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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



U.S. Citizenship
and Immigration
Services



D2

DATE: **OCT 03 2011** Office: VERMONT SERVICE CENTER

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:



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 \$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,

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director initially approved the nonimmigrant visa petition. The director subsequently revoked approval of the petition on February 27, 2009. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. Approval of the petition will be revoked.

The petitioner, self-described as an IT consulting and software development firm, filed this visa petition to classify the beneficiary as an H-1B temporary nonimmigrant worker in a programmer analyst position.

The director of the Vermont Service Center of U.S. Citizenship and Immigration Services (USCIS) approved the petition on May 7, 2007.

After issuance of a Notice of Intent to Revoke (NOIR) and review of the petitioner's submissions in response to it, the service center director revoked approval of the petition, on February 7, 2009.

The regulation at 8 C.F.R. § 214.2(h)(11)(iii), which establishes the procedures for revocations on notice by the director, reads as follows:

(A) *Grounds for revocation.* The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:

- (1) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition, or if the beneficiary is no longer receiving training as specified in the petition; or
- (2) The statement of facts contained in the petition . . . was not true and correct, inaccurate, fraudulent, or misrepresented a material fact.
- (3) The petitioner violated terms and conditions of the approved petition; or
- (4) The petitioner violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of this section; or
- (5) The approval of the petition violated paragraph (h) of this section or involved gross error.

(B) *Notice and decision.* The notice of intent to revoke shall contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal. The petitioner may submit evidence in rebuttal within 30 days of receipt of the notice. The director shall consider all relevant evidence presented in deciding whether to revoke the petition in whole or in part. If the

petition is revoked in part, the remainder of the petition shall remain approved and a revised approval notice shall be sent to the petitioner with the revocation notice.

The AAO finds that the content of the NOIR comported with the regulatory notice requirements, as it provided a detailed statement that conveyed grounds for revocation encompassed by the regulation at 8 C.F.R. § 214.2(h)(11)(iii)(A), and allotted the petitioner the time for the submission of evidence in rebuttal that is specified in regulation at 8 C.F.R. § 214.2(h)(11)(iii)(B). As will be discussed below, the AAO further finds that the director's decision to revoke approval of the petition accords with the evidence in the record of proceeding (ROP), and that neither the response to the NOIR nor the submissions on appeal overcome the grounds for revocation indicated in the NOIR. Accordingly, the AAO shall not disturb the director's decision to revoke approval of the petition.

The AAO reaches two particular conclusions, whose support by the ROP will be evident in the discussion of the evidence below. These particular determinations, each of which is a separate and independent basis for dismissing the appeal, are: (1) that, as constituted prior to the service center director's approval, the petition stated facts that were not true and correct, were inaccurate, or misrepresented a material fact, thus establishing a legitimate ground for revocation of approval of the petition in accordance with the provision at 8 C.F.R. § 214.2(h)(iii)(A)(2); and (2) that the service center director's revocation of approval of the petition accords with the provision, at 8 C.F.R. § 214.2(h)(10)(iii)(A)(5), for such action when the approval violates the regulations regarding H-1B specialty occupation petitions at 8 C.F.R. § 214.2(h).

The AAO bases its decision upon its review of the ROP, which includes: (1) the petitioner's Form I-129 and all of the documentation constituting the ROP from filing through the service center director's approval of the petition; (4) the service center's NOIR, with attachments; (5) the response to the NOIR; (6) the director's revocation letter; and (7) the Form I-290B and the exhibits attached in support of the appeal.

A brief summary of the procedural history between the approval and the decision revoking it follows below.

This H-1B petition was initially approved on May 7, 2007 with validity dates of October 1, 2007 to August 31, 2010. However, on October 21, 2008, the acting director issued an NOIR because evidence was presented by the beneficiary to the U.S. Consulate in Chennai indicating that the petitioner does not have sufficient work available to the beneficiary.

The petitioner responded to the NOIR on November 25, 2008. However, the director determined that the response did not adequately address the grounds for revocation identified in the NOIR, and he therefore revoked approval of the petition on February 27, 2009.

The AAO notes that the NOIR included as an attachment and incorporated by reference the content of a February 9, 2008 memorandum from a consular officer of the U.S. Consulate General in

Chennai (hereinafter referred to as the USCG) which, in part, memorialized that consular officer's interview of the beneficiary regarding this petition.

The USG memorandum, addressed to the Vermont Service Center, returned the approved petition "for review and possible revocation," on the basis of information, summarized in the memorandum, that the USCG "believ[ed] was not available to USCIS at the time of the petition's approval." The memorandum states the following conclusion as the basis for the decision to return the visa petition:

Post believes that the evidence suggests that [the petitioner] will not be able to offer the beneficiary a qualifying position in accordance with existing regulations.

The memorandum provided the following factual statement regarding the basis for this adverse conclusion:

The beneficiary appeared for his first visa interview on 31-JAN-08. In the I-129 application filed with the H-1B petition, [the petitioner] stated that the beneficiary would work at the petitioner's premises in Jersey City, NJ. When asked where he would work in the United States, [the beneficiary] confirmed that he would work at the petitioner's premises on the internal project called "ECM Suite Equity MMA Customer Management."

At the time of the interview, [the beneficiary] provided: A client letter from Equity MMA and a detailed description of the ECM Suite Equity MMA Customer Management project. Despite both the beneficiary and the petitioner stating that the project was an in-house development effort, the documentation provided states that it is indeed an external project. However, the project description provided is copied almost verbatim from the Sugar Enterprise and Professional Administration Guide. See http://www.sugarcrm.com/doc/Administration_Guides/EntPro_AdministrationGuide_5_0Beta1/preface.2.4.html .

Text in 8 CFR 214(h)(2)(i)(B) states the following:

"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."

In addition, USCIS published a public notice on 27-MAR-2007 reiterating the itinerary requirement in the text below:

“8 CFR 214(h)(2)(B) [sic] requires that petitioners provide a detailed itinerary of the dates and places where work will be performed if those services will be provided in more than one location. For example, a labor contractor or consultant who hires H-1B workers to work at client sites must provide, in advance, an itinerary with dates and places where the worker will perform that work.”

The only supporting documentation was a client letter and the project description copied from the aforementioned web resource. There was no itinerary as described in 8 CFR 214(h)(2)(i)(B) for the duration of [the beneficiary's] H-1B petition; no contract between the petitioner and the client listing the beneficiary; and no comprehensive description of the beneficiary's proposed duties from the client. Without such description, Post is concerned that the proffered position may not exist, or may not meet the statutory definition of a specialty occupation.

Finally, while the company states [that] it has only 11 employees in the I-129 and its unemployment wage quarterly reports and its staff roster show only 1 H-1B holder, PIMS reveals that there are 58 active petitions from the company.

In light of the above, Post believes [that the beneficiary] is not eligible for the H-1B visa because the petitioner is unable or unwilling to provide the qualifying employment.

Further documentation pertaining to the case is attached.

In response to the USCG memorandum, the service center issued an NOIR, on October 21, 2008, which referenced the USCG memorandum, included a copy as an enclosure, summarized its salient points, and thus effectively incorporated by reference the content of the memorandum into the NOIR.

The NOIR framed the factual basis for the contemplated revocation as follows:

It has now come to the attention of USCIS that it does not appear that the petitioner will be able to offer the beneficiary a qualifying position in accordance with existing regulations:

- 1) The beneficiary provided evidence that the proffered employment would be in-house development, and yet records show that the position is actually an external project. No proposed itinerary was provided.
- 2) There is also a lack of information about the job's existence. No specific employer/client contracts have been provided that include the beneficiary's proposed duties from the client.
- 3) Records show that the petitioner lists only 11 employees, there are 58

active employment petitions from your company.

The NOIR specifically informed the petitioner to “[p]rovide evidence to overcome the referenced issues and explain discrepancies.” It also specified types of evidence for submission that “may help to overcome the noted issues.” The generally described types of evidence included, but were not limited to, “evidence that your business is engaged in the type of services indicated on your Form I-129 and that you have sufficient work and resources available to satisfy [USCIS] that the beneficiary will be performing services in a specialty occupation for the requested period of employment.” With regard to the adverse information provided in the USCG memorandum, the NOIR also stated:

USCIS regulations at 8 C.F.R. § 214.2(h)(2)(i)(B) provide that an H petition, which requires services to be performed in more than one location[,] must include an itinerary with the dates and locations of the services to be performed. Your company provides software consulting services to business clients. Submit a detailed itinerary of the work sites the beneficiary is to be assigned to, to include specific dates, locations, and clients that the beneficiary will be servicing. Also provide the original contract with the end client or a letter from the end client that addresses the specific duties that will be performed by the beneficiary. The end client contract or letter must provide the address and telephone number of the business where a contact can be reached. In addition, submit evidence from the end client of their requirements for the position. If the petitioner does not have a contract with the employer that is that is the end user, include the succession of contracts from the petitioner to the employer that is the end user. All contracts must be signed. The evidence must directly rebut the concerns addressed in the [USCG] memorandum.

The petitioner provided a timely but inadequate response to the NOIR, in the form of a two-page letter dated November 18, 2008, and a number of attachments.

The petitioner’s letter, signed by its director of human resources, states, in pertinent part:

The beneficiary was selected by our client Equity MMA. Please find attached the entire manual describing the project along with all specifications. Attached also is the client contract detailing the project is [sic] between [the petitioner] and Equity MMA. We understand that the US Consulate abroad believes that the manual was written verbatim off of another website. There are references to other CRM sites, but this in no way is the entire project copied. References to another CRM Suite are based solely on what the project will be. The ECM Suite project is being developed for Equity MMA by [the petitioner]. The development of the project will be carried out at the Jersey City office of [the petitioner]. The project specifications were developed by Equity MMA incorporating features available in leading CRM applications. Most of the functions proposed in the application

come standard in all commercial CRM suites. This application is further customized for use by Equity MMA.

* * *

Unfortunately, we can only provide you with a copy of our contract agreement with Equity MMA. Our original contract has to stay with our office since legally we need this in case of any breach or legalities concerning our project with our client. Our client also has refused to give another contract so that we can supply you with the original contract. In case of any breach and liabilities the original contract is needed, and in this case we are unable to give the original for your records. We are sending a true copy for your review.

* * *

Among the letter's enclosures is a copy of what appears to be a document signed by representatives of Equity MMA and the petitioner on October 1, 2007. It is self-described as "general terms for consulting services" between Equity MMA as client and the petitioner as supplier.

The AAO notes that, significantly, this document is not itself a contract for particular services to be performed by the petitioner and does not even obligate either party to any particular contract. Rather, it explicitly states that its purpose is to provide some contractual terms that would be incorporated by reference into any agreement for services that may be signed by the two parties during the pendency of this October 1, 2007 document.¹ As such, the AAO finds that this document neither addresses nor satisfies the NOIR's contemplated revocation for the petitioner's failure to establish that, at the time of the petition's filing, the petitioner had secured definite, non-speculative work for the beneficiary for the employment period specified in the petition. 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 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. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The AAO further finds that the twelve-page "ECM Suite Equity MMA Customer Management Document," also submitted with the letter responding to the NOIR, does not effectively rebut the grounds described in the NOIR and the incorporated USCG memorandum for revocation based upon the petitioner's failure to establish that the petition was based upon actual specialty-occupation work that would be performed by the beneficiary. In this regard, the AAO notes that this undated and

¹ Significantly, the AAO finds that no such contract has been presented.

unsigned document contains no specifications of definite work required by the asserted client Equity MMA, bears no endorsement by Equity MMA, is undated, and does not constitute a contract or agreement as required by the aforementioned October 1, 2007 document signed by MMA for the terms of that document to become effective through incorporation by reference. Not only is this "ECM Suite Equity MMA Customer Management" document *not* a contract specific to the beneficiary's services as specified in the NOIR, but the information concerning the work that it is asserted that the beneficiary would perform is nebulous, generic, and generalized and, as such, is not sufficient to establish the substantive requirements and the allied type and level of knowledge that would be required to perform the work.²

The AAO also finds insubstantial and insufficient the petitioner's response to the NOIR's indication that the petitioner inaccurately and misleadingly provided another entity's website material as proof of its own efforts with regard to the project cited in the petition as the source of work for the beneficiary. In particular, the AAO finds that the petitioner's responses to the allegation of misrepresentation is insubstantial and inadequate, as it is basically the petitioner's protestations of regular, well-intentioned action, but without credible documentation to support it. 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).

By virtue of the above-quoted language of the USCG memorandum and ground 2 in the NOIR ("lack of information about the job's existence," including "specific employer/client contracts that include the beneficiary's proposed duties from the client") the petitioner was put on notice that the director was proposing to revoke the petition (1) because it was approved on the basis of statements presented by the petitioner that now appear to have been not true and correct, to have been inaccurate, and/or to have misrepresented a material fact, namely, that the petitioner had secured the work for the beneficiary that was claimed in the petition, and (2) because, in the absence of a contract and/or equally persuasive evidence establishing the specific work that the beneficiary would perform, the petitioner failed to establish that the proffered position is a specialty occupation. The first aspect presents a basis for revocation under 8 C.F.R. § 214.2(h)(11)(iii)(A)(2) (that is "The statement of facts contained in the petition . . . was not true and correct, inaccurate, fraudulent, or misrepresented a material fact"), while the second aspect presents a basis for revocation under 8 C.F.R. § 214.2(h)(11)(iii)(A)(5) (that is, "The approval of the petition violated paragraph (h) of [8 C.F.R. § 214.2]"). Because, as already indicated in this decision's comments regarding the documents submitted in response to the NOIR, the petitioner's response to the NOIR failed to

² This document identifies the beneficiary as sharing the role of Product Development Team member with nine other persons and describes the associated "Responsibilities and Authorities" in these generalized terms: "Provide technical requirements to support the business initiative. (DB, Front End and Middle tier support.)"

effectively rebut these grounds of the NOIR, the director's decision to revoke approval of the petition will not be disturbed.

The AAO will now further comment on deficient aspects of the NOIR response and the appeal.

The duties for the proffered position as described in the petitioner's support letter dated March 26, 2007, are generically described as:

- Designing, programming and implementing software applications and packages;
- Reviewing repairing and modifying software programs;
- Analyzing communications, informational, data based and programming requirements of clients;
- Reviewing existing information systems; and
- Training clients on use of information systems and debugging.

As already noted, in response to the NOIR, the petitioner provided a copy of "ECM Suite Equity MMA Customer Management" document. With regard to this document, the AAO further notes that, while this document indicates that the beneficiary would allegedly be part of a product development team that would provide technical requirements to support the business initiative, according to the list of 11 employees provided by the beneficiary to the U.S. Consulate in Chennai, which was signed by the petitioner and notarized on November 27, 2007, none of the other names of people listed on the ECM project team or the project manager are employees of the petitioner. The petitioner has not explained how the beneficiary could be involved at the ECM project at the petitioner's offices when it appears that all the other team members are not employees of the petitioner. Additionally, as the beneficiary would report to the project manager listed in the ECM project document and, as the project manager listed appears to have not been an employee of the petitioner, it further appears that the beneficiary's work would not be supervised or directly controlled by the petitioner. 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).

Additionally, the AAO again notes, that the document signed by representatives of Equity MMA and the petitioner on October 1, 2007 does not mention the beneficiary by name or the ECM project, or provide details about the project or the duration of time the beneficiary was expected to work on the project. Further, the location where the services would be performed is indicated in this document as follows:

The Services will be performed at the place stated in the Agreement. If the Services are performed at [Equity MMA's] premises, [the petitioner] may have access to [Equity MMA's] premises only during [Equity MMA's] normal business hours. [The petitioner] must observe [Equity MMA's] procedures for security and obey [Equity MMA's] reasonable instructions while on [Equity MMA's] premises.

Again, no copy of any Agreement referred to in the October 1, 2007 document was provided. Therefore, the petitioner did not provide credible independent evidence of the specific work in which the beneficiary would engage, the entity for which his services would be directly performed, or where exactly the beneficiary would perform work, if at all. 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

Counsel for the petitioner filed an appeal on March 31, 2009. Counsel argues that the beneficiary will perform his duties at the petitioner's offices rather than the client site. Counsel also states that the circumstances have changed since filing the petition as follows:

Since the filing of the Petition, two years ago, circumstances have changed and due to today's economy Equity MMA was forced to close its doors. Nevertheless, the employer, [the petitioner] still remains same, the location remains same [sic] and the job duties remain the same. The only change that has occurred is the client for whose ultimate benefit the beneficiary will be providing services. Presently, the beneficiary will work at [the petitioner's] premises in Jersey City, New Jersey performing the technical job duties previously described. However, the new client for whom [the petitioner] and its employees will be providing services is Angara Inc. . . .

Therefore, by the petitioner's own admission, the never-submitted contract for work on which this petition was allegedly based is no longer valid.

For the first time on appeal, counsel submits a Technical Services Agreement (TSA) between the petitioner and Angara Inc. The TSA is dated March 9, 2009, after the present petition was revoked. Attached to the TSA is a Work Statement, also dated March 9, 2009, which lists the beneficiary by name. The Work Statement states that the beneficiary will start work on July 1, 2009 and that the duration of the project will be 30 months. The Work Statement also provides that the project entails, "[a]pplication support, maintenance and enhancement of Angara.com website and other applications and databases." Regarding the location, the Work Statement states, "[w]ork to be performed on [the petitioner's] premises."

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 and response to the NOIR described the proffered position as being part of a product development team that would provide technical requirements, for another client entity, to support the business initiative for an unspecified period of time. Now, on appeal, counsel tries, impermissibly, to change the nature of the proffered position as providing application support, maintenance and enhancement of the Angara.com website and other applications and databases not heretofore identified.

Counsel argues on appeal that the location and job duties are the same. However, there is no evidence to support these assertions. First, as discussed previously, the petitioner never provided evidence that the beneficiary's duties would be performed at the petitioner's premises. Indeed, the evidence submitted indicates that it would have been unlikely that the beneficiary would have worked at the petitioner's premises on the ECM project given that all of the other individuals listed as being on the beneficiary's team are not the petitioner's employees. Therefore, the petitioner has failed to demonstrate that the location of the project remains the same on appeal. Second, the petitioner has not demonstrated how providing application support, maintenance and enhancement of the Angara.com website, applications and databases entails the same duties and responsibilities as providing technical requirements to support the business initiative on the ECM project. Despite counsel's statements that the duties are the same for both of these projects, counsel does not submit evidence regarding details of the new project or that the beneficiary's role and responsibilities in that project is the same as the one initially proffered. Therefore, counsel's assertions merit no weight. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. Again, 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; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

Next, as the duties presented on appeal appear to 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). The AAO's analysis therefore properly focused on the documentation submitted with the initial petition and in response to the NOIR.

In summary, then, for the reasons discussed above, the AAO finds that the director correctly applied the revocation-on-notice regulations to the evidence in the ROP, and that he did not err in revoking approval of the petition. Therefore, the appeal will be dismissed, and approval of the petition will be revoked.

As will now be explained, the AAO finds that, by now attempting to justify approval of the petition on the basis of work for a new end-client, the petitioner is engaging in an impermissible attempt to amend the original petition. In this regard, the AAO first notes that, contrary to the petitioner's assertion that the employment for the new client is essentially the same as was stated initially in the petition and in the NOIR response, proffered positions are not fungible. If, as here, the specific work to be performed by a beneficiary is to be determined by the particularized needs of a specific client, the petitioner retains the burden to establish that work for such client was encompassed by the petition when filed. This the petitioner failed to do. 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).³ 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). Further, the regulation at 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.

In the absence of the petitioner's proving the contrary, it appears that the new work, asserted for the first time on appeal, involves a material change in the terms and conditions of employment and, thus, in compliance with the provisions at 8 C.F.R. § 214.2(h)(2)(i)(E), cannot be approved except through the filing of a new petition, with a new and corresponding Labor Condition Application and the required filing fee, and a favorable USCIS adjudication of the same.

Further, the AAO notes that the Angara TSA submitted on appeal was not signed until March 9, 2009, approximately two years after the date of the petition's filing on April 2, 2007, and after the petition approval was revoked. Thus, the submission of the agreement at this stage also constitutes an attempt to justify approval of a petition on the basis of asserted employment that appears not to have been secured for the beneficiary by the time of the petition's filing. As such, that agreement is not material to this appeal, for, as already stated in this decision, 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; *Matter of Katigbak*, 14 I&N Dec. at 49 (Comm. 1971).

Finally, the fact that the petitioner's business is established is not sufficient in and of itself to demonstrate a bona fide offer of employment. In a situation where the beneficiary is performing

³ The regulation at 8 C.F.R. § 103.2(b)(1) states:

Demonstrating eligibility at time of filing. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. All required application or petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form's instructions. Any evidence submitted in connection with the application or petition is incorporated into and considered part of the relating application or petition.

work based on a contract with a third party, the petitioner must provide detailed evidence with respect to the contractual relationship between the petitioner, its clients, and any other third-party end users, in order to establish which entity will actually control the work to be performed by the beneficiary. Such documentation was not provided. As discussed above, the petitioner has not provided sufficient evidence to demonstrate that it would employ the beneficiary at the petitioner's offices, or in any specific work requiring a bachelor's degree, or the equivalent, in a specific specialty, for the duration of the petition. Moreover, by counsel's own admission, the claimed project on which the petitioner allegedly intended to assign the beneficiary at the time the petition was filed is no longer in existence. In any event, the petitioner did not demonstrate that it had sufficient work for the beneficiary at the time the petition was filed. For this reason also, the AAO will not disturb the director's decision to revoke the approval of the present petition.

The appeal will be dismissed and the petition revoked. 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 revoked.