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

U.S. Citizenship and Immigration Services

D2

[redacted]

FILE: EAC 08 139 52466 Office: VERMONT SERVICE CENTER Date: JAN 05 2010

IN RE: Petitioner: [redacted]
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:

[redacted]

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).

for

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 technology consulting services company. It seeks to employ the beneficiary as a software engineer and to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on the following grounds: (1) the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation; and (2) the petitioner does not qualify as an H-1B employer as it failed to establish that it has sufficient work and resources for the beneficiary.

The record of proceeding before the AAO contains: (1) Form 1-129 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 1, 2008, the petitioner described itself as being engaged in the business of software solutions, training development, and information technology consulting services. The petitioner listed more than 4 employees in the Form I-129 and described itself as a subsidiary of a company in India. The petitioner indicated that it wished to employ the beneficiary as a software engineer from October 1, 2008 through September 16, 2011 at an annual salary of $55,500.

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:

- Analyzing the communications, informational and programming requirements of clients; planning, developing and designing business programs and computer systems.
- Designing, programming and implementing software applications and packages customized to meet specific client needs.
- Reviewing, repairing and modifying software programs to ensure technical accuracy and reliability programs.
- Training of clients on the use of software applications and providing trouble shooting and debugging support.

In the support letter, the petitioner goes on to state:

> This position requires at least a Bachelor degree in the field of computer Engineering or related field such as Engineering in electronics or communication because such a degree is the normal minimum requirement and the job duties are complex as described above. In order to be able to perform the duties, the beneficiary must have the theoretical knowledge of the above fields...This position therefore qualifies as a specialty

> occupation as defined in Title 8, C.F.R. 214.2(h)(4)(iii)(A), which states four criteria, anyone of which would show a position to be a **specialty occupation.**

The submitted Labor Condition Application (LCA) was filed for a software engineer to work in Piscataway, NJ and covers nearly the entire period requested by the petitioner. The LCA lists a prevailing wage of $55,500 obtained from a 2008 Watson Wyatt survey, a copy of which was not submitted by the petitioner. The LCA submitted by the petitioner covers the validity dates requested by the petitioner in the Form I-129 request for H-1B extension on behalf of the beneficiary.

With respect to the proposed worksite where the beneficiary will be assigned, the petitioner's support letter does not provide this information. However, the Form I-129 indicates that the beneficiary will work at the petitioner's offices at [redacted]

The beneficiary's education documents, indicating that he has a foreign degree, were submitted with the petition, but the petitioner did not include an education evaluation. The petitioner later submitted an education evaluation in response to the RFE.

On April 28, 2008, the director issued an RFE stating that the evidence of record appeared to indicate that the petitioner would utilize the beneficiary to perform services for clients outside the petitioner's work site. The petitioner was advised to submit an itinerary of definite employment, listing the organization(s) and location(s) where the beneficiary would provide services, as well as the dates of service, for the period of requested H-1B status. The petitioner was also advised to submit copies of its contractual agreements with the beneficiary and with companies for which the beneficiary would be providing consulting services. The RFE specifically noted that the petitioner should "provide a copy of the contract with the end user which specifically mentions the beneficiary and the duties he will perform with that end user...Also provide letters from customers of the petitioner to verify that the petitioner's products are being used by them." The director also requested documentation evidencing the petitioner's business, an organizational chart, and an evaluation of the beneficiary's education.

Counsel for the petitioner responded to the RFE on May 30, 2008 and stated as follows in the cover letter:

> Please note that Petitioner is a subsidiary and registered branch office of a large Indian corporation with the same name. They had recently acquired the consultancy division of Logistic Solutions, Inc. on February 1, 2008 for over $8 million dollars and currently doing business as Logistic Solutions. Logistic Solutions Inc. (hereinafter referred to as LSI) has been doing consulting and software development business since 1990. . . . Based on the Business Transfer Agreement, Petitioner had acquired all the contracts, personnel and other assets of LSI including the right to use Logistic Solutions name as goodwill. Petitioner is in the process of personnel transition from LSI to Petitioner Company. This is a cumbersome process **due to the fact that employees are placed at different client sites . . . .** LSI has contracts with large corporate clients to name [a] few Credit Suissee, AT&T, Pepsi, ADP, Info Experts and Procure Staff. **Now all their contracts have been assigned to petitioner due to the business purchase. Petitioner**

> **has to recruit more IT professionals and support professionals to full fill the contractual obligations and all future work orders.**

(Emphasis added).

This assertion by counsel that employees of the petitioner are assigned out to different client sites as well as the contracts between LSI and third party companies provided as supporting documentation in the petitioner's response to the RFE directly contradict the information that the petitioner indicated in the Form I-129 and LCA, namely, that the petitioner would employ the beneficiary at its offices in Piscataway, NJ.

Counsel for the petitioner included a copy of the business transfer agreement between LSI and the petitioner as well as copies of a number of contracts, all of which are between clients and LSI. None of the contracts or corresponding work orders mention the beneficiary by name. Moreover, nearly all the contracts are no longer valid. For the few contracts that remain valid, the validity periods do not cover the entire time period of the requested period of employment of the beneficiary. In addition, the work orders attached to the contracts indicate many different worksite locations, most of which are outside the area of employment listed in the Form I-129 and LCA. Even more probative, most of the work orders are for short term duration – a few months to one year. All this evidence indicates that it is unlikely that the petitioner has sufficient work for the beneficiary covering the requested period in the petition or that the petitioner will assign the beneficiary to work at the location listed in the Form I-129 and LCA.

The AAO will first consider whether the proffered position is a specialty occupation. Section 214(i)(l) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(l), 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 his services, and therefore whether his services would actually be those of a software engineer.

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 [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 Department of Labor's *Occupational Outlook 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.

On appeal, the petitioner claims that the beneficiary will be working at its offices at 2000 Centennial Avenue, Suite 209, Piscataway, NJ 08854 unless he is required to work at the client work location. However, in its response to the RFE and in support of the appeal, the petitioner does not provide any information about what projects the beneficiary will work on or duties the beneficiary will perform at its headquarters or contracts with client orders for work to be done that covers the period of employment requested in the petition. Indeed, most of the supporting documentation indicates that the petitioner primarily assigns its workers holding the same proffered position as the beneficiary to work at different client sites on projects of short-term duration. There are no work orders, no statements of work, and no work itinerary with respect to the proposed employment of the beneficiary. 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).

The AAO notes that, as recognized by the court in *Defensor v. Meissner*, 201 F.3d at 387, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. The court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work. The record of proceedings lacks such substantive evidence from any end-user entities that may generate work for the beneficiary and whose business needs would ultimately determine what the beneficiary would actually do on a day-to-day basis. 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.

The petitioner is seeking the beneficiary's services as a software engineer. Counsel's brief in support of the appeal seeks to distinguish *Defensor* by stating that the position of software engineer is always a specialty

occupation. In this matter, however, the AAO need not address the issue of whether the position of software engineer is always a specialty occupation, because the issue that must be addressed first is whether insufficient evidence was provided that demonstrates whether the work to be completed by the beneficiary entails the performance of duties that correspond with the description of a software engineer. 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 his 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 will address the issue of whether or not the petitioner qualifies as an H-1B employer. In the RFE response letter, counsel for the petitioner provides the following explanation as to why the beneficiary's name is not mentioned in the contracts or work orders: "Please note that in the consultancy business, there is a master service agreement by which the consultancy firms enter into an agreement with clients to provide service based on their requirements. When the requirement occurs, the client would place a work order with the available consultant. Most of the big corporate clients will place more consultants in one project that could run for a long term. Hence, client will able to put consultant's name in the work order only when he or she is present inside the US." The AAO understands that it may not be the petitioner's business practice to list the beneficiary by name in a work order until the beneficiary is employed by the petitioner. However, if the petitioner only intends to employ the beneficiary on short-term work orders at different third party sites throughout the U.S. on an as needed basis, which is what the supporting evidence that the petitioner submitted indicates it intends to do, then there is no guarantee of work for the beneficiary for the requested period in the petition and any offer of employment made to the beneficiary would be purely speculative.

In support of its assertion that the petitioner will be the employer of the beneficiary and not a contractor or agent, counsel on appeal cites to *Matter of Smith*, 12 I&N Dec. 772 (Dist.Dir. 1968) and AAO decisions that followed. *Smith* can also be distinguished from this case. First, *Smith* involved a sixth preference immigrant petition and not an H-1B nonimmigrant petition. Second, the petitioner in *Smith*, a staffing service, provided a continuous supply of secretaries to third-party clients. The district director determined that the staffing service, rather than its clients, was the beneficiary's actual employer. To reach this conclusion, the director looked to the fact that the staffing service would directly pay the beneficiary's salary; would provide benefits; would make contributions to the beneficiary's social security, worker's compensation, and unemployment insurance programs; would withhold federal and state income taxes; and would provide other benefits such as group insurance. (*Id.* at 773). Although these factors are relevant in determining the beneficiary's employer for the purpose of guaranteeing permanent employment in an immigrant petition context, in an H-1B context the petitioner has to establish that it is an employer that has or will have an employer-employee relationship with the beneficiary and that it is making a bona fide offer of employment to the beneficiary. *See* 8 C.F.R. § 214.2(h)(4)(ii)(definition of United States employer).

By not submitting any other contracts, itineraries of definite employment, or other supporting documentation evidencing that the beneficiary would be employed in the proffered position for the period of time and at the location requested in the petition, the petitioner precluded the director from determining the beneficiary's proposed work schedule, dates of service, pay schedule, and work location. In other words, the director could not establish 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 and employer-employee relationship based on the evidence of record.[1] Likewise, the USCIS memoranda referred to by the petitioner on appeal are intended for cases where the petitioner has been found to be an employer. However, in this case, the AAO does not find that the petitioner has submitted sufficient documentation evidencing that it will be the beneficiary's employer.

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[1] It is noted that, subsequent to the decision in *Matter of Smith*, the United States Supreme Court determined that where federal law fails to clearly define the term "employee," courts should conclude that the term was "intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (hereinafter "*Darden*") (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). The Supreme Court stated:

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Darden, 503 U.S. at 323-324; *see also Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. at 440 (hereinafter "*Clackamas*"). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).

As such, while social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are still relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary's employer. Without full disclosure of all of the relevant factors, the director would be unable to properly assess whether the requisite employer-employee relationship will exist between the petitioner and the beneficiary.

The AAO therefore affirms the director's finding that the petitioner does not qualify as an H-1B employer as it also failed to establish that it has sufficient work and resources for the beneficiary.

Beyond the decision of the director, the AAO will next examine whether USCIS has the authority to require the petitioner to submit this additional documentation. On appeal, in justifying why it was not required to provide this additional evidence, counsel for the petitioner cited to two USCIS memorandums as well as several case decisions.

With respect to the USCIS memorandum (HQ 214h-C, Nov. 13, 1995) and the Michael L. Aytes internal memorandum (Dec. 25, 1995) mentioned by counsel on appeal, unpublished and internal opinions can not 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, 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 evidence submitted by the petitioner in response to the RFE contradicts the assertions made in the forms and documentation initially submitted (in the initial filing there was no mention of the petitioner's acquisition of a division of LSI or the fact that the beneficiary would most likely be assigned out to work at third party locations). 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). In this case, the discrepancies and errors catalogued above lead the AAO to conclude that the evidence of the beneficiary's eligibility is not credible. Accordingly, the petitioner has not established the beneficiary's eligibility for the requested nonimmigrant visa classification.

On appeal, counsel also asserts that an unpublished decision, *In re: X*, 16 Immig. Rptr. B2-69 (AAO, Feb. 23, 1996), stands for the same proposition as the USCIS memoranda cited by counsel, namely that the director's request for contracts did not fall within service guidelines. Again, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. Moreover, as discussed above in the context of the USCIS memorandums, the reasoning behind this decision should be applied in a situation where the documentation submitted by the petitioner indicates that the petitioner is the actual employer and not a contractor or agent and, further, must not be interpreted as countermanding or contradicting the regulations authorizing USCIS to request additional documentation.

In another of the unpublished decisions referenced by counsel on appeal, *Matter of X*, 22 Immig. Rptr. B2-29 (AAO, May 23, 2000), the AAO determined that the petitioner was an actual employer, not an agent, and that it does not merely send employees to jobs, but also employs computer specialists at its own facility. Also cited by counsel on appeal, *In re: X*, 13 Immig. Rptr. B2-210 (AAO, Oct. 31, 1994) and *In re: X*, 14 Immig. Rptr. B2-87 (AAO, Jan. 26, 1995) found that the petitioner was an employer, not an agent. In this petition, the supporting evidence submitted indicates that the petitioner intends to employ the beneficiary primarily at client sites as the work and need arises. Therefore, whether a petitioner would act as either an employer or agent, the regulations clearly require the submission of an itinerary detailing the dates and locations of the services to be provided. *See* 8 C.F.R. §§ 214.2(h)(2)(B) and (F). The petitioner has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decisions. 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.

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).

As mentioned above, the petitioner did not submit any contracts, itineraries of definite employment, or other supporting documentation evidencing that the beneficiary would be employed in the proffered position for the period of time and at the location requested in the petition. As the petitioner failed to provide this material requested evidence, the petition must be denied for this additional reason. *Id.*

Moreover, where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and will not consider the sufficiency of the evidence submitted on appeal. Consequently, the appeal will be dismissed. However, the AAO notes that, in any event, the additional contracts submitted on appeal between LSI and third party clients do not reconcile any inconsistencies as they do not cover the entire period of time requested in the petition and as the beneficiary is not mentioned by name.

Beyond the decision of the director, the AAO also finds that the petitioner did not establish eligibility at the time the petition was filed. The LCA and Form I-129, which list the proffered position's location as being at the petitioner's offices in Piscataway, NJ, do not correspond with the contracts and work orders provided by the petitioner as supporting documentation in response to the RFE. The petitioner cannot possibly assert that it will pay the beneficiary the prevailing wage for the geographical area where the beneficiary will be employed as listed in the submitted LCA if the petitioner does not yet know where the beneficiary will perform the work. As such, the petitioner cannot establish that it has complied or will comply with the requirements of § 212(n)(1)(A)(i) of the Act, 8 U.S.C. § 1182(n)(1)(A)(i), as of the time the petition was filed. The 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). For this additional reason, the petition cannot be approved.

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 and whether the beneficiary possesses the requisite qualifications also cannot be determined. Therefore, the AAO need not and will not address the beneficiary's qualifications further.

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.