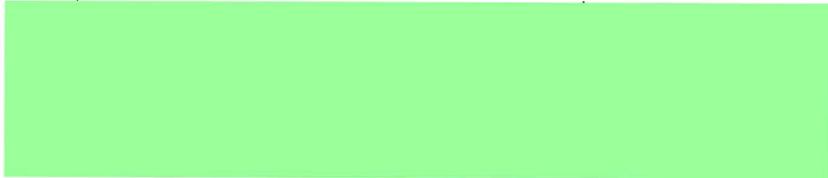
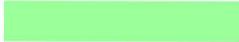


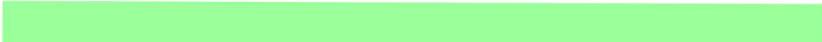


U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: APR 02 2013 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:

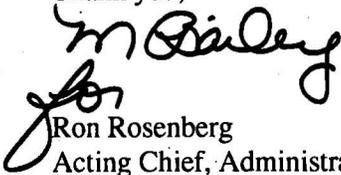


INSTRUCTIONS:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the Vermont Service Center on October 17, 2011. In the Form I-129 visa petition, the petitioner describes itself as a medical rehabilitation office established in [REDACTED]. In order to employ the beneficiary in what it designates as an associate director of physical therapy position, the petitioner seeks 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 February 1, 2012, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that it satisfied all evidentiary requirements.

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

For the reasons that will be discussed below, the AAO agrees with the director that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

Before proceeding further, the AAO notes that there are several errors in the director's decision with regard to the proffered position.² The AAO hereby withdraws these statements. However, the AAO finds that the director's ultimate conclusion was correct in determining that the petitioner failed to establish that its proffered position is a specialty occupation in accordance with the applicable statutory and regulatory provisions.

The petitioner and counsel are reminded that the AAO conducts appellate review on a *de novo* basis, evaluating the sufficiency of the evidence in the record according to its probative value and credibility. See *Soltane v. DOJ*, 381 F.3d 145. As previously noted, the AAO reviewed the record of proceeding in its entirety before issuing its decision. It is further noted that the director's statements did not result in the improper granting of a benefit in this matter, i.e., the statements did not

¹ The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

² On page 3, the director states that an RFE was issued requesting documentation demonstrating the proffered position qualifies as a specialty occupation. On page 5, the director states that advertisements and opinion letters were submitted. On page 6, the director refers to the position as a part-time executive recruiter position. The director also references a requirement of a degree in psychology and a degree with a title such as "communications with concentration in public relations and advertising business administration." The AAO hereby withdraws these statements.

change the outcome of this case and were a harmless error. See *Soltane v. DOJ*, 381 F.3d 143; *Black's Law Dictionary* 563 (7th Ed., West 1999) (defining the term "harmless error" and stating that it is not grounds for reversal). Furthermore, it not clear what remedy would be appropriate beyond the motion and appeal process itself. The petitioner has in fact supplemented the record, and therefore it would serve no useful purpose to remand the case simply to afford the petitioner the opportunity to supplement the record with additional evidence.

In this matter, the petitioner stated in the Form I-129 that it seeks the beneficiary's services as an associate director of physical therapy to work on a full-time basis at a rate of pay of \$60,000 per year. In a support letter dated September 20, 2011, the petitioner indicated that the beneficiary would be performing the following duties in the associate director of physical therapy position:

- Oversee, plan, organize, and improve training of physical/occupational therapists with respect to the use of the [REDACTED] Rehabilitation Center methods of therapy including suit therapy. Manage the operation of [REDACTED] Rehabilitation Center-based training programs from initial ramp-up to program execution and control. Conduct Children Cerebral Palsy, Training Methods, Parent Education and related therapy seminars and presentations first for Physical/Occupational Therapists, but also parents of disabled children (typically from Cerebral Palsy and Spinal Cord injuries), in Louisiana, then the State of Florida and eventually for the whole of the Southern geographic region of the United States concerning the uses of the [REDACTED] Rehabilitation Center therapies and their benefits for the injured and disabled population.
- Engage in [REDACTED] Rehabilitations Center-based therapy research. Develop and implement future therapy applications to new internal and external programs [of the petitioner] and practices such as increase therapy requirements and unique problems suffered by veterans of Iraq and Afghanistan Wars.
- Attend seminars and continuing education courses in order to increase the effectiveness of the [REDACTED] Rehabilitation Center-based therapies, training and methods throughout the [petitioner's] organization, as well as for other public and private physical/occupational therapy organizations in Louisiana and the South, and the incorporation of new medical developments in the field of Cerebral Palsy and other neuro-motor disorders including those derived from battle injuries (e.g. Iraq and Afghanistan Wars).
- Plan and direct the training of physical/occupational therapists with respect to the use of the [REDACTED] Rehabilitation-based training programs from initial ramp-up to program execution and control, emphasizing advanced therapies in order to relieve body pain, develop or restore body functions and/or maintaining performance, due to patient injuries or muscle, nerve, joint and bone diseases such as newborn and child Cerebral Palsy, paralytic disorders,

and other neuro-motor disorders motor conditions that cause physical disability in human development, mainly with regard to human body movement.

- Train clinical staff in the Polish and European therapeutic methods and the use of specialized therapeutic tools. Assist Director in oversight and direction of assigned personnel to ensure patient care is carried out in accordance with established practice standards and clinic policies and procedures.
- Plan and monitor development and implementation of new programs and ensure delivery of high-quality patient care in compliance with clinic standards, policies, procedures, and other regulations. Complete annual competencies for all clinical staff.
- Plan and lead expansion of [the petitioner's] programs into greater [redacted] Florida area at a new physical therapy clinic to be opened in [redacted], FL in 2012.

In its letter of support accompanying the initial I-129 petition, the petitioner described the educational requirements for the associate director of physical therapy as "a minimum of [a] Bachelor's degree in Physical Therapy or Rehabilitation. A Master's degree in Physical Therapy or Rehabilitation is, however, preferred." The petitioner did not provide any information regarding licensure requirements. The petitioner provided a copy of the beneficiary's foreign academic credentials, but did not submit an academic evaluation.

The petitioner states in its letter of support that it "strives to improve physical therapies as well as occupational therapies." The petitioner also claims that natural disasters in the area have impacted the number of professionally trained medical personnel and "have made it more difficult for those injured or afflicted to find state-of-the-art physical therapy to improve their situation." Additionally, the petitioner asserts that the beneficiary "can effect in instilling the training programs and methodologies to physical and occupational therapists." Furthermore, the petitioner states that there is urgency in the need for physical therapy programs using the [redacted] Rehabilitation Center-based training and claims that Louisiana "suffers terribly from a lack of qualified physical and occupational therapists with training in [redacted] Rehabilitation Center therapies." According to the petitioner, it intends to implement the beneficiary's training among therapists in the company "as well as those who are engaged in the professional practice throughout the State of Louisiana." The petitioner continues by reporting that, in the associate director of physical therapy position, the beneficiary will "plan and direct the training of physical/occupational therapists with respect to the use of the [redacted] Rehabilitation Center-based methods." Furthermore, the petitioner states its intention for the beneficiary to plan and lead the expansion of the petitioner's programs into Florida at a new physical therapy clinic.

The AAO observes that the petitioner designated its business operations under the North American

Industry Classification System (NAICS) code 621340.³ This NAICS code is designated for "Offices of Physical, Occupational and Speech Therapists, and Audiologists." See U.S. Dep't of Commerce, U.S Census Bureau, 2007 NAICS Definition, 621340 - Offices of Physical, Occupational and Speech Therapists, and Audiologists, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last viewed March 13, 2013).

The petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The AAO notes that the LCA designation selected by the petitioner for the associate director of physical therapy position corresponds to the occupational classification "Medical and Health Services Managers" - SOC (ONET/OES Code) 11-9111, at a Level I (entry level) wage.⁴ The LCA includes jobsites in the Louisiana cities of Slidell, Metairie, and Kenner.⁵

The petitioner also submitted an unsigned copy of its 2010 Federal Tax Return and a copy of its Articles of Incorporation (dated January 2001). No further documentation regarding the petitioner's business operations or evidence to substantiate the duties of the associate director of physical therapy position was provided.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on October 28, 2011 (eleven days after the petition was received). The director

³ According to the U.S. Census Bureau, the North American Industry Classification System (NAICS) is used to classify business establishments according to type of economic activity, and each establishment is classified to an industry according to the primary business activity taking place there. See <http://www.census.gov/eos/www/naics/> (last viewed March 13, 2013).

⁴ The petitioner designation the associate director of physical therapy position under the occupational category "Medical and Health Services Managers" - SOC (ONET/OES Code) 11-9111 in the LCA. Notably, in the H-1B Data Collection and Filing Fee Exemption Supplement (page 17), the petitioner listed the DOT Code as 189, which is designated for "Miscellaneous Managers and Officials." The petitioner elected not to classify the proffered position under one of the occupations listed under the category "Occupations in Medical and Health."

⁵ In the instant case, the petitioner indicated in the Form I-129 (Part 1) that its address is [REDACTED] in [REDACTED] Louisiana. The Form I-129 requests (on page 4) that the petitioner provide the "[a]dress where the beneficiary(es) will work if different from address in Part 1. (Street number and name, city/town, state, zip code)." The petitioner did not provide any worksites, thus, indicating that the beneficiary would only be employed at the address listed in Part 1 in [REDACTED] Louisiana. However, the petitioner provided two additional work sites in the LCA and four additional worksite in the letter of support (dated September 30, 2011) for the associate director of physical therapy position. Notably, DOL guidance clearly indicates that an "employer may file additional LCAs to identify additional places of employment beyond the three places listed on the original application." See DOL, Employment and Training Administration, Office of Foreign Labor Certification, Frequently Asked Questions - February 17, 2011 available on the Internet at <http://www.foreignlaborcert.doleta.gov/pdf/H1BFAQ021711.pdf> (last visited March 13, 2013).

No explanation was provided for the inconsistencies in the petitioner's representation of the beneficiary's work site locations in the Form I-129 petition, LCA and letter of support. Thus, the record contains significant discrepancies as to where the beneficiary will be employed.

outlined the evidence to be submitted.

On January 19, 2012, the petitioner responded to the director's RFE by providing a letter of support and additional evidence. In the letter of support dated January 18, 2012, the petitioner stated that it had made a change to its business model and personnel since the filing of the H-1B petition. The following is a summary of the petitioner's statement regarding the changes:

October 17, 2011 (when the H-1B petition was submitted)

22 full-time employees

- 2 Medical Doctors
- 3 Doctors of Chiropractic
- 2 **Physical Therapists**
- 2 **Physical Therapy Assistants**
- 4 **Physical Therapy Technicians**
- 5 **Physical Medicine and Chiropractic Technicians or Assistants**
- 4 management, administrative and medical billing/collection employees

January 18, 2012 (in response to the director's RFE)

19 full-time employees

- 2 Medical Doctors
- 3 Doctors of Chiropractic
- 9 **Physical Medicine and Chiropractic Technicians or Assistants**
- 4 management, administrative and medical billing/collection employees

The AAO observes that the petitioner stated that it currently employs 19 full-time employees, but only provided information regarding 18 employees. No explanation was provided.

The petitioner reported that the "change in personnel happened because the Doctors finally had the realization that [the] Physical Therapy employees were the weak link in not only [the] medical treatment, but in [the] business model." The petitioner claimed that it had "migrated to a medical practice and staffing model, which, in short, no longer envisions or requires physical therapists."

The petitioner continued by stating that a license is not required for the proffered position of associate director of physical therapy. In support of this assertion, the petitioner submitted an opinion letter from its legal counsel [REDACTED]. The petitioner claimed that the attorneys in the firm are legal experts in medical and malpractice law. The letter from Mr. [REDACTED] is dated December 28, 2010. Mr. [REDACTED] provided the following description for the associate director of physical therapy position:

Associate Director of Physical Therapy

Plan, direct, or coordinate the training and development activities and staff of an

organization. Plan, organize, and implement training of clinical staff with respect to the use of the [REDACTED] Rehabilitation Center methods of therapy. Plan, organize, and implement training of clinical staff in the Polish and European therapeutic methods and the use of specialized therapeutic tools. Monitor and evaluate the operation of [REDACTED] Rehabilitation Center-based training programs. Conduct seminars and presentations related to Children Cerebral Palsy, Training Methods, Parent Education and related therapies. Attend seminars and continuing education courses in order to increase the effectiveness of the [REDACTED] Rehabilitation Center-based therapies, training and methods. Research new medical developments in the field of Cerebral Palsy, paralytic disorders, and other neuro-motor disorders motor conditions that cause physical disability in human development, mainly with regard to human body movement. Implement revisions and/or additions to the training programs to incorporate these new developments into the [REDACTED] therapy model, as appropriate. Develop curricula to implement new therapy programs and applications by identifying unique problems suffered by veterans of Iraq and Afghanistan Wars and focus on addressing the increased therapy requirements of those individuals. Assist Director in oversight and direction of daily activities of assigned personnel in accordance with established practice standards and clinic policies and procedures. Plan and monitor development and implementation of new programs. Complete annual and/or periodic evaluations of clinical staff. Comply with clinic standards, policies, procedures, and other regulations.

Mr. [REDACTED] continued by stating that "after an exhaustive review of the Louisiana Licensing Guide as well as the statutes governing the practice of Physical Therapy in this state," that it is his opinion that "no license is required for the undertaking of those duties under the title of Associate Director of Physical Therapy."⁶ Mr. [REDACTED] claimed that the associate director of physical therapy position does not include any healthcare practice and that the duties are advisory, administrative and educational. According to Mr. [REDACTED], the associate director of physical therapy position does not

⁶ Mr. [REDACTED] stated that he had reviewed and research professional and occupational licenses offered in Louisiana and that he had included an attachment with his letter. The AAO notes that the attachment consists of the initial pages of the Louisiana Licensing Guide, including the Table of Contents. However, the petitioner did not submit the substantive content of the Louisiana Licensing Guide.

Nevertheless, the AAO obtained a copy of the guide from the Louisiana Workforce Commission website and notes that it provides brief summaries of the duties and requirements for various occupations, as well as contact information for the relevant licensing agencies. The guide provides the following description for the occupational category physical therapists: "Assess, plan, organize, and participate in rehabilitative programs that improve mobility." See Louisiana Workforce Commission, Louisiana Licensing Guide on the Internet at <http://www.prd.doa.louisiana.gov/LaServices/PublicPages/ServiceDetail.cfm?> [REDACTED] (last visited March 13, 2013). It is not clear from this brief, general description the reason that Mr. [REDACTED] discounts the associate director of physical therapy position as falling under this occupational category, and therefore, not requiring a license. Notably, Mr. [REDACTED] failed to submit this section of the Louisiana Licensing Guide. Moreover, upon review of the guide, it must be noted that it lacks sufficient information to support Mr. [REDACTED] conclusion. Mr. [REDACTED] did not provide any further documentary evidence to support his assertion.

provide healthcare services, evaluate or treat patients. Mr. [REDACTED] further reported that the petitioner "will not be employing physical therapists or physical therapist assistants, choosing to have all patient care performed by or under the direction of physicians and/or chiropractors."

The director reviewed the information provided by the petitioner. Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish how the beneficiary's immediate duties would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. The director denied the petition on February 1, 2012. The petitioner and counsel submitted an appeal of the denial of the H-1B petition. With the appeal, the petitioner and counsel submitted a brief and additional evidence.

In the appeal, counsel claims that the director erred in denying the petition without first issuing an RFE pertinent to the evidentiary insufficiency later identified as a basis of denial of the petition. As to the perceived error in the director's failure to issue an RFE covering all of the possible bases for denial of the petition, the AAO notes that there is no requirement for USCIS to issue an RFE or to issue an RFE pertinent to a ground later identified in the decision denying the visa petition. Title 8 C.F.R. § 103.2(b)(8) clearly permits the director to deny a petition for failure to establish eligibility without having to request evidence regarding the ground or grounds of ineligibility identified by the director. Counsel's assertion is tantamount to a shift in the evidentiary burden in this proceeding from the petitioner to USCIS, which would be contrary to section 291 of the Act, 8 U.S.C. § 1361. His attempt to shift the evidentiary burden in this proceeding is without merit. The burden to establish eligibility in this matter remains solely with the petitioner. Section 291 of the Act. When any person makes an application for a "visa or any other document required for entry, or makes an application for admission [. . .] the burden of proof shall be upon such person to establish that he is eligible" for such relief. 8 U.S.C. § 1361; *see also Matter of Treasure Craft of California*, 14 I. & N. Dec. 190 (Reg. Comm'r 1972). It must be noted that the regulations governing RFEs clearly indicate that the issuance of an RFE is purely discretionary and that the director may instead deny a benefit request when eligibility has not been established. *See* 8 C.F.R. § 103.2(b)(8).

In the H-1B petition, the petitioner designated the proffered position as an associate director of physical therapy. A significant number of the duties of the associate director of physical therapy position as stated in the initial petition indicated that the beneficiary would be working with physical therapists, and the petitioner stated that its staff consisted of eight individuals involved in physical therapy (physical therapists, physical therapy assistants and physical therapy technicians). The petitioner repeatedly stressed the need for physical therapy programs using certain rehabilitation therapies. However, in response to the RFE, the petitioner indicated that there had been several significant changes. For instance, the petitioner stated that after filing the H-1B petition it had changed its business model and no longer employed any physical therapists, physical therapy assistants or physical therapy technicians. Moreover, the petitioner claimed for the first time that the associate director of physical therapy position does not require a physical therapy license. In support of this claim, the petitioner submitted a letter from Mr. [REDACTED] which provided a new job description with significant changes to the job duties. The petitioner's response to the RFE did not clarify information previously provided in the initial petition, but instead informed the

director of substantial changes. This new information was not previously provided, and consequently not reviewed by the director, until the petitioner *responded to the RFE*. The regulations are clear that the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). It would be absurd to suggest that the director must continuously issue RFEs in response to each new piece of information provided by a petitioner who fails to establish eligibility for the benefit sought (as well as resulting in multiple RFEs, significant delays and inefficient processing).

Furthermore, even if the director had erred as a procedural matter in not issuing an RFE or Notice of Intent to Deny relative to the petitioner's failure to establish the proffered position as a specialty occupation, it is not clear what remedy would be appropriate beyond the appeal process itself. As previously noted the petitioner has in fact supplemented the record on appeal, and therefore it would serve no useful purpose to remand the case simply to afford the petitioner yet another additional opportunity to supplement the record with new evidence. As previously mentioned, the AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 145.

The issue before the AAO is whether the petitioner has provided sufficient evidence to establish that it would employ the beneficiary in a specialty occupation position. The AAO will first discuss some findings that are material to this decision's application of the H-1B statutory and regulatory framework to the proffered position as described in the record of proceeding.

In the instant case, the petitioner stated that the beneficiary would be employed in an associate director of physical therapy position. However, to determine whether a particular job qualifies as a specialty occupation, U.S. Citizenship and Immigration Services (USCIS) does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

Thus, a crucial aspect of this matter is whether the petitioner has adequately established the duties of the proffered position, such that USCIS may discern the nature of the position and whether the position indeed requires the theoretical and practical application of a body of highly specialized knowledge attained through attainment of at least a baccalaureate degree in a specific discipline. The AAO finds that the petitioner has not done so.

A position may be awarded H-1B classification only on the basis of evidence of record establishing that, at the time of the filing, definite, non-speculative work would exist for the beneficiary for the period of employment specified in the Form I-129. As previously mentioned, the 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). In response to the RFE, a petitioner cannot offer a new position to the beneficiary or materially alter the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification for the benefit sought. *Id.* 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). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). If significant changes are made to the initial request for approval, the petitioner must file a new or amended petition. The proper procedure for notifying USCIS of any material changes in the terms and conditions of employment or the beneficiary's eligibility as specified in the original petition, is to submit a new or amended petition, with a valid LCA and the proper fee(s), for the director to consider. See 8 C.F.R. § 214.2(h)(2)(E).

The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather materially changed the duties of the associate director of physical therapy position. For example, in the initial letter of support, the petitioner stated that the associate director of physical therapy would "plan and direct the training of physical/occupational therapists." The petitioner indicated that its staff included physical therapists, physical therapist assistants and physical therapist technicians. The petitioner repeatedly stressed the need for physical therapy programs using certain rehabilitation therapies and claimed that the beneficiary would be responsible for "the training programs and methodologies to physical and occupational therapists." Additionally, the petitioner claimed that the beneficiary would "[o]versee, plan, and organize and improve training of physical therapists/occupational therapists" and "[c]onduct seminars and presentations" for physical/occupational therapists, and "[p]lan and direct the training of physical/occupational therapists." The petitioner emphasized the importance of the beneficiary's work in training physical therapists, and also claimed that the beneficiary would "[p]lan and lead the expansion" of the petitioner's new "physical therapy clinic." However, in the appeal, the petitioner stated that after filing the H-1B petition it had changed its business model and no longer employed any physical therapists. Furthermore, the petitioner provided a letter from Mr. [REDACTED] in which the duties of the proffered position were significantly altered from the original description. Additionally, for the first time the petitioner stated that the proffered position does not require a physical therapy license.

When comparing the job description for the associate director of physical therapy position as provided by the petitioner in the initial petition to the job duties as stated by Mr. [REDACTED], the AAO observes that there have been significant revisions with job duties added, deleted and altered. Furthermore, while the original job description for the associate director of physical therapy position focused upon the beneficiary's work with physical/occupational therapist, the new description indicates that the beneficiary will work with "staff." The petitioner provided a description of its staff, which includes medical doctors, doctors of chiropractic, and "physical medicine and chiropractic technicians or assistants." However, notably, the petitioner failed to specify the occupation(s) and/or position(s) of the "staff" referred to in the revised job description. Moreover, the petitioner did not provide any supporting documentation to make such a determination.

Furthermore, the petitioner failed to provide any probative evidence to establish that such duties as the planning and directing of new training programs for physical/occupational therapists is the same as planning, organizing and implementing new training programs for "staff," which may or may not consist of medical doctors, doctors of chiropractic and/or physical medicine and chiropractic technicians or assistants. Notably, these are distinct professions and occupational categories, with vastly different educational and licensure requirements (from each other – and from physical therapists and occupational therapists). It appears that the knowledge required to plan and direct new training programs for physical/occupational therapists would differ significantly from the knowledge required to plan, organize and implement training programs for medical doctors, which would also differ significantly from the knowledge required to perform this function for chiropractic technicians or assistants.

Moreover, the petitioner claims that the beneficiary will serve as associate director of physical therapy and claims, in response to the RFE, that a license is not required. However, upon review of the Louisiana Physical Therapy Practice Act and the Florida Physical Therapy Act, the AAO is not persuaded by the petitioner's assertion.

The record of proceeding indicates that a necessary attribute of the proffered "associate director of physical therapy" position is that, through the job title of the proffered position, the beneficiary would be represented as providing physical therapy services.⁷ In the letter of support dated September 30, 2011, the petitioner stated that the beneficiary will be employed in Louisiana and Florida.

The Louisiana Physical Therapy Practice Act reserves the use of the term "physical therapy" and the legal right to use the term. More specifically, the term "physical therapy" is described as follows:

Use of titles and terms; restrictions

B. No person or business entity, its employees, agents, or representatives shall use in connection with that person's name or the name or activity of the business, the words "physical therapy", "physical therapist", "physiotherapy", "physiotherapist", "registered physical therapist", "licensed physical therapist", "doctor of physical therapy", the letters "PT", "DPT", "LPT", "RPT", or any other words, abbreviations, or insignia indicating or implying directly or indirectly that physical therapy is provided or supplied, unless such services are provided by or under the direction of a physical therapist licensed pursuant to this Chapter.

La. Rev. Stat. Ann. § 37:2419. Thus, an individual may not use the term "physical therapy" or other words indicating or implying (directly or indirectly) that physical therapy is provided or supplied, unless such services are provided by or under the direction of a licensed physical therapist. *Id.*

⁷ The petitioner does not claim, nor did it provide any evidence to suggest, that the beneficiary possesses a current physical therapist license in any state or territory of the United States.

Additionally, the following information is provided regarding violations and penalties:

Violations; penalties

A. No person shall:

* * *

(3) Use in connection with his name any designation tending to imply that he is a licensed physical therapist or a physical therapist assistant unless duly licensed to practice under the provisions of this Chapter.

B. Any person who, or legal entity which, commits or assists in the commission of any violation listed in Subsection A of this Section, or any legal entity which knowingly employs a person who engages in, or which legal entity otherwise facilitates or assists in the unlicensed practice of physical therapy shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than one hundred dollars nor more than five hundred dollars, or imprisoned for not less than thirty days nor more than six months, or both, and, in addition, a board licensee may have his license restricted, suspended, or revoked by the board. Each violation shall constitute a separate offense, and, for such additional violations, at the discretion of the court, such person or legal entity may be subject to a fine of not less than five hundred dollars or imprisonment of not less than six months, or both.

La. Rev. Stat. Ann. § 37:2421. It is a violation for a person to use in connection with his/her name any designation tending to imply that he/she is a licensed physical therapist unless the individual has been granted licensure. *Id.* A violation resulting in a conviction is a misdemeanor and will result in a fine and/or imprisonment. *Id.*

Similarly, the definitions section of the Florida Physical Therapy Practice Act states that the term physical therapist "means a person who is licensed and who practices physical therapy in accordance with the provisions of this chapter." See Florida Physical Therapy Practice Act § 486.021(5). The Florida Physical Therapy Practice Act reserves the use of the term "physical therapy" and the legal right to use the term to persons who have been licensed by the State of Florida to practice physical therapy.

The term "physical therapist" and "physical therapy" are described in the Florida Physical Therapy Practice Act § 486.135, which states the following:

False representation of licensure, or willful misrepresentation or fraudulent representation to obtain license, unlawful.—

(1)(a) It is unlawful for any person who is not licensed under this chapter as a physical therapist, or whose license has been suspended or revoked, to use in connection with her or his name or place of business the words "physical therapist,"

"physiotherapist," "physical therapy," "physiotherapy," "registered physical therapist," or "licensed physical therapist"; or the letters "P.T.," "Ph.T.," "R.P.T.," or "L.P.T."; or any other words, letters, abbreviations, or insignia indicating or implying that she or he is a physical therapist or to represent herself or himself as a physical therapist in any other way, orally, in writing, in print, or by sign, directly or by implication, unless physical therapy services are provided or supplied by a physical therapist.

Thus, it is unlawful for a person who is not licensed as a physical therapist to use in connection with his/her name the term "physical therapy" indicating or implying that he/she is a physical therapist or to represent herself or himself as a physical therapist. *Id.*

The Florida Physical Therapy Practice Act § 486.151 further states the following:

Prohibited acts; penalty.—

(1) It is unlawful for any person to:

- (a) Practice physical therapy or attempt to practice physical therapy without an active license.
- (b) Use or attempt to use a license to practice physical therapy which is suspended or revoked.
- (c) Obtain or attempt to obtain a license to practice physical therapy by fraudulent misrepresentation.
- (d) Use the name or title "Physical Therapist" or "Physical Therapist Assistant" or any other name or title which would lead the public to believe that the person using the name or title is licensed to practice physical therapy, unless such person holds a valid license.
- (e) Make any willfully false oath or affirmation whenever an oath or affirmation is required by this chapter.
- (f) Knowingly conceal information relating to violations of this chapter.

(2) Any person who violates any of the provisions of this section is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

It is unlawful for any person to use a name or title which would lead the public to believe that the person using the name or title is licensed to practice physical therapy, unless such person holds a valid license. *Id.* A violation is a misdemeanor and will result in a fine and/or imprisonment. *Id.*

The record of proceeding indicates that a necessary attribute of the proffered "associate director of physical therapy" position is that the beneficiary would be represented as being a physical therapist through the job title and/or implying directly or indirectly that physical therapy is provided or supplied. Thus, it appears that the beneficiary must have a physical therapist license in order to represent himself as serving in the petitioner's "associate director of physical therapy" position. However, the petitioner and Mr. [REDACTED] failed to address or even acknowledge that the term

"physical therapy" is reserved for licensed physical therapists according to the Louisiana Physical Therapy Practice Act and Florida Physical Therapy Practice Act.

Moreover, the "practice of physical therapy" is defined by the Louisiana Physical Therapy Practice Act as the following:

[T]he health care profession practiced by a physical therapist licensed under this Chapter and means the holding out of one's self to the public as a physical therapist and as being engaged in the business of, or the actual engagement in, the evaluation and treatment of any physical or medical condition to restore normal function of the neuromuscular and skeletal system, to relieve pain, or to prevent disability by use of physical or mechanical means, including therapeutic exercise, mobilization, passive manipulation, therapeutic modalities, and activities or devices for preventative, therapeutic, or medical purposes, and further shall include physical therapy evaluation, treatment planning, instruction, consultative services, and the supervision of physical therapy supportive personnel, including physical therapist assistants.

La. Rev. Stat. Ann. § 37:2407 (2010).

The AAO finds that the duties of the proffered position place the beneficiary squarely within the "practice of physical therapy" as contemplated by the State of Louisiana. For instance, the petitioner has stated that in the position of "Associate Director of Physical Therapy," the beneficiary will undertake the following:

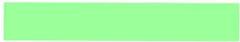
Oversee, plan, organize and improve training of physical/occupational therapists with respect to the use of Euromed Rehabilitation Center methods of therapy including suit therapy.

* * *

Conduct Children Cerebral Palsy, Training Methods, Parent Education and related therapy seminars and presentations first for Physical/Occupational Therapists, but also parents of disabled children (typically from Cerebral Palsy and Spinal Cord injuries), in Louisiana, then the State of Florida and eventually for the whole of the Southern geographic region of the United States concerning the uses of the Rehabilitation Center therapies and their benefits for the injured and disabled population.

* * *

Plan and direct the training of physical/occupational therapists with respect to the use of the Rehabilitation-based training programs from initial ramp-up to program execution and control, emphasizing advanced therapies in order to relieve body pain, develop or restore body functions and/or maintaining performance, due to patient injuries or muscle, nerve, joint and bone diseases such as newborn and child



Cerebral Palsy, paralytic disorders, and other neuro-motor disorders motor conditions that cause physical disability in human development, mainly with regard to human body movement.

* * *

Train clinical staff in the Polish and European therapeutic methods and the use of specialized therapeutic tools. Assist Director in oversight and direction of assigned personnel to ensure patient care is carried out in accordance with established practice standards and clinic policies and procedures.

* * *

Complete annual competencies for all clinical staff.

* * *

Plan and lead expansion of [the petitioner's] programs into greater [redacted] Florida area at a new physical therapy clinic to be opened in [redacted] FL in 2012.

The AAO finds that the petitioner's job description indicates that the beneficiary will be "engaged in the business of, or the actual engagement in, the evaluation and treatment of any physical or medical condition to restore normal function of the neuromuscular and skeletal system, to relieve pain, or to prevent disability by use of physical or mechanical means, including therapeutic exercise, mobilization, passive manipulation, therapeutic modalities, and activities or devices for preventative, therapeutic, or medical purposes." See La. Rev. Stat. Ann. § 37:2407. Moreover, the job duties of the associate director of physical therapy as stated by the petitioner indicate that the beneficiary will be involved in "treatment planning, instruction, consultative services, and the supervision of physical therapy supportive personnel," which are also activities that require a license in physical therapy in the State of Louisiana. See La. Rev. Stat. Ann. § 37:2407.

As previously mentioned, the petitioner submitted a letter from Mr. [redacted] in which Mr. [redacted] states that, based on the duties presented to him, he does not believe that a physical therapy license is required to carry out the duties of the associate director of physical therapy position in the State of Louisiana. The AAO notes that the list of duties upon which Mr. [redacted] based his opinion differs substantially from the list of duties provided to USCIS with the initial petition.⁸ It is noted that this revised description of the duties of the proffered position was provided by Mr. [redacted] not the petitioner. The letter was not endorsed by the petitioner and the record of proceeding does not

⁸ The AAO observes that the petitioner did not provide any information with regard to the order of importance and/or frequency of occurrence with which the beneficiary will perform the functions and tasks. Thus, the petitioner failed to specify which tasks were major functions of the proffered position, and it did not establish the frequency with which each of the duties would be performed (e.g., regularly, periodically or at irregular intervals). As a result, the petitioner did not establish the primary and essential duties of the proffered position.

indicate the actual source of the duties and responsibilities that Mr. [REDACTED] attributes to the associate director of physical therapy position.

As Mr. [REDACTED] did not base his opinion on the duties of the proffered position as presented to USCIS, the AAO does not find his letter persuasive in the instant proceeding. Moreover, Mr. [REDACTED] does not address the fact that the petitioner has designated the proffered position as an "associate director of physical therapy," and that the legal right to use the term "physical therapy" is reserved for persons who are licensed to practice physical therapy. See La. Rev. Stat. Ann. § 37:2419. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988).

In the instant case, there are significant discrepancies in the record of proceeding with regard to the nature, duties and requirements of the associate director of physical therapy position. When a petition includes numerous discrepancies, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions. Consequently, the petitioner has not established the services the beneficiary will perform, as well as the actual nature and requirements of the associate director of physical therapy position.

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

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.

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 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, 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 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), U.S. Citizenship and Immigration Services (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. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 147 (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular 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 directly related to the duties and responsibilities of the particular position, fairly

represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

The petitioner stated that the beneficiary would be employed in an associate director of physical therapy position. However, the record of proceeding contains materially conflicting information regarding the nature of the position and the petitioner's business operations, as well as the duties and requirements for the position. Based upon a complete review of the record of proceeding, the AAO finds that the petitioner has failed to establish (1) the substantive nature and scope of the beneficiary's employment; (2) the actual work that the beneficiary would perform; (3) the complexity, uniqueness and/or specialization of the tasks; and/or (4) the correlation between that work and a need for a particular educational level of highly specialized knowledge in a specific specialty. Consequently, these material conflicts preclude a determination that the petitioner's associate director of physical therapy position qualifies as a specialty occupation under the pertinent statutory and regulatory provisions. Moreover, there is a lack of evidence supporting the petitioner's claims regarding its business operations and substantiating the duties of the associate director of physical therapy position.

In the instant case, 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 entry into 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. The petitioner has provided inconsistent information regarding basic aspects of the proffered position, including the duties of the position, the location of the employment, with whom the beneficiary will be working, the nature of the petitioner's business operation, the requirements for the position, etc. Thus, the petitioner has failed to establish that its associate director of physical therapy position is a specialty occupation under the applicable provisions.

In this regard, the AAO here refers back to, and hereby incorporates by reference, its earlier analysis, comments, and findings with regard to the descriptions of the duties and the position they comprise, the discrepancies in the record, and the lack of evidence substantiating the duties and responsibilities of the position. As described, the AAO finds, they do not provide a sufficient factual basis to convey a persuasive basis to discern the substantive matters that would engage the beneficiary in the actual performance of the associate director of physical therapy position for the entire three-year period requested, such that they persuasively support any claim in the record of proceeding that the work that they would generate would require the theoretical and practical application of any particular educational level of highly specialized knowledge in a specific performance specialty directly related to the demands of the proffered position.

The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). The AAO finds that the petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

As a final note, the AAO acknowledges that on appeal, counsel claims that the proffered position is the same position in job title as previously approved H-1B petitions filed by a different petitioner on behalf of the beneficiary. Counsel also references an April 23, 2004 memorandum authored by William R. Yates (hereinafter Yates memo) as establishing that USCIS must give deference to those prior approvals or provide detailed explanations why deference is not warranted. Memorandum from William R. Yates, Associate Director for Operations, *The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity*, HQOPRD 72/11.3, (Apr. 23, 2004).

First, it must be noted that the Yates memo specifically states as follows:

[A]djudicators are not bound to approve subsequent petitions or applications seeking immigration benefits where eligibility has not been demonstrated, merely because of a prior approval which may have been erroneous. *Matter of Church Scientology International*, 19 I&N 593, 597 (Comm. 1988). Each matter must be decided according to the evidence of record on a case-by-case basis. See 8 C.F.R. § 103.8(d). . . . Material error, changed circumstances, or new material information must be clearly articulated in the resulting request for evidence or decision denying the benefit sought, as appropriate.

Thus, the Yates memo does not advise adjudicators to approve a petition when the facts of the record do not demonstrate eligibility for the benefit sought. On the contrary, the memorandum's language quoted immediately above acknowledges that a petition should not be approved, where, as here, the petitioner has not demonstrated that the petition should be granted.

Again, as indicated in the Yates memo, the AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See, e.g., *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It must be noted that the petitioner in the instant case has provided inconsistent information regarding the proffered position and the nature of its business. In response to the RFE, the petitioner made material changes to the proffered position. If the previous nonimmigrant petitions were approved based on the same description of duties and assertions that are contained in the current record, which has not been established, they would constitute material and gross error on the part of the director.⁹ It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), cert. denied, 485 U.S. 1008 (1988). A prior approval does not compel the approval

⁹ Further, USCIS records indicate that the approval of the most recent H-1B petition on behalf of the beneficiary was revoked.

of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). A prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of eligibility for the benefit sought. *See Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved nonimmigrant petitions on behalf of a beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Moreover, the memorandum clearly states that each matter must be decided according to the evidence of record. In the appeal, counsel suggests that USCIS was required to look at the prior records of proceeding dealing with the separate adjudications of the approved H-1B petitions filed on behalf of the beneficiary *by a different petitioner* and provide a reason why deference is not warranted.

Notably, copies of these allegedly approved petitions and supporting documents were not included in the record and, therefore, this claim is without merit. If a petitioner wishes to have prior decisions considered by USCIS in its adjudication of a petition, the petitioner is permitted to submit copies of such evidence that it either obtained itself and/or (when authorized) received in response to a Freedom of Information Act request filed in accordance with 6 C.F.R. Part 5. Otherwise, "[t]he non-existence or other unavailability of required evidence creates a presumption of ineligibility." 8 C.F.R. § 103.2(b)(2)(i).

As previously mentioned, when any person makes an application for a "visa or any other document required for entry, or makes an application for admission [. . .] the burden of proof shall be upon such person to establish that he is eligible" for such relief. 8 U.S.C. § 1361; *see also Matter of Treasure Craft of California*, 14 I. & N. Dec. 190. Each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. There is no requirement either in the regulations or in USCIS procedural documentation requiring nonimmigrant petitions to be combined in a single record of proceeding.¹⁰ Accordingly, there is no requirement for USCIS to request and obtain a copy of the prior H-1B petitions.

Again, the petitioner in this case failed to submit copies of the prior H-1B petitions and their respective supporting documents. As the record of proceeding does not contain sufficient evidence

¹⁰ USCIS is not required to engage in the practice of reviewing previous nonimmigrant petitions when adjudicating petitions. Given the various and changing jurisdiction over various nonimmigrant petitions and applications, requiring previously adjudicated nonimmigrant petitions to be reviewed before any newly filed application or petition could be adjudicated would result in extreme delays in the processing of petitions and applications. Furthermore, such a suggestion, while being impractical and inefficient, would also be tantamount to a shift in the evidentiary burden in this proceeding from the petitioner to USCIS, which would be contrary to section 291 of the Act.

of the allegedly approved petitions, there were no underlying facts to be analyzed and, therefore, no prior, substantive reasons could have been provided to explain why deference to the approvals of the prior H-1B petitions was not warranted. The burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act. For this additional reason, the Yates memorandum does not apply in this instance.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner.¹¹ Section 291 of the Act. Here, that burden has not been met.

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

¹¹ As previously mentioned, the AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 145. However, as the appeal is dismissed, and the petition is denied for the reasons discussed above, the AAO will not further discuss the additional issues and deficiencies that it observes in the record of proceeding.