

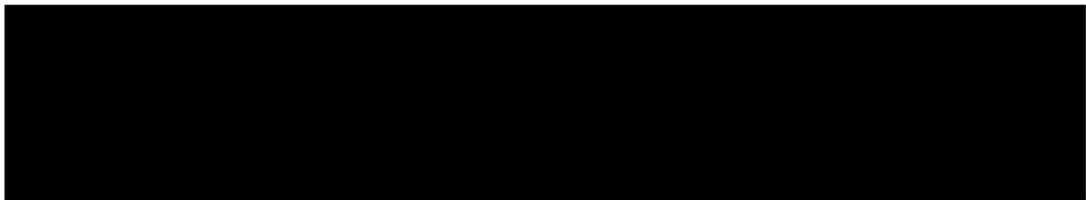


U.S. Citizenship  
and Immigration  
Services

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Date: **OCT 14 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:



**INSTRUCTIONS:**

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

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$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 Director, Vermont Service Center, 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 remain denied.

The petitioner is a software consulting company. It seeks to employ the beneficiary as a programmer analyst 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 grounds that: (1) the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation; (2) the petitioner failed to provide the requested itinerary; and (3) the petitioner failed to submit an appropriate and valid Labor Condition Application (LCA).

The record of proceeding before the AAO contains: (1) Form I-129, Petition for a Nonimmigrant Worker, 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, Notice of Appeal or Motion, with counsel's brief and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

On the Form I-129, the petitioner indicated it was established in 1994, had 125 employees, and a gross annual income of \$19,000,000. The petitioner also stated on the Form I-129 that it wished to employ the beneficiary as a programmer analyst from October 1, 2009 to September 20, 2012 at an annual salary of \$63,606.

In the April 1, 2009 letter in support of the petition, the petitioner noted that it currently had 170 personnel worldwide and its gross annual income for 2009 was projected to be over \$20 million. The petitioner stated that it is headquartered in [REDACTED] with operations on both the east and west coasts of the United States and at an offshore development center in [REDACTED]. The petitioner indicated further that it partnered with major companies and federal, state, and local agencies and had two component groups of business – IT Professional Services Group and Solutions Group. The petitioner stated that the beneficiary would work as a Programmer Analyst and that the beneficiary would be assigned to one of its lines of business and that during his assignment he would be “involved in the analysis, design, development, re-engineering and implementation of software applications” using different computer languages and computer platforms. The petitioner noted further:

Either independently or as a team member, [the beneficiary] will be responsible for determining client requirements, performing system analysis and design, program coding, implementation, documentation, and maintenance support as required by the client. He will prepare technical reports, user and instructional manuals as required by the Project Manager and will also provide on-site/offsite maintenance and support to the client on various customized system packages, including debugging, modification, fine tuning and code organization.

The petitioner stated that it required at least a bachelor's degree to perform the duties described

and that the beneficiary had been awarded a bachelor of technology degree in computer engineering in [REDACTED] in 2004 and that his degree had been evaluated as equivalent to a United States bachelor of science degree in computer engineering.

The Form I-129 indicates that the beneficiary would work only at the petitioner's New York address.

The petitioner also submitted a copy of its employment offer letter to the beneficiary which stated that as a programmer analyst, the beneficiary would be assigned to provide computer software consulting services.

The petitioner also submitted a copy of its U.S. corporate income tax return, which indicated that it is in the business of computer consulting.

On June 10, 2009, the director issued an RFE noting that the record did not establish where, when, or for whom the beneficiary would work. The petitioner was advised to submit a more detailed job description for the beneficiary's work assignment as well as a signed statement clarifying the physical location of the beneficiary's work assignment during the validity of the requested classification. The director specifically requested that the petitioner submit information regarding each of the beneficiary's proposed work locations and a letter from the end client identifying the projects to which the beneficiary would be assigned.

In response to the RFE, the petitioner indicated that it provides software solutions to a wide ranging client base and that it generally controls the manner and scope of projects, although from time to time, it may co-manage projects with allied consultancies or the clients themselves. The petitioner claimed that it was developing an internal project at its [REDACTED] for another company. The petitioner did not indicate specifically that it will assign the beneficiary to the project but noted that employment of the beneficiary was not contingent upon any one specific project. The petitioner stated that it would be the beneficiary's true employer and that it intended to provide the beneficiary with work for the duration of his visa term. The petitioner certified that it would follow all labor condition application rules and would file an amended petition if required pursuant to the regulations. The petitioner stated its belief that the proffered position is a specialty occupation and provided an overview of general duties indicating "in broad terms" the beneficiary would: use SRP and XML to develop Enterprise Resource Planning systems; work with others to develop new standards and clarify issues in pending development progress; collaborate with others to determine technical solutions; analyze software requirements; and test to ensure that the product functions as designed.

The petitioner also submitted a copy of a Global Product Information Exports project. The project information identified a project manager and two team members but did not list the total number of workers and their specific duties while assigned to the project. The project information did not identify the beneficiary as working on the project, did not indicate the expected duration of the project, or provide other evidence necessary to ascertain the beneficiary's job duties for the particular project if the beneficiary in fact would be assigned to the project.

On October 23, 2010, the director denied the petition.

On appeal, counsel submits the same response as submitted with the RFE adding only his assertion that the director did not properly consider the burden of proof in this matter. Counsel asserts that the petitioner established a prima facie case and once the prima facie case is established, the director's role is to weigh the evidence submitted under the preponderance of the evidence standard. Counsel contends that even if the director had some doubt regarding eligibility for the visa classification, the director must still approve the petition under the preponderance of the evidence standard.

The petitioner in this matter has not established by a preponderance of the evidence that the beneficiary will be employed in a specialty occupation. Nor has the petitioner established by a preponderance of the evidence that the LCA corresponds to the petition by encompassing all of the work locations and related wage requirements for the beneficiary's full employment period. The petitioner's failure to submit the requested itinerary pursuant to the regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) further requires the denial of the petition.

The AAO will first consider 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 [(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 [(2)] 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 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 at 387. 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 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 387-388. Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work.

In this matter, although the petitioner stated that the beneficiary would work in-house at its [REDACTED] headquarters, it also indicated that it has a number of clients and operations on both the east and west coasts of the United States. The petitioner noted that the beneficiary's employment would not be contingent on any one project but that it intended to employ the beneficiary for the duration of his visa term. The petitioner also noted that it generally controls the manner and scope of projects, although from time to time, it may co-manage projects with allied consultancies or the clients themselves. The petitioner provided a general description of the beneficiary's proposed duties acknowledging that the proposed duties were listed "in broad terms." Accordingly, the record of proceeding lacks substantive evidence from the petitioner regarding the beneficiary's actual claimed in-house work and 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. The petitioner has not provided sufficient descriptive evidence for analysis. In short, the petitioner has failed to establish the existence of H-1B caliber work for the beneficiary.

Even if the petitioner had provided the requisite detail regarding the beneficiary's day-to-day work, whether in-house or for a third party company, which it has not, the petitioner has not established that the proffered position of programmer analyst is a specialty occupation. The AAO recognizes the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>1</sup>

The Programmer Analyst occupational category is addressed in two chapters of the *Handbook* (2010-11 online edition) – "Computer Software Engineers and Computer Programmers" and "Computer Systems Analysts."

The *Handbook* describes computer programmers as follows:

[C]omputer programmers write programs. After computer software engineers and systems analysts design software programs, the programmer converts that design into a logical series of instructions that the computer can follow (A section on computer systems analysts appears elsewhere in the Handbook.). The programmer codes these instructions in any of a number of programming languages, depending on the need. The most common languages are C++ and Python.

Computer programmers also update, repair, modify, and expand existing programs. Some, especially those working on large projects that involve many programmers, use computer-assisted software engineering (CASE) tools to automate much of the coding process. These tools enable a programmer to concentrate on writing the unique parts of a program. Programmers working on smaller projects often use "programmer environments," applications that

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<sup>1</sup> The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2010 – 2011 edition available online.

increase productivity by combining compiling, code walk-through, code generation, test data generation, and debugging functions. Programmers also use libraries of basic code that can be modified or customized for a specific application. This approach yields more reliable and consistent programs and increases programmers' productivity by eliminating some routine steps.

As software design has continued to advance, and some programming functions have become automated, programmers have begun to assume some of the responsibilities that were once performed only by software engineers. As a result, some computer programmers now assist software engineers in identifying user needs and designing certain parts of computer programs, as well as other functions. . . .

\* \* \*

[M]any programmers require a bachelor's degree, but a 2-year degree or certificate may be adequate for some positions. Some computer programmers hold a college degree in computer science, mathematics, or information systems, whereas others have taken special courses in computer programming to supplement their degree in a field such as accounting, finance, or another area of business. . . .

The *Handbook's* section on computer systems analysts reads, in pertinent part:

In some organizations, programmer-analysts design and update the software that runs a computer. They also create custom applications tailored to their organization's tasks. Because they are responsible for both programming and systems analysis, these workers must be proficient in both areas. (A separate section on computer software engineers and computer programmers appears elsewhere in the Handbook.) As this dual proficiency becomes more common, analysts are increasingly working with databases, object-oriented programming languages, client-server applications, and multimedia and Internet technology.

\* \* \*

[W]hen hiring computer systems analysts, employers usually prefer applicants who have at least a bachelor's degree. For more technically complex jobs, people with graduate degrees are preferred. For jobs in a technical or scientific environment, employers often seek applicants who have at least a bachelor's degree in a technical field, such as computer science, information science, applied mathematics, engineering, or the physical sciences. For jobs in a business environment, employers often seek applicants with at least a bachelor's degree in a business-related field such as management information systems (MIS). Increasingly, employers are seeking individuals who have a

master's degree in business administration (MBA) with a concentration in information systems.

Despite the preference for technical degrees, however, people who have degrees in other areas may find employment as systems analysts if they also have technical skills. Courses in computer science or related subjects combined with practical experience can qualify people for some jobs in the occupation. . . .

As evident in the excerpts above, the *Handbook's* information on educational requirements in the programmer analyst occupation indicates that a bachelor's or higher degree, or the equivalent, in a specific specialty is not a normal minimum entry requirement for this occupational category. Rather, the occupation accommodates a wider spectrum of educational credentials. Additionally, while the *Handbook* indicates that a bachelor's degree level of education in a specific specialty may be preferred for particular positions, the generically described position duties in the record of proceeding do not demonstrate a requirement for the theoretical and practical application of highly specialized computer-related knowledge.

The AAO acknowledges counsel's reference to a memorandum, from Nebraska Service Center Director [REDACTED] dated December 22, 2000 which discusses the position of computer programmers/analysts and the growing demand for individuals with bachelor's degree in computer related fields for such positions. However, an agency guidance document, such as the Way memo, does not have the force and effect to preempt or countermand the clear mandate of an agency regulation, such as the one at 8 C.F.R. § 214.2(h)(2)(i)(B), that has been properly promulgated, after opportunity for public comment, in accordance with the Administrative Procedure Act (APA). Further, the AAO notes that the Way memo has no precedential value and, therefore, no binding effect as a matter of law upon USCIS. See 8 C.F.R. § 103.3(c) (types of decisions that are precedent decisions binding on all USCIS officers). Courts have consistently supported this position. See *Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000) (holding that legacy Immigration and Naturalization Serviced (INS) memoranda merely articulate internal guidelines for the agency's personnel; they do not establish judicially enforceable rights. An agency's internal personnel guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely"); see also *Noel v. Chapman*, 508 F.2d 1023 (2nd Cir. 1975) (finding that policy memoranda to legacy INS district directors regarding voluntary extended departure determinations to be "general statements of policy"); *Prokopenko v. Ashcroft*, 372 F.3d 941, 944 (8th Cir. 2004) (describing a legacy INS Operating Policies and Procedures Memorandum (OPPM) as an "internal agency memorandum." "doubtful" of conferring substantive legal benefits upon aliens or binding the INS); *Romeiro de Silva v. Smith*, 773 F.2d 1021, 1025 (9th Cir. 1985) (describing an INS Operations Instruction (OI) as an "internal directive not having the force and effect of law"). In this matter, the Way memo written in 2000 does not provide probative evidence regarding the occupation of computer programmers/analysts more than a decade later.

As the 2010-2011 *Handbook* indicates no specific degree requirement for employment as a programmer analyst, and as it is not self-evident that, as described in the record of proceeding, the proposed duties comprise a position for which the normal entry requirement would be at least

a bachelor's degree, or its equivalent, in a specific specialty, the AAO concludes that the performance of the proffered position's duties does not require the beneficiary to hold a baccalaureate or higher degree in a specific specialty. Accordingly, the AAO finds that the petitioner has not established its proffered position as a specialty occupation under the requirements of the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively requires a petitioner to establish that a bachelor's degree, in a specific specialty, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. Further, the petitioner did not submit documentation to establish that similar firms routinely require at least a bachelor's degree in a specific specialty.

The petitioner also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "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." The evidence of record does not refute the *Handbook's* information to the effect that a bachelor's degree is not required in a specific specialty. The record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than programmer analyst positions that can be performed by persons without a specialty degree or its equivalent.

Although the petitioner claimed that it had not hired any individual for the programmer analyst position that did not have a bachelor's degree, the petitioner did not provide evidence supporting its claim. 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)). Moreover, as discussed above, the standard is not whether or not the petitioner employs individuals with a bachelor's degree in the proffered position, but whether it only employs individuals with a bachelor's degree in a specific specialty. No evidence was provided that the petitioner has a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty. Therefore, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of its position's duties is so specialized and complex that the knowledge required to

perform them is usually associated with the attainment of a baccalaureate or higher degree. The AAO finds that the evidence in the record of proceeding does not support the proposition that the performance of the proposed duties requires a higher degree of IT/computer knowledge than would normally be required of programmer analysts not equipped with at least a bachelor's degree, or its equivalent, in a specific specialty. The petitioner notes that its description of duties is set out in broad terms and such a generic description is insufficient to establish that a position's duties are complex and specialized. The AAO, therefore, concludes that the proffered position has not been established as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

Next the AAO will address the petitioner's failure to provide an itinerary although requested to do so by the director. The regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) states, in pertinent part:

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

The itinerary language at 8 C.F.R. § 214.2(h)(2)(i)(B), 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 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. The nature of the petitioner's business is to provide consulting services to other companies. The petitioner acknowledged its operations on both the east and west coasts and indicated that it partnered with other companies and government agencies. The petitioner also noted that it generally controls the manner and scope of projects; although from time to time, it may co-manage projects with allied consultancies or the clients themselves. These statements do not include the specificity necessary to discern where or for whom the beneficiary would be working or the actual duties and duration of the position proffered to the beneficiary.

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 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.

Although the petitioner provided a response to the director's RFE, the petitioner did not provide the requested itinerary. The petitioner's indication that it was its intent to employ the beneficiary throughout the duration of his visa classification does not supplant the requirement of an itinerary. The purpose of the itinerary is not to substantiate that the petitioner will just "employ" the beneficiary but to establish that the beneficiary will be employed in H-1B caliber work throughout the duration of the visa classification.

Next the AAO will address the issue of whether the petitioner failed to establish that the LCA corresponds to the petition by encompassing all of the work locations and related wage requirements for the beneficiary's full employment period.

In pertinent part, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B) states:

The petitioner shall submit the following with an H-1B petition involving a specialty occupation: (1) A certification from the Secretary of Labor that the petitioner has filed a labor condition application . . . .

The regulation at 8 C.F.R. § 103.2(b)(1) states, in pertinent part:

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.

In addition, the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1), states, as part of the general requirements for petitions involving a specialty occupation, that:

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.

As the director determined, the record of proceeding does not include the necessary evidence establishing where and for whom the beneficiary would work and the length of time the beneficiary would work in a specific location. The evidence does not demonstrate conclusively that the beneficiary will work in [REDACTED] for the entire duration of the petition. In light of the fact that the record of proceeding is insufficient to establish the beneficiary's work location for the duration of the classification, USCIS cannot conclude that this LCA actually supports and fully corresponds to the H-1B petition. A 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. at 248.

Beyond the decision of the director, the AAO finds that the petitioner has failed to establish that it will be the beneficiary's employer or agent. Although the petitioner claims that it has an established employer-employee relationship with the beneficiary, the petitioner has not provided the supporting documentation establishing the necessary "control" of the beneficiary's employment. Again, we observe that the petitioner acknowledges that it generally controls the manner and scope of projects, although from time to time, it may co-manage projects with allied consultancies or the clients themselves. The petitioner in this matter does not provide the necessary probative information to establish that it will act as the beneficiary's sole employer. The petitioner's business, as detailed by the petitioner on the printouts from the website and the petitioner's description of the nature of its business, involves providing consulting and staffing services to other companies. As observed above, although the petitioner has provided evidence of one project it asserts will supply the beneficiary with work, it does not provide the requisite detail regarding the beneficiary's work associated with the project, the project does not list the number of individuals necessary for the project, and neither the beneficiary nor the proffered position is identified as associated with the project. As the record does not demonstrate that the beneficiary will work on the petitioner's claimed in-house project and the petitioner is also engaged in providing consulting and staffing services to other business, the petitioner has not provided the requisite evidence that establishes it will be the beneficiary's actual employer.

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 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review 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 is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). In this matter, the petitioner has not sustained its burden.

**ORDER:** The appeal is dismissed. The petition remains denied.