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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

B2

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: JUL 01 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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner describes itself as a corporation which provides a full continuum of information technology services. To employ the beneficiary in a position that it designates as Programmer Analyst, the petitioner endeavors to classify the beneficiary 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 three independent grounds, namely, his findings that the evidence of record failed to (1) provide the itinerary that the regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) requires when a proffered H-1B position is to be performed at more than one location; (2) establish that the Labor Condition Application (LCA) filed with the petition corresponds to the locations where the beneficiary would work; and (3) establish that the proffered position is a specialty occupation.

Appeal Dismissed for the Petitioner's Failure to Contest the Specialty Occupation and LCA Issues

Of the three grounds that the director specified for denying the petition, the appeal addresses only one, namely, the petitioner's failure to produce an itinerary of the beneficiary's proposed employment in accordance with the regulation at 8 C.F.R. § 214.2(h)(2)(i)(B).

The specialty occupation and LCA grounds invoked by the director are separate and independent from the itinerary issue, the single issue raised on appeal, and their merits are beyond the scope of that single issue. Whether, as asserted on appeal, the petitioner was not required by 8 C.F.R. § 214.2(h)(2)(i)(B) to provide the itinerary there described is a separate issue from both the specialty occupation ground for denying the petition (for the absence of "documentation that establishes what the beneficiary's specific duties will be while working under contract for a client, subcontractor, or end client," such that "USCIS cannot determine that these duties will require at least a baccalaureate degree or the equivalent in a specific specialty as required for H-1B classification") and the LCA ground for denial (for failure to establish that the proposed employment would be within the area encompassed by the LCA). Consequently, even if the single issue raised on appeal were resolved favorably for the petitioner, the validity of the director's separate determinations to deny the petition on the specialty occupation and LCA grounds would be unaddressed and unaffected.

Therefore, regardless of the outcome of the one issue raised on appeal, the appeal must be dismissed because the petitioner fails to specify any factual or legal error in the director's determinations to deny the petition on the specialty occupation and LCA grounds. *See* 8 C.F.R. § 103.3(a)(1)(v), which requires summary dismissal of an appeal that does not specify any erroneous conclusion of law or

statement of fact by the director in denying the petition. Therefore, the AAO affirms the director's determinations to deny the petition on each of these two grounds, and the appeal will be dismissed.

Notwithstanding the fact that the above determination is dispositive of the appeal, the AAO will address the merits of each of the three grounds that the director specified for denying the petition. Although not required, the AAO will do so in order to elucidate the validity of each of the three grounds upon which the director denied the petition.

The AAO will first outline salient facts in the record that relate to each of the director's grounds for denying the petition.

In its March 26, 2009 letter of support filed with the Form I-129, the petitioner states that it currently conducts business in three main IT areas, namely: (1) development of Web Portals in the job search arena; (2) development of products that will increase the petitioner's line of services to its clients; and (3) client projects.

In his letter of reply to the director's request for additional evidence (RFE), counsel for the petitioner states that the petitioner will provide the beneficiary work from two general "'sources,'" namely (1) "its own direct clients which utilize the services of [the petitioner's] IT professionals," and (2) other "IT providers" who need IT workers for contracts with "end-user clients." Counsel also states, however, that due to the realities of the IT staffing and consulting business in which it is engaged, the petitioner is unable to provide the itinerary evidence requested by the RFE.

The petitioner provides three documents as examples of contracts with "direct clients," namely, the petitioner's agreements for consulting services with (1) CIBA Vision Corporation (CIBA); (2) Julius Baer Investment management (JBIM); and (3) BlackRock Financial Management, Inc. (BlackRock).

In the CIBA document, the petitioner agrees to provide a specifically named individual (not the beneficiary) for a period commencing November 13, 2007 and projected to end on December 31 of that year. The only reference to the type of service to be provided by the petitioner is the phrase "Scope of Work: Java/Tibco," about which no information is provided.

The copy of the JBIM Agreement for Consulting Services is materially incomplete, as its sections for "The [E]ssential Terms and Conditions of Services to [B]e [P]erformed" and for the "Scope of Work" are blank. Also, the document does specify the position title of the person who would perform the unidentified work.

The petitioner also failed to provide a copy of the complete Consulting Agreement with BlackRock. The petitioner submitted only the first 10 pages of what is paginated as a 13-page document, and the petitioner also failed to submit the sample SOW (Statement of Work) that the agreement references as its Exhibit A. The incomplete BlackRock agreement contains terms and conditions that would govern any SOW which the petitioner and BlackRock accept as a mutually binding contractual obligation. However, the petitioner has not provided any SOW to which this agreement relates.

As an example of its contracts with other IT providers, the petitioner provides only one document, namely, a Consulting Services Agreement of March 2, 2005 with Tata Consulting Services (TCS). This document provides a framework of provisions that would govern any SOW under which the petitioner would agree to provide "consultants" to TCS for TCS to assign, in turn, to TCS's customer AIG. However, as this document is not supplemented by any SOW, the specific nature of any project to which the agreement would apply is not established. Thus, as with the other agreement documents submitted into the record, there is no indication of any substantive work performed or to be performed under the agreement.

As reflected in the above survey of the record's agreement documents, they fail to establish any specific projects to which they relate, the substantive nature of any such project, the educational requirements for such work, and, consequently, whether the agreement documents relate to any specialty occupation work. Further, the record is devoid of documentary evidence of any contract for the beneficiary's services during the employment period specified in the petition.

With regard to the LCA issue, the AAO notes that the petitioner's list matching its workers to particular job sites shows that, besides the Princeton, New Jersey work location specified in the Form I-129 and the LCA, the petitioner's workers are also assigned to various other locations in Pennsylvania, Texas, Georgia, California, Illinois, New York, Ohio, and Massachusetts. Given this record's absence of any independent documentation of where the beneficiary would be assigned, the broad range of worksites in the worker-location list indicates that the beneficiary may be assigned to worksites outside of the location indicated in the Form I-129 and the LCA. Further, with regard to the locations where the beneficiary would work, section 5 of Part 5 of the Form I-129 states that the beneficiary's work address would be the petitioner's office address and "various unanticipated client locations throughout the U.S."

The Itinerary Issue

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) 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.

With the Form I-290B and its attachment page counsel submits an AILA[1] InfoNet transmission of a document from the Office of Adjudications of the legacy Immigration and Naturalization Service

[1] AILA is the acronym of the American Immigration Lawyers Association.

(INS), namely: a 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 referred to as the Aytes memo). Quoting sections of the memo, counsel contends that the director's denial of this petition for failure to provide an itinerary as that term is defined at 8 C.F.R. § 214.2(h)(2)(i)(B) "contravenes the long-established INS and USCIS [(U.S. Citizenship and Immigration Services, the successor to INS)] policy set out in the [Aytes memo] regarding the term 'itinerary.'" Counsel claims the following section of the Aytes memo states a policy that estops USCIS from denying an H-1B petition for lack of an itinerary:

> In addition, in the case of an H-1B petition filed by an employment contractor, a general statement of the alien's proposed or possible employment is acceptable since the regulation does not require that the employer provide the Service with the exact dates and places of employment. As long as the officer is convinced of the bona fides of the petitioner's intentions with respect to the alien's employment, the itinerary requirement has been met. The itinerary does not have to be so specific as to list each and every day of the alien's employment in the United States.

Counsel also quotes the following section of the memo as requiring, as a matter of policy, that "the staffing company's H-1B track record [be given] 'significant weight'" in determining compliance with the itinerary requirement at 8 C.F.R. § 214.2(h)(2)(i)(B):

> The petitioner's past hiring should also be considered in determining whether the petitioner has met the itinerary requirement as discussed in the regulation. Certainly, a company's past practice of employing H-1B non-immigrants in conformity with the statute and the regulation should be given significant weight in determining whether the itinerary has been met.

Asserting that the policy in the memorandum "has been relied upon by the computer software services staffing industry, among other consulting industries" and "has been the basis of approval of thousands of H-1B petitions where the petitioning consulting company did not know the exact place where the H-1B consultant would be assigned," counsel states that "to deny a petition that explicitly relied upon that policy with no notice to the public is improper," and that USCIS cannot decide the itinerary issue as the director did in this case because the agency has not yet issued a "a notice to the employment community" of its intent to abandon the policy stated in the Aytes memo."

The AAO will now discuss why counsel's argument is erroneous on many levels.

The Aytes memo does not override the regulation

The itinerary language at 8 C.F.R. § 214.2(h)(2)(i)(B) of the regulation, with its use of the mandatory "must," establishes that the itinerary as there defined is a material and necessary document for an H-1B petition involving employment at multiple locations, and that such a petition

may not be approved for any employment period for which there is not submitted at least the employment dates and locations. An agency guidance document, such as the Aytes memo, does not have the force and effect to preempt or countermand the clear mandate of an agency regulation, such as the one at 8 C.F.R. § 214.2(h)(2)(i)(B), that has been properly promulgated, after opportunity for public comment, in accordance with the Administrative Procedure Act (APA). Further, the AAO notes that the Aytes memo has no precedential value and, therefore, no binding effect as a matter of law upon 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"); *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").

The Aytes memo does not proscribe the actions taken by the director with regard to this petition

Aside from the fact that the Aytes memo does not have the authoritative status to override the regulatory mandate for an itinerary at 8 C.F.R. § 214.2(h)(2)(i)(B), and contrary to the counsel's interpretation of the memo's language, the Aytes memo does not mandate USCIS officers to forgo the regulatory requirement for an itinerary. 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." As such, the Aytes memo does not mandate that the director in this matter, or any USCIS officer, accept any substitute for the itinerary minimum (i.e., dates and locations) mandated at 8 C.F.R. § 214.2(h)(2)(i)(B). Accordingly, the director's seeking itinerary information and later denying the petition for the lack of that information did not violate any aspect of the Aytes memo.

The petitioner has not established an H-1B employment record that merits "significant weight" under the Aytes memo

Next, by quoting the Aytes memo's statement about giving "significant weight" to "a company's past practice of employing H-1B non-immigrants in conformity with the statute and the regulation" counsel asserts, at least by implication, that the record of proceeding establishes such a past practice by the petitioner. The AAO finds, however, that such is not the case here. The documentation

submitted by the petitioner with regard to H-1B petitions approved on its behalf (consisting of the aforementioned agreement documents and lists of H-1B beneficiaries, their job titles, their work locations, and the customers to which they are assigned) does not establish that the petitioner has actually been employing any of the beneficiaries in conformity with the statutes and regulations promulgated by INS/USCIS and by DOL with regard to the H-1B program,[2] and counsel's uncorroborated assertions in this regard have no weight. 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)). 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).

Reliance on the Aytes memo and H-1B petition approvals as supplanting the itinerary requirement at 8 C.F.R. § 214.2(h)(2)(i)(B) is misplaced

As will now be discussed, the AAO finds no merit in counsel's claim that staffing and consulting industries' reliance on the Aytes memorandum and on "thousands" of H-1B petitions approved "where the petitioning consulting company did not know where the H-1B consultant would be assigned" requires USCIS to disregard the precisely stated itinerary requirement at 8 C.F.R. § 214.2(h)(2)(i)(B) until and unless USCIS publishes a statement expressly "abandoning" the Aytes memo.[3]

As already noted in this decision, an agency guidance document, such as the Aytes memo, does not have the force and effect to preempt or countermand the clear mandate of an agency regulation, such as the one at 8 C.F.R. § 214.2(h)(2)(i)(B), that has been properly promulgated, after opportunity for public comment, in accordance with the APA. Therefore, even if the Aytes memo explicitly renounced the regulatory requirement for an itinerary in circumstances, such as here, where the

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[2] The record of proceeding does not document the specific projects upon which the petitioner's H-1B employees have been employed; the nature and level of specialized knowledge required to be theoretically and practically applied for the successful performance of those projects; the nature and level of higher education, if any, required to attain such knowledge; or the extent of the petitioner's compliance with the wage-and-hour and other obligations that DOL regulations require of H-1B employers. The record also fails to establish that, where services were to be provided in more than one location, itineraries were provided and the H-1B employees were employed in accordance with those itineraries. Accordingly, the record of proceeding lacks an adequate factual basis for USCIS to assess the extent to which the petitioner has been employing its H-1B beneficiaries in conformity with the governing statutes and regulations.

[3] Although not documented in the record of proceeding, for the sake of definitively resolving this issue, the AAO will assume that, because of the Aytes memo, many H-1B petitions that have been approved in disregard of the clear mandate at 8 C.F.R. § 214.2(h)(2)(i)(B) for an itinerary as there described. Also, the AAO will not dispute counsel's claim on appeal that the petitioner relied upon the Aytes memo as USCIS policy.

petitioner neither provides nor knows the dates and locations of the beneficiary's assignments,[4] the memo would not supersede or override the agency's published regulation requiring the itinerary. Further, as already discussed in this decision, the Aytes memo does not proscribe any action that the director took with regard to the present petition.[5] Therefore, the petitioner's reliance upon the Aytes memo is misplaced and does not relieve the petitioner of the itinerary requirement at 8 C.F.R. § 214.2(h)(2)(i)(B).

Next, the AAO finds that counsel errs in contending that past approvals of petitions for H-1B workers in multiple locations without the itinerary information specified at 8 C.F.R. § 214.2(h)(2)(i)(B), and petitioners' reliance upon that course of USCIS conduct, are effectively equivalent to a published USCIS policy conferring upon petitioners a substantive right to forgo the regulation's itinerary requirement. It should first be noted, however, that no evidence was submitted to support this claim, i.e., decisions and corresponding case files for petitions approved by USCIS for which an itinerary normally required by the regulations was not submitted.

Although corroborating evidence was not submitted, counsel does cite one court case in support of his argument, *British Steel PLC v. U.S.*, 127 F.3d 1471, 1475 (C.A. Fed., 1977), quoting the court's recognition of the principal that "[a]n agency is obligated to follow precedent, and if it chooses to change, it must explain why." Counsel fails to establish any correlation between the facts in *British Steel* and those in the present case. Further, counsel provides no statutory, regulatory, precedent-decision, or case-law basis to support his premise that the Aytes memo and/or USCIS non-precedent decisions constitute an agency precedent.

Further, counsel fails to recognize that the Aytes memo and USCIS decisions must be evaluated in the full regulatory context pertaining to H-1B petitions. Knowledge of all regulations is imputed to every petitioner by virtue of the fact that, after opportunity for public comment, these regulations have been officially published in the Federal Register as final rules governing the agency's operations. In this regard, the AAO finds that the relevant regulatory context defeats counsel's argument. The import of the regulations at 8 C.F.R. §§ 103.2(b)(16)(ii) and 103.8(d) is that each petition filing is a separate proceeding with a separate record, and that, in making a determination of statutory eligibility, USCIS is limited to the information contained in the particular record of proceeding. Also, the regulation at 8 C.F.R. § 103.3(c) limits USCIS decisions binding all USCIS officers as a matter of law to "service precedent decisions" as defined in that regulation. Further, the regulation at 8 C.F.R. § 103.2(b)(1) states that petitions must be filed with "any initial evidence required by applicable evidence regulations and/or the [petition] form's instructions," thereby

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[4] That this is not the case is evident in the language of the Aytes memo and reflected in this decision's previous comments regarding the memo.

[5] The AAO here incorporates its earlier comments regarding the fact that the language of the Aytes memo, with its reference to officer discretion and its precatory wording, does not purport to mandate USCIS officers to ever forgo the requirement at 8 C.F.R. § 214.2(h)(2)(i)(B) for at least the dates and locations of proposed employment when adjudicating an H-1B petition for employment of a beneficiary at multiple locations.

requiring the 8 C.F.R. § 214.2(h)(2)(i)(B) itinerary at the time of filing. In addition, the current regulation at 8 C.F.R. § 103.2(b)(8), authorizes USCIS to deny a petition outright, without issuing an RFE or further reviewing the evidence of record, where the petition is filed without initial evidence required by regulation (which here includes the itinerary). Further, 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). In this context, and given the clear mandate for an itinerary at 8 C.F.R. § 214.2(h)(2)(i)(B), the petitioner's reliance upon alleged approvals issued on petitions that do not strictly comply with the itinerary requirement at 8 C.F.R. § 214.2(h)(2)(i)(B) – and which are, by the way, all vulnerable to revocation proceedings per 8 C.F.R. § 214.2(h)(11)(iii)(5), as issued in violation of the H-1B regulations – is unjustified and misplaced.

Additionally, the director had authority beyond 8 C.F.R. § 214.2(h)(2)(i)(B) to request and consider itinerary evidence

Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, 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 regulations at 8 C.F.R. §§ 103.2(b)(8) and 214.2(h)(9)(i) provide the director broad discretionary authority to require such evidence as contracts to establish that the services to be performed by the beneficiary will be in a specialty occupation. A service center director may issue an RFE for evidence that he or she may independently require to assist in adjudicating an H-1B petition, and his or her decision to approve a petition must be based upon consideration of all of the evidence as submitted by the petitioner, both initially and in response to any RFE that the director may issue. *See* 8 C.F.R. § 214.2(h)(9). The purpose of an RFE 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)(1), (b)(8), and (b)(12).

The AAO finds that, in the context of the record of proceedings as it existed at the time the RFE was issued, the RFE request for itinerary evidence was more than appropriate under the above cited regulations, in that it addressed the petitioner's failure to submit documentary evidence substantiating the petitioner's claim that it had H-1B caliber work for the beneficiary for the period of employment requested in the petition. Further, as discussed in this decision's upcoming section on the specialty occupation issue, the petitioner's failure to provide the itinerary evidence requested in the RFE, and the petitioner's admission that it possessed no such evidence, required the director to deny the petition.

For all of the reasons discussed above, the AAO affirms the director's denial of the petition on the grounds of the petitioner's failure to provide the itinerary evidence sought in the RFE.

The LCA Issue

The director determined that the petitioner failed to provide an LCA valid for this petition, that is, an LCA that "cover[s] the location where the services are to be performed by the beneficiary." The director's decision states, in pertinent part:

> [B]ecause the intention of this petition is to employ the beneficiary at end client sites, and it is not known where, when, or for whom the beneficiary would actually perform duties, you have not satisfied the requirement per 8 C.F.R. § 214.2(h)(4)(i)(B)(1) in obtaining a certification from DOL [the Department of Labor] before filing for the H-1B classification.

As will now be discussed, the AAO finds that the director was correct to deny the petition on the LCA issue.

The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) stipulates the following:

> 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.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(1) states that, when filing an H-1B petition, the petitioner must submit with the petition "[a] certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary." Thus, in order for a petition to be approvable, the LCA must have been certified before the H-1B petition was filed. The submission of a certified LCA certified subsequent to the filing of the petition satisfies neither 8 C.F.R. § 214.2(h)(4)(i)(B)(1) nor 8 C.F.R. § 214.2(h)(4)(iii)(B)(1). 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).

While the DOL is the agency that certifies LCA applications before they are submitted to USCIS, the DOL regulations note that it is within the discretion of the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) to determine 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.)

It should be noted that a petition consists of all of the documents submitted with it, and that its content with regard to any particular issue consists not just of entries on the Form I-129 but also of all relevant information within the four corners of the record of proceeding. Therefore, the extent to which the terms of an LCA conform to the terms of an H-1B petition depends upon the totality of relevant information provided within the record of proceeding.

The record of proceeding indicates that actual work locations for performance of the beneficiary's services would be determined by whatever contractual documents specify them, but no such documents were submitted. This fact, the record's list of present worksites around the United States, the petitioner's annotation on the LCA that the beneficiary would work "at various unanticipated client locations throughout the U.S.," and counsel's statements that the petitioner could not forecast where exactly the beneficiary would work demonstrate that the director was correct in determining that the one location specified in the LCA does not encompass all of the locations where the beneficiary would be assigned to work. Accordingly, the petitioner has not established that the petition is supported by a corresponding LCA. For this reason also, the appeal must be dismissed and the petition denied.

The Specialty Occupation Issue

The AAO hereby endorses the director's analysis of the specialty occupation as written, finding that it accurately assesses the evidence of record and comports with the statutes and USCIS regulations governing the specialty occupation aspect of the H-1B program. Accordingly the AAO fully affirms the director's determination with regard to the specialty occupation issue. [6]

As reflected in the director's discussion of the specialty occupation issue, by failing to document the projects to which the beneficiary would be assigned, their substantive nature, and the educational requirements for their performance, the petitioner has also necessarily failed to establish that the work to which the beneficiary would be assigned would require the theoretical and practical

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[6] The AAO notes, however, that the director is incorrect if he meant to convey that Programmer Analyst positions categorically qualify as a specialty occupation. The information on educational requirements in the "Computer Systems Analysts" chapter of the 2010-2011 edition of DOL's *Occupational Outlook Handbook* indicates that a bachelor's or higher degree in computer science, information systems, or management information systems is a general preference, but not an occupational requirement, among employers of Programmer Analysts, whom the *Handbook* identifies as a subcategory of the Computer Systems Analyst occupation. That the Programmer Analyst occupational category accommodates a wide spectrum of educational credentials is especially reflected in the "Training, Other Qualifications, and Advancement" section of the *Handbook's* "Computer Systems Analysts" chapter.

application of at least a U.S. bachelor's degree level of highly specialized knowledge in a particular IT-related specialty, as required by section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l), and the implementing regulations at 8 C.F.R. § 214.2(h).

The petition will be denied and the appeal dismissed 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.