

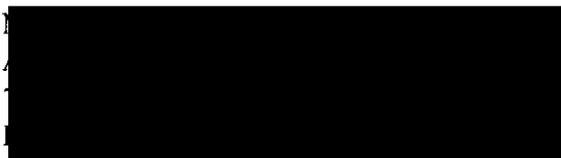
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U. S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



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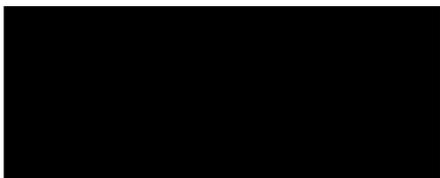
FILE: 

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:

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-90B, Notice of Appeal or Motion, with a fee of \$630. 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,

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.

On the Form I-129 visa petition, signed on March 31, 2009 and filed on April 1, 2009, the petitioner stated that it is an IT (information technology) consulting services firm established during February 2009. In the space on the visa petition reserved to report its current number of employees, the petitioner entered "3 – Projected in one year." In response to inquiries pertinent to its net and gross incomes, the petitioner stated its estimated gross income for 2009 as \$125,000 and for 2010 as \$500,000. It estimated its net income as \$30,000 for 2009 and \$100,000 for 2010. Because the petitioner was established during February 2009 and was providing those figures during March of 2009, it had no figures other than those projected.

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 Labor Condition Application (LCA) submitted to support the visa petition identifies Princeton, New Jersey as the location for the beneficiary's work. The petitioner's address is in Princeton, New Jersey. On the visa petition, in the section reserved for the petitioner to report where the beneficiary would work, the petitioner entered, "[The petitioner's address] and at various unanticipated client locations throughout the U.S."

The director denied the petition on three independent grounds, namely, his findings that the evidence of record failed to (1) establish that the proffered position is a specialty occupation; (2) 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; and (3) establish that the LCA filed with the petition corresponds to the petition.

The AAO bases its decision upon its review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and the petitioner's submissions on appeal.

The AAO will first outline salient facts in the record that relate to the director's grounds for denying the petition. The AAO notes that the record of proceeding reflects that, although the petitioner's vice president acknowledges that it is a "start-up" company, and the petitioner stated, on the visa petition, that it projects having three employees within a year, the petitioner filed 28 other H-1B petitions with the present petition, and all for the same type of position – programmer analyst. Further, U.S. Citizenship and Immigration Services (USCIS) computer records show that the petitioner has filed more than 30 other H-1B visa petitions.

In his March 25, 2009 letter of support filed with the Form I-129, the petitioner's vice president stated, "[The petitioner] currently serves two main areas of IT services, namely: (1) helping clients develop products that will increase their client services; and (2) client projects." However, as will be

discussed below, the record of proceeding contains no evidence of any specific project to which the beneficiary would be assigned in these or any other area.

In response to the RFE issued in this matter, the petitioner provided evidence pertinent to [REDACTED], also of Princeton, New Jersey and apparently in the same industry as the petitioner. Because the petitioner has not established their relevance to the issues on appeal, the AAO will not consider any of the documentation that the petitioner has submitted with regard to Bramha Infotech Corporation.

The petitioner submitted a number of documents as evidence that it has secured sufficient clients to ensure that the beneficiary will be employed in accordance with the petition. As reflected in the discussion below, none of those documents establishes any definite assignment, project, or substantive work of any kind that had been designated for the beneficiary at the time the petition was filed.

With the Form I-129, the petitioner filed documents "by way of example" of companies with which the petitioner has current contracts, specifically: (1) a Supplier Agreement with [REDACTED] effective March 11, 2009, that contains terms and conditions governing any Purchase Order (P.O.) whereby the petitioner agrees to refer its "technical services personnel" to ERSS for ERSS to refer to its clients for their temporary needs for "technical services personnel"; (2) a subcontractor agreement ratified by the petitioner and [REDACTED] on March 2, 2009, and (3) a Novartis Supplier/Contractor Classification Form listing the petitioner as a Minority Owned Business Enterprise and Small Disadvantaged Business, which, at most, indicates that the petitioner filed this form with the form's issuer, Novartis Pharmaceuticals Corporation (NPC). The form does not indicate any particular transaction to which it may relate.

The ERSS agreement states:

If [the petitioner's] candidates are selected by [any of ERSS's clients] to provide services, [the petitioner] will be compensated by [ERSS] in accordance with a Purchase Order (Exhibit A) to be attached hereto for each individual who provides such services through [ERSS].

The AAO notes that the petitioner did not submit a P.O. related to its agreement with ERSS. The record contains no evidence that ERSS ever selected any of the petitioner's workers to perform services for its clients, let alone that it selected the beneficiary. Even if the record indicated that ERSS had selected the beneficiary to perform services for its clients, the record of proceeding contains no documents establishing the substantive nature and the educational requirements of any work provided or to be provided under the ERSS agreement and no indication, therefore, that any work he would perform would qualify as specialty occupation employment.

The March 2, 2009 [REDACTED] subcontractor agreement indicates that, as the need may arise, [REDACTED] will contract for the petitioner's services by issuing to the petitioner individual task orders (T.O.'s) for specific services to be delivered to [REDACTED], or its client(s), which will become effective upon the

petitioner's written acceptance. This Subcontractor Agreement states, in part, that a T.O. "will indicate the tasks or services to be performed by [the petitioner], including [the] date on which [the] assignment is to begin, estimated ending dates, and the per hour rates to be paid to [the petitioner] by [redacted]. The record of proceeding does not include any T.O. from [redacted], and thus, does not establish either the substantive nature or the location of any work to be performed in accordance with the Subcontractor Agreement.

As part of its reply to the RFE, the petitioner submitted additional documents pertinent to [redacted] and [redacted] as well as documents pertinent to [redacted]

The [redacted] documents consist of (1) a document entitled "Order [redacted]" which reflects that [redacted] contracted for the petitioner to provide a specified employee (not the beneficiary) for "St [sic] Tech Systems Support" commencing on February 16, 2009, for a price of \$15,450, and (2) two pages of "Terms and Conditions" to apply to any P.O. from [redacted]. That statement of terms and conditions contains no indication that it relates in any way to the petitioner or the beneficiary. Further, neither these [redacted] documents nor any other evidence of record establishes the substantive nature and the educational requirements of work required under Order [redacted]. In this regard, the AAO observes that the record of proceeding contains no description of the "St [sic] Tech Systems Support" work and no explanation of the educational and/or training credentials required by that work.

The document pertinent to [redacted] is a letter, dated May 21, 2009, from [redacted] managing director. It alludes to the March 2, 2009 [redacted] agreement as one under which the petitioner will provide "specialist talent and hard-to-locate resources on an *as-needed* project basis." [Emphasis supplied.] It states that the petitioner "will continue to provide resources as per the terms of our agreement into the foreseeable future" and states, "The performance of *most* of these job duties requires a consultant with a computer-related bachelor's degree plus several year's of experience." [Emphasis supplied.]

The AAO accords no probative weight to this letter as it is not accompanied by documentary evidence of any contract, T.O., or other contractual document relating to the petitioner's services in the past or requiring those services in the future. Further, as such documents do not exist in the record of proceeding, there is no basis for the AAO to determine the educational credentials that actually have been or would be required for any project for which the petitioner would supply workers to [redacted]. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The [redacted] documents consist of (1) a copy of the petitioner's March 18, 2009 agreement with [redacted] a firm "in the business of locating temporary personnel with information technology skills for various clients," which will allow the petitioner, as "an independent contractor," to "introduce personnel candidates to [redacted] in order that [redacted] may propose the services of such personnel to [clients of

under various Client agreements;" and (2) a Work Order between [REDACTED] and the petitioner, accepted by the petitioner on March 26, 2009, for the services of a named employee of the petitioner (not the beneficiary) as a "Sr. Programmer/Analyst" at Horizon Blue Cross/Blue Shield on a project starting March 30, 2009. The AAO notes that, as the Work Order does not provide either the rate to be paid to the petitioner, or the project end date, it does not appear to qualify as an example of an authentic contractual obligation between [REDACTED] and the petitioner.¹ Further, the description of the duties to be performed is only a generalized statement of generic functions that does not relate substantive details of any work to be performed for the end-client, [REDACTED].

The document pertinent to [REDACTED] is a Professional Services Agreement in which [REDACTED] and the petitioner agreed to some terms pursuant to which the petitioner would perform services for [REDACTED] in the event that [REDACTED] commissions such services with a written statement of work. That agreement was not accompanied by any statements of work or any other evidence that the petitioner performed any work pursuant to that agreement or that it will do so in the future. That agreement is dated August 5, but the year is unspecified. As such, even if it evinced an agreement for the petitioner to perform specific work for [REDACTED], it would not demonstrate that the petitioner had any work to which to assign the beneficiary on April 1, 2009, when it filed the instant visa petition.

The document pertinent to [REDACTED] is an Independent Contractor Agreement pursuant to which [REDACTED] and the petitioner agreed to some terms pursuant to which the petitioner would perform services for [REDACTED]'s clients in the event that [REDACTED] selects one or more of the petitioner's workers for such work and the client assents to that selection. In that event, the agreement indicates that [REDACTED] would issue a work order to the petitioner which would specify the work to be performed, the rate at which it is to be recompensed, and the specific worker to perform the work. That agreement was not accompanied by any work orders or any other evidence that any of the petitioner's workers have ever performed work pursuant to it.

The RFE reply also includes a June 9, 2009 e-mail exchange between [REDACTED] and the petitioner's president. [REDACTED] provided a sample of a net request that FNYS typically sends when they are seeking a computer professional and thanked the petitioner's president for his interest in working for FNYS. The petitioner's president responded that he was interested in providing services as a vendor.

Because the record contains no indication that any agreement was ever reached, those E-mails are not evidence of any contractual commitment between the petitioner and FNYS. Further, they do not mention the beneficiary. Further still, as that E-mail exchange is dated June 9, 2009, it could not, in any event, be construed as evidence that the petitioner had any work for the beneficiary to perform when the visa petition was submitted on April 1, 2009. The AAO notes, yet further, that the subject

¹ The [REDACTED] Agreement with the petitioner expressly states "This agreement is not a purchase commitment or request for delivery by [REDACTED] of any Supplier services. Any services to be performed under this Agreement by Supplier will be authorized only by individual signed Purchase Orders." It further states, "In the event that a Purchase Order is required, each Purchase order will specify the type of services or level of effort required, the term, the negotiated labor rate, the name of the individual performing the services and the performance location(s)."

of the E-mails is a Senior Software Engineer position, not a programmer analyst position, which is the occupation for which the present petition is filed.

As reflected in the above survey of the documents submitted as evidence that the petitioner's clients would provide sufficient work for the beneficiary, those documents 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 those documents relate to any specialty occupation work. Further, the record is devoid of documentary evidence of any contract or commitment from any client for the beneficiary's services during the employment period specified in the petition.

The critical aspects of the record of proceeding with regard to the itinerary issue are that (1) the record reflects that the petitioner intends to assign the beneficiary to any location where its clients may require the beneficiary's services; and (2) the record does not document any firm's contractual obligation to use the beneficiary's services at any specific time or for any specific project or projects during the period designated in the petition.

With regard to the LCA issue, while the Form I-129 and the LCA indicate Princeton, NJ as the location where the beneficiary would work, the petitioner provided no documentary evidence of any work reserved for the beneficiary at that location. Further, the letter of May 21, 2009, with its listing of potential clients for which may draw personnel from the petitioner, indicates that the beneficiary would be subject to assignments at as yet undesignated locations outside the Princeton, New Jersey location specified in the LCA.

The Specialty Occupation Issue

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation. The issue before the AAO is whether the petitioner has provided evidence sufficient to establish that it would be employing the beneficiary in a specialty occupation position.

Section 214(i)(1) of 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.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation "which [(1)] 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 [(2)] 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, the 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 a particular position 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 occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher

degree in a specific specialty, or its equivalent, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

The AAO hereby endorses the director's analysis of the specialty occupation issue 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.² Accordingly the AAO fully affirms the director's determination with regard to the specialty occupation issue.³

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 beneficiary would be assigned work requiring the theoretical and practical application of at least a U.S. bachelor's degree level of a body of highly specialized knowledge in a particular IT-related specialty, as required by section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and the implementing regulations at 8 C.F.R. § 214.2(h).

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 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.

Further, a position may be awarded H-1B classification only on the basis of evidence of record establishing that, at the time of the petition's filing, definite, non-speculative work would exist for the beneficiary for the period of employment specified in the Form I-129. The record of proceeding

² The decision only specifically references the agreements the petitioner has with [REDACTED] and [REDACTED]. However, this analysis, i.e., that none of the agreements provided shows that the petitioner's workers were ever selected to perform work under them, applies equally to all of the evidence in the record.

³ The AAO notes, however, that the director is incorrect if he meant to convey that Programmer Analyst positions categorically qualify as specialty occupations. The information on the educational requirements in the "Computer Systems Analysts" chapter of the 2010-2011 edition of the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook* indicates at most that a bachelor's or higher degree in computer science, information systems, or management information systems may be a general preference, but not an occupational, entry requirement, among employers of Programmer Analysts in some environments. See Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook*, 2010-11 Ed., "Computer Systems Analysts," <<http://www.bls.gov/oco/ocos287.htm>> (accessed October 28, 2011). As such, the instant petition could not be approved based on the evidence of record even if the proffered position were established as being that of a programmer analyst.

does not contain such evidence. 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). 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'r 1978). 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'r 1998).⁴ For the foregoing reasons, the petition must be denied and the appeal dismissed.

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

⁴ It is further noted that to ascertain the intent of a petitioner, USCIS must look to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. If a petitioner's intent changes with regard to a material term and condition of employment or the beneficiary's eligibility, an amended or new petition must be filed. To allow a petition to be amended in any other way would be contrary to the regulations. Taken to the extreme, a petitioner could then simply claim to offer what is essentially speculative employment when filing the petition only to "change its intent" after the fact, either before or after the H-1B petition has been adjudicated. The agency made clear long ago that speculative employment is not permitted in the H-1B program. A 1998 proposed rule documented this position as follows:

Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. *See* section 214(i) of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998). While a petitioner is certainly permitted to change its intent with regard to non-speculative employment, e.g., a change in duties or job location, it must nonetheless document such a material change in intent through an amended or new petition in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E).

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.

On appeal, the petitioner contends that the director's denial of this petition for failure to provide an itinerary pursuant to 8 C.F.R. § 214.2(h)(2)(i)(B) must be overturned, and the petition approved, because the petitioner has provided sufficient documentary evidence to satisfy the regulation's itinerary requirement as addressed in a document issued by the Office of Adjudications of the legacy Immigration and Naturalization Service (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).⁵ At Part 3 of the Form I-290B, the petitioner states, in pertinent part:⁶

[W]e have provided clear evidence that [the petitioner] has direct clients which utilize our professional services as well as with third parties who in turn have contracts with end clients seeking our company to provide employees to work on their respective projects. Despite the lack of a specific itinerary, the approval of the petition would be consistent with [the Aytes memo] defining "itinerary" as it relates to H-1B visa petitions. It states "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." Thus[,] based on the [redacted] letter] seeking the services of our employees as well as our contract with our direct client, [redacted] seeking our employees to work on [IT] projects in their offices, we have provided sufficient evidence of an "itinerary" for this petition to be approved.

The AAO will now discuss several reasons why the petitioner errs in arguing that the director's determination to deny the petition for lack of an itinerary is incorrect.

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" and its inclusion in the subsection "Filing of petitions," establishes that the itinerary as there defined is a material and necessary document for an H-1B petition involving

⁵ Prior to the director's decision, the petitioner submitted a copy of the memo that appeared on the Internet site of the American Immigration Lawyers Association (AILA).

⁶ No brief was submitted on appeal. The petitioner stated the grounds of the appeal at Part 3 of the Form I-290B.

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. Neither the documents relied upon by the petitioner specify any dates for employment of the beneficiary or indicate definite H-1B employment for the beneficiary for any portion of the period specified in the petition. Therefore, the director did not err in his determination to deny the petition for failure to provide the itinerary required by 8 C.F.R. § 214.2(h)(2)(i)(B).

The petitioner erred to the extent that it argued that the language of the Aytes memo supersedes the clear language at 8 C.F.R. § 214.2(h)(2)(i)(B) mandating an itinerary consisting of at least “dates and locations of the [beneficiary’s] services or training.” 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 Procedures 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 Service (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”); *Schweiker v. Hansen*, 450 U.S. 785, 789-790 (1981) (finding that an agency’s failure to comply with procedures announced in an agency manual does not estop the agency from following an otherwise binding regulation).

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 as described at 8 C.F.R. § 214.2(h)(2)(i)(B), the Aytes memo does not mandate USCIS officers to forgo the requirement for an itinerary as defined in the regulation as to at least “the dates and locations of the services or training” that the beneficiary is to perform. Rather, 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, suspend, dispose with, or 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.⁷

Additionally, the director had authority beyond and independent of 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 and itineraries to establish that the services to be performed by the beneficiary will be in a specialty occupation during the entire period requested in the petition. 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 proceeding as it existed at the time the RFE was issued, the RFE request for itinerary evidence was appropriate under the above cited regulations, not only on the basis that it was required initial evidence, but also on the basis that it was material 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 sections on the specialty occupation and LCA issues, 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. 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 LCA Issue

The director determined that the petitioner failed to demonstrate that the LCA submitted with the visa petition corresponds with it and may be used to support it. The director's decision states, in pertinent part:

⁷ In reaching this conclusion, the AAO obviously rejects the [REDACTED] documents as evidence of any commitment by these firms to employ the beneficiary at any time within the period of intended employment specified in the Form I-129.

[B]ecause the intention of this petition appears to be employing the beneficiary at a[n] end client site(s), it is not known where, when, or for whom the beneficiary would actually perform their [sic] duties. Therefore, 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 did not err in denying 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.

In addition, 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 an 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).

Additionally, the Department of Labor (DOL) regulations governing Labor Condition Applications states that “[e]ach LCA shall state...[t]he places of intended employment.” 20 C.F.R. § 655.730(c)(4) (emphasis added). “Place of intended employment” is defined as “the worksite or physical location where the work actually is performed by the H-1B...nonimmigrant.” 20 C.F.R. § 655.715. Moreover, the instructions for Section G of Form ETA 9035 require that the employer list the place of intended employment “with as much geographic specificity as possible” and notes that the employer may identify up to three physical locations, including street address, city, county, state, and zip code, where work will be performed. Petitioners who know that an employee will be working at additional worksites at the time of filing must include all worksites on Form ETA 9035. Failure to do this will result in a finding that the employer did not file an LCA that supports the H-1B petition.

While 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 (emphasis added):

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. . . .

A petition consists of all of the documents submitted with it, and 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 in the present matter 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 combined with (1) the petitioner's letter in response to the RFE, with its acknowledgement that the petitioner does not know where exactly the beneficiary will be working; and (2) the [REDACTED] letter of May 21, 2009, with its listing of potential clients for which [REDACTED] may draw personnel from the petitioner, indicate that the beneficiary would be subject to assignments at as yet undesignated locations outside the Princeton, New Jersey location specified on the LCA. Accordingly, the director did not err in determining that the one location specified in the LCA does not likely 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.

For all of the reasons discussed above, the AAO affirms the director's denial of the petition.

Additionally, the appeal must be dismissed for failing to address the director's separate determinations to deny the petition for its failures to establish the proffered position as a specialty occupation and to be supported by an LCA corresponding to the locations where the beneficiary would work. 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 the merits of the director's specialty occupation and LCA determinations, each of which constitute a separate basis for the director's denial of the petition. 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 basis and on the LCA grounds would remain unaddressed, uncontested, and unaffected, and, as such, a proper basis for affirming the director's decision to deny the petition. Therefore, regardless of the outcome of the one issue raised on appeal, the appeal would have to have been dismissed because the petitioner failed to specify any factual or legal error in the director's determinations to deny the petition on the specialty occupation and LCA grounds.

Beyond the decision of the director, the petition must also be denied due to the petitioner's failure to establish that it qualifies as a United States employer or agent. As detailed above, the record of proceeding lacks sufficient documentation evidencing what exactly the beneficiary would do for the period of time requested or where exactly and for whom the beneficiary would be providing services. Given this specific lack of evidence, the petitioner has failed to establish 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 the requisite 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). Again and as previously discussed, there is insufficient evidence detailing where the beneficiary will work, the specific projects to be performed by the beneficiary, or for which company the beneficiary will ultimately perform these services. Therefore, the appeal must be dismissed and the petition must be denied for this additional reason.

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.