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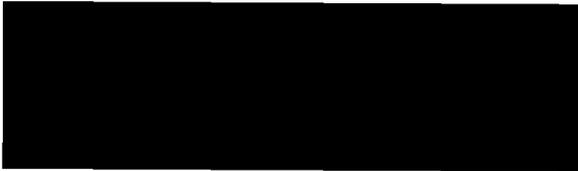
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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Services

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FILE: WAC 08 148 52200 Office: CALIFORNIA SERVICE CENTER Date: **MAR 02 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 an SAP services company. It seeks to employ the beneficiary as a computer software engineer (SAP systems) 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 does not qualify as a United States employer or agent; (2) the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation; and (3) the petitioner did not comply with the requirement that a Labor Condition Application (LCA) be certified by the Department of Labor (DOL) for the period of employment at the time of filing the H-1B petition.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) Form I-290B, an appeal brief, and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

In the petition submitted on April 28, 2008, the petitioner stated it has four employees and a gross annual income of \$400,000. The petitioner indicated that it wished to employ the beneficiary as a software engineer from October 1, 2008 through September 20, 2011 at an annual salary of \$60,000.

The job duties as described in the H-1B petition are as follows:

- Design, develop and debug presentation layer and middle layer (business rules) using C, C++, VC++, C#, VB, Net, ASP, VSS, SQL Server, Java, XML, and NET, for n-tier and client server applications.
- Software development, management and maintenance of application environment using .Net, ASP.NET, ADO.NET
- Create new functions, procedures, and packages using PL/SQL to implement business rules.
- Designing, testing and implementation of backup/recovery procedure for database.
- Generate automated and load processes, batch job administration, optimize database performance and SQL queries.
- Provide capacity planning and space allocation.
- Attends specification meeting with project team workers to determine scope and limitations of project.
- Reviews procedures in data base management system manuals for making changes to database, such as defining, creating, revising, and controlling database.

The petitioner stated that 35% of the beneficiary's time would be spent on software analysis and modification; 35% on system integration, testing & quality assurance; 10% on providing system management, backup and

recovery; 10% studying the existing system; and 10% in meetings and discussions. The petitioner stated that the job requires, at a minimum, a bachelor's degree in science, engineering, a related analytic or scientific discipline, or the equivalent.

The submitted Labor Condition Application (LCA) was filed for a software engineer to work in Denver, CO from September 20, 2008 through September 20, 2011. The LCA lists a prevailing wage of \$58,573. The Form I-129 indicates that the beneficiary will work in Denver, CO.

The petitioner submitted an Employment and Confidentiality and Assignment of Inventions Agreement between the petitioner and the beneficiary, which states that the beneficiary will work as a software engineer, but does not provide any detail about the project(s) to be worked on or the location where the work will be performed.

The beneficiary's education documents and resume were submitted with the petition. In response to the RFE, the petitioner submitted a credential evaluation, which states that the beneficiary's foreign degree is equivalent to a Master's degree in Computer Information Systems at a regionally accredited university in the United States.

On May 12, 2008, the director issued an RFE requesting additional evidence pertaining to the proffered position, the petitioner, and the beneficiary. The petitioner was advised to submit documentation clarifying the petitioner's relationship with the beneficiary, including an itinerary of definite employment, listing the names of the employers and locations where the beneficiary would provide services, as well as copies of its contractual agreements with its clients. The RFE specifically noted that "providing evidence of work to be performed for other consultants or employment agencies who provide consulting or employment services to other companies may not be sufficient. The evidence should show specialty occupation work with the actual client-company where the work will ultimately be performed."

Counsel for the petitioner responded to the RFE, asserting that the petitioner is the actual employer of the beneficiary. Among the documents counsel included, in pertinent part, were copies of the following:

- An undated Independent Contractor Agreement between the petitioner and a company called eInfotek, Inc. (EINFOTEK), which is located in Fremont, CA;
- A Work Order between the petitioner and EINFOTEK, dated June 2, 2008, after the date the petition was filed, which is valid from October 20, 2008 to July 20, 2009. The Work Order lists the beneficiary by name and states that he will "[p]rovide technical consulting services for EINFOTEK, INC client. . . ."
- A letter from a Project Manager at a company called Spectranetics, which states that the beneficiary will work at Spectranetics as a Programmer Analyst in Colorado Springs, CO.
- A new LCA, certified on June 18, 2008, after the petition was filed, for a software engineer to work in Colorado Springs, CO from October 1, 2008 to October 1, 2011, with a prevailing wage listed of \$57,970.
- Photographs of the petitioner's offices, which indicates that the petitioner is located in a residential home.

Therefore, the documentation submitted in response to the RFE indicates that the petitioner intends to assign the beneficiary to a third-party client in Colorado Springs, CO for nine months as a programmer analyst, in

contrast to the information provided in the petition that the beneficiary would be employed by the petitioner as a software engineer in Denver, CO for approximately three years. 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 director denied the petition on July 29, 2008. On appeal, counsel asserts that the petitioner is the employer. Counsel also states as follows:

The Petitioner had two open work-orders for the beneficiary's services with e-Infotek and had provided the service with a LCA and work-order for the Colorado Springs location with the Petitioner's Response to the Service Request for Additional Evidence.

Given that a new LCA is not acceptable for the Colorado Springs location, the beneficiary has been re-assigned back to the original location for which we had submitted a certified LCA with the original petition. . . .

Counsel also, for the first time on appeal, states that the beneficiary will be assigned to a job in Aurora, Colorado, which is within the same metropolitan geographical region as Denver, CO, listed in the initial LCA. Counsel also provides a Statement of Work (SOW) not previously submitted, which he states is pursuant to the petitioner's contract with EINFOTEK. The SOW is signed by EINFOTEK and a company called Republic Financial, Inc. The SOW also lists the beneficiary by name and indicates that he will work as a Java, VB Developer from October 20, 2008 to July 20, 2009. Additionally, the SOW states that all work to be performed by the beneficiary will be done under the direction of a supervisor at Republic Financial. The petitioner is not a party to the SOW and counsel did not submit a copy of the contract between EINFOTEK and Republic Financial.

With the SOW, counsel also submits a letter, dated June 15, 2008, from a Project Manager at Republic Financial, who writes that the beneficiary will work "[a]s a contractor in the position of Java Developer." The new position duties are described as follows in this letter:

- Analyzes business requirements and operating procedures to under the web applications written in JAVA, JAVA Script, VB.Net and ASP.Net
- Analyze, review, and modify programs to increase operating efficiency, and adapt new requirements;
- Develops and analyze options for improving the performance of business functions by developing and evaluating enhancements and modifications of software applications.
- Design and develop programming using C#, VB.NET, ASP.NET, HTML, Web-Service, JAVA, JAVA Script, SQL SERVER 2005 and ORACLE 10g if necessary

- Develop, test and implement custom and modified information systems
- Work with System Administrators to assure smooth functioning of newly implemented programs.

It is apparent that counsel is attempting to change the nature and title of the proffered position as stated in the petition. The initial petition described the proffered position as a software engineer who would work in Denver, CO for approximately three years. In response to the RFE, counsel tried to change the proffered position to a programmer analyst working for a third-party client in Colorado Springs, CO for approximately nine months and submitted an LCA that was certified after the petition was filed. Now, on appeal, counsel retracts the amended position of programmer analyst described in response to the RFE and tries, yet again, to change the nature and title of the proffered position to be that of a Java Developer who would work for a third-party client in Aurora, CO for approximately nine months. As the duties presented on appeal materially change the scope and nature of the position for which the petition was filed, they will not be considered on appeal. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Therefore, the analysis of this criterion will be based on the job description submitted with the initial petition.¹

¹ As counsel for the petitioner stated that the petitioner no longer intends to assign the beneficiary to work as a programmer analyst for a third-party client in Colorado Springs, CO, the AAO need not address the amended position description or new LCA submitted by the petitioner in response to the RFE. However, the AAO notes that this attempt to change the nature and title of the proffered position to be that of a programmer analyst in response to the RFE would, in any event, be rejected as the petitioner, in this case, would be required to file an amended or new petition. Title 8 C.F.R. § 214.2(h)(2)(i)(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.

Moreover, 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 as of the date the petition was filed.

While DOL is the agency that certifies LCA applications before they are submitted to U.S. Citizenship and Immigration Services (USCIS), DOL regulations note that the Department of Homeland Security (DHS) (i.e.,

Counsel argues that the SOW for the Java Developer position in Aurora, CO existed at the time the petition was filed, however the petitioner and counsel failed to provide a copy of the SOW or the other documentation pertaining to Republic Financial until this appeal. 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). The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19

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]. As 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary, this regulation inherently necessitates the filing of an amended H-1B petition to permit USCIS to perform its regulatory duty to ensure that the new LCA actually supports the H-1B petition filed on behalf of the beneficiary. In addition, as 8 C.F.R. § 103.2(b)(1) requires eligibility to be established at the time of filing, it is factually impossible for an LCA approved by DOL after the filing of an initial H-1B petition to establish eligibility at the time the initial petition was filed. Therefore, in order for a petitioner to comply with 8 C.F.R. § 103.2(b)(1) and USCIS to perform its regulatory duties under 20 C.F.R. § 655.705(b), a petitioner must file an amended petition, with fee, whenever a beneficiary's job location changes such that a new LCA is required to be filed with DOL.

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 the petitioner's response to the RFE. The petitioner's attempt to remedy the deficiency by submitting an LCA certified after the filing of the petition is ineffective. Again, a petitioner must establish eligibility at the time of filing a 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). 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).

I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

The request to reconsider the original petition on appeal with the new job duties presented is therefore rejected for all of the reasons described above.

Moreover, even if the AAO were to consider the newly proffered position of Java Developer presented by counsel on appeal, counsel does not provide any details about the Java development project beyond its generic and vague description of job duties to be performed by the beneficiary, or information about what work the beneficiary would perform once the project is complete, as the SOW provided on appeal covers only nine months of the proposed employment period requested in the Form I-129. Additionally, as discussed above, the petitioner is not a party to the SOW, counsel did not submit a copy of the contract between EINFOTEK and Republic Financial, and the SOW indicates that Republic Financial, and not the petitioner, would be overseeing the beneficiary's work. Therefore, counsel did not submit sufficient documentation to demonstrate that the beneficiary would be employed in the proffered position for the period of time and at the location requested in the petition. 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. at 534; *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The AAO will first focus this decision on whether the proffered position is a specialty occupation. Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

Specialty occupation means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. See *K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); see also *COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary and sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. See *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), 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.

The AAO affirms the director’s determination that the evidence provided by the petitioner is not sufficient to establish that the proffered position is 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 U.S. Department of Labor’s *Occupational Outlook Handbook (Handbook)*. Critical factors for consideration are the extent of the evidence about specific duties of the proffered position and about the particular business matters upon which the duties are to be performed. In this pursuit, the AAO must examine the evidence about the substantive work that the beneficiary will likely perform for the entity or entities ultimately determining the work’s content.

In the petition initially submitted, the petitioner claims that the beneficiary will be working in Denver, CO for approximately three years as a software engineer, but provides no work orders or statements of work that can be considered for the reasons discussed above and no work itinerary, even though the petitioner intends to assign the beneficiary to different third-party client sites on projects requiring the beneficiary to work in different occupations and locations for short periods of time. As stated above, 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 Obaighena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. It appears that at the time the petition was filed, the petitioner did not yet know to which projects the beneficiary would be assigned.

In this respect, the AAO notes that, as recognized by the court in *Defensor v. Meissner*, 201 F.3d at 387, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. The court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. *Id.* at 388. Such evidence must be sufficiently detailed and explained as 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 demonstrating eligibility at the time of filing 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.

Therefore, the petitioner has not established a foundation by which USCIS can reasonably determine either the level of knowledge in any specific specialty that would be required by or associated with the proffered position or that the petitioner had any specific, non-speculative employment designated for the beneficiary at the time the petition was filed. Again, USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1) and 103.2(b)(12). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The AAO therefore affirms the director's finding that the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation.

Second, the AAO will address the issue of whether or not the petitioner qualifies as an H-1B employer or agent. As the director notes in her denial, 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 has not established who has or will have actual control over the beneficiary's work or duties, or the condition and scope of the beneficiary's services. In other words, the petitioner has failed to establish whether it has made a bona fide offer of employment to the beneficiary based on the evidence of record or that the petitioner, or any other company which it may represent, will have and maintain an employer-employee relationship with the beneficiary for the duration of the requested employment period. *See* 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer" and requiring the petitioner to engage the beneficiary to work such that it will have and maintain an employer-employee relationship with respect to the sponsored H-1B nonimmigrant worker). As discussed above, the SOW provided will not be considered by the AAO and, in any event, does not sufficiently describe the specific project to be performed by the beneficiary or the petitioner's role, if any, in the work to be performed for the third party company. It also does not cover the duration of the petition. Therefore, the director's decision is affirmed, and the petition must be denied for this additional reason.

Third, regarding the LCA, because it is not clear that the petitioner had knowledge of the project to which the beneficiary would be assigned at the time the petition was filed, the AAO also finds that the petitioner did not establish eligibility at the time the petition was filed in that it failed to provide a certified LCA covering the beneficiary's intended worksite and position. The Form I-129, which lists the proffered position's location as being in Denver, CO, does not correspond with the documentation submitted that indicates the petitioner intends to assign the beneficiary to various third-party companies in different locations for short periods of time. The fact that counsel on appeal stated that the beneficiary would be assigned to work on a different project for a different client in a different position than those described previously further demonstrates that the petitioner did not know to what project or client or in what position the beneficiary would be assigned at the time the petition was filed. The petitioner cannot assert that it will pay the beneficiary the prevailing wage for the occupation and 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 or what he will be doing. As such, the petitioner cannot establish that it has complied or will comply with the requirements of section 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. Once again, 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.

Beyond the decision of the director, the AAO finds that the petition must be denied for the additional reason that it was filed without an itinerary of the dates and locations where the beneficiary would work, as required by the regulation at 8 C.F.R. § 214.2(h)(2)(i)(B), which states, in pertinent part:

Service or training in more than one location. A petition which requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with the Service office which has jurisdiction over I-129H petitions in the area where the petitioner is located. The address which the petitioner specifies as its location on the I-129H petition shall be where the petitioner is located for purposes of this paragraph.

The language of the regulation, which appears under the subheading "Filing of petitions" and uses the mandatory "must," indicates that an itinerary is material and required initial evidence for a petition involving employment at multiple locations, and that such a petition may not be approved for any employment for which there is not submitted, at the time of the petition's filing, at least the employment dates and locations. USCIS may in its discretion deny an application or petition for lack of initial evidence. 8 C.F.R. § 103.2(b)(8)(ii). The AAO hereby exercises that discretion and denies the petition for this additional reason.

Also beyond the decision of the director, the AAO finds that the petitioner failed to submit requested evidence that precludes a material line of inquiry. As discussed previously, the petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. Instead of submitting requested evidence in response to the RFE, counsel attempted to submit documentation on appeal that he claimed existed at the time of the petition's filing. The regulations state 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).

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.