with the terms and conditions of the Labor Condition Application (LCA).

The director found that "[w]ithout evidence of a specific project and contracts indicating the beneficiary's actual work location, USCIS is unable to determine whether the petitioner has complied with the terms of the LCA, nor can USCIS determine if the LCA is proper in relationship to the area of employment or the wage offered the beneficiary." The AAO concurs.

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.

At the time of filing the petition the petitioner must file a certified LCA valid for the work location specified in part E of the LCA, and part F for an additional or subsequent work location. The work location is critical in determining the prevailing wage for the occupation in the area of intended employment. *See* 20 C.F.R. §§ 655.730(c)(4) and (d)(1).

In the response to the RFE, the petitioner states: "If there is a material change in the conditions of the beneficiary's employment, an amended petition will be filed on her behalf."

The regulation at 8 C.F.R. § 214.2(h)(2)(E) 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.*

[Italics added].

In light of the above, the AAO finds that a necessary condition for approval of an H-1B visa petition is an LCA, certified prior to the filing of the petition, with accurate information about where the beneficiary would actually be employed through the employment period specified in the Form I-129. That condition was not satisfied in this proceeding as the petitioner did not provide any evidence regarding the project(s) on which the beneficiary will work, including documentation to support how the project(s) entails the performance of duties in a specialty occupation, the length of the project(s), and that the beneficiary's assignment will be at the petitioner's offices on the project(s) for the duration of the petition, in contrast to the petitioner's business model of assigning workers pursuant to third-party contracts. A petitioner must establish eligibility at the time of filing a 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). Moreover, the purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought had been established at the time the petition was filed. *See* 8 C.F.R. §§ 103.2(b)(1) and (b)(8).

Beyond the decision of the director, the AAO will next examine whether USCIS has the authority to require the petitioner to submit the contracts requested in the RFE. In the support letter, the petitioner states: "The assignment of our computer professionals basically depends on our business needs and projects undertaken by the company. *Therefore, many of our contracts take the form of what is routinely referred to as third-party contracts.*" (Emphasis added.) However, the petitioner also asserts in its support letter that it is not required to provide either third-party contracts or itineraries in support of the petition and bases this position on two internal Legacy Immigration and Naturalization Service (INS) Memoranda, one from Michael L. Aytes, Assistant Commissioner, Office of Adjudications (Dec. 25, 1995), and the other from Louis D. Crocetti, Jr., Associate Commissioner, Office of Examinations (Nov. 13, 1995).

With respect to the USCIS memoranda, unpublished and internal opinions cannot be cited as legal authority and they are not precedent or binding on USCIS. *See* 8 C.F.R. § 103.3(c) (types of decisions that are precedent decisions binding on all USCIS officers). Courts have consistently supported this position. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000) (holding that legacy Immigration and Naturalization Serviced (INS) memoranda merely articulate internal guidelines for the agency's personnel; they do not establish judicially enforceable rights. An agency's internal personnel guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely"); *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); and *Romeiro de Silva v. Smith*, 773 F.2d 1021, 1025 (9th Cir. 1985) (describing an INS Operations Instruction (OI) as an "internal directive not having the force and effect of law"). Further, the Aytes memo qualifies its guidance as being subject to the exercise of the adjudicating officer's discretion. This is evident in the memo's statements that the itinerary requirement has been met "[a]s long as the officer is convinced of the bona fides of the petitioner's intentions with respect to the alien's employment," and that "[s]ervice officers are encouraged to use discretion in determining whether the petitioner has met the burden of establishing that it has an actual employment opportunity for the alien."

In addition, these memoranda were 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 memoranda 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, the director clearly has the regulatory authority to request such evidence as contracts and statements of work to ensure that a proffered position is not speculative and that it is in fact a specialty occupation. To that end and as indicated above, the director specifically requested evidence material to a determination of what duties the beneficiary would perform, where he would perform them, and who would ultimately control the work of the beneficiary. The petitioner refused to provide this material evidence and for this additional reason, the petition must also be denied. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Moreover, under the regulations, USCIS has the 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. Accordingly, the petitioner has not established the beneficiary's eligibility for the requested nonimmigrant visa classification.

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.