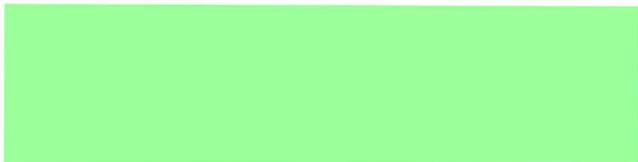




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **JUL 28 2014** OFFICE: CALIFORNIA 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:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
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.

I. FACTUAL AND PROCEDURAL HISTORY

On the Form I-129 visa petition, the petitioner describes itself as a computer consulting business established in 1989. In order to employ the beneficiary in what it designates as a consultant 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 petitioner indicates that the beneficiary will work at 333 S. Wabash Avenue, Chicago, Illinois 60604. The petitioner did not request any other work sites.

In the support letter dated March 26, 2013, the petitioner states that "[the beneficiary] will be assigned to work on IT development projects for our client, [REDACTED]." The petitioner further indicates that "[the beneficiary] will work out of our client office in [REDACTED], IL."

The petitioner also submitted a Labor Condition Application (LCA). The occupational category is designated as "Computer Systems Analysts" at a Level I (entry level) wage. The LCA lists the places of employment as follows:

[REDACTED]

The director found the evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on July 16, 2013. On October 8, 2013, the petitioner responded to the RFE by submitting a brief and supporting documents, which include:

- A letter dated September 23, 2013 from [REDACTED] VP of Procurement at [REDACTED] Mr. [REDACTED] states that "[t]he [Petitioner's] Employee [the beneficiary] has been assigned to [REDACTED] account pursuant to a Statement of Work under the MOSA [Master Outsourcing Services Agreement], which Statement of Work has been duly executed by [the petitioner] and [REDACTED] (see Attachment 166-009 hereto)."² Mr. [REDACTED] further states that "[t]he Services to be performed by the [Petitioner's] Employee under that Statement of Work will be provided at [REDACTED] offices in [REDACTED] Illinois."
- A Statement of Work (SOW) entitled "Work Request # 166-009 to OMNIBUS STATEMENT OF WORK A-166" between the petitioner and

¹ The petitioner provided an incorrect zip code for this address on the LCA.

² It must be noted for the record that the petitioner did not provide a copy of the Master Outsourcing Services Agreement referenced in the letter.

The document indicates "Request Date: 07/15/2013." Notably, the majority of the document has been redacted.

- An itinerary for the beneficiary, which indicates that the "Claims" project for Financial Corporation will be from April 1, 2011 to December 23, 2016 in Illinois.

The director denied the petition, finding that the petitioner failed to establish eligibility for the benefit sought. 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 contains: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) the Form I-290B and supporting materials. We reviewed the record in its entirety before issuing our decision.

For the reasons that will be discussed below, we agree 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.

Furthermore, later in the decision, we will also address several additional, independent grounds, not identified by the director's decision, that also preclude approval of this petition. Thus, the petition cannot be approved for these reasons as well.³

II. ISSUES NOT ADDRESSED BY THE DIRECTOR'S DECISION

A. Worksite

General requirements for filing immigration applications and petitions are set forth at 8 C.F.R. § 103.2(a)(1) in pertinent part as follows:

Every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions . . . and such instructions are incorporated into the regulations requiring its submission.

Further discussion of the filing requirements for applications and petitions is found at 8 C.F.R. § 103.2(b)(1):

Demonstrating eligibility. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request and must continue to be eligible through adjudication. Each benefit request must be properly completed and filed with all initial evidence required by applicable regulations and

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

other USCIS instructions. Any evidence submitted in connection with a benefit request is incorporated into and considered part of the request.

The regulations require that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner obtain a certified LCA from DOL in the occupational specialty in which the H-1B worker will be employed. See 8 C.F.R. § 214.2(h)(4)(i)(B). The instructions that accompany the Form I-129 also specify that an H-1B petitioner must submit evidence that an LCA has been certified by DOL when submitting the Form I-129.

Further, the regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) provides as follows:

Service or training in more than one location. A petition that 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 USCIS as provided in the form instructions. The address that the petitioner specifies as its location on the I-129 shall be where the petitioner is located for purposes of this paragraph.

In addition, the regulation at 8 C.F.R. § 214.2(h)(2)(E) states:

Amended or new petition. The petitioner shall file an amended or new petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition. An amended or new . . . petition must be accompanied by a current or new Department of Labor determination. In the case of an H-1B petition, this requirement includes a new labor condition application.

As mentioned, the LCA lists the places of employment as the petitioner's address at [REDACTED] and CNA's address at [REDACTED]. The itinerary identifies the client address as [REDACTED] which corresponds to the LCA.

However, on appeal, the petitioner indicated additional work sites for the beneficiary. Specifically, the petitioner's letter dated November 15, 2013 states:

[The petitioner] expects to assign [the beneficiary] to the CNA Financial Corporation project to work at the following address(es):

[REDACTED]

It is self-evident that a change in the location of a beneficiary's work is a material change in the terms and conditions of employment. Because work locations are critical to the petitioner's wage rate obligations, the change deprives the petition of an LCA supporting the periods of work to be performed at multiple locations and certified on or before the date the instant petition was filed. The petitioner in this case was required to submit an amended or new H-1B petition with USCIS indicating the change in locations and dates along with a newly certified LCA that establishes eligibility at the time that new or amended petition is filed.

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the U.S. Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part:

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL-certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

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

In light of the above, we find that a necessary condition for approval of an H-1B visa petition is an LCA, certified *on or before* the filing date of the petition, with information, accurate as of the date of the petition's filing, as to where the beneficiary would actually be employed. Furthermore, the petition must list the locations where the beneficiary would be employed and be accompanied by an itinerary with the dates the beneficiary will provide services at each location. Both conditions were not satisfied in this proceeding.

B. Employer-Employee Relationship

We will briefly address the issue of whether or not the petitioner qualifies as a United States employer with standing to file the H-1B petition.

We find that the petitioner has provided inconsistent information regarding the proffered position and did not establish that H-1B caliber work exists for the beneficiary for the entire requested period from October 1, 2013 to September 11, 2016. For example, the itinerary indicated that the beneficiary's services will be working from April 1, 2011 to December 23, 2016. Further, rather than establish definitive, non-speculative employment for the beneficiary for the entire period requested, the petitioner stated that the beneficiary would work on the [REDACTED] project, and that if the [REDACTED] project ended, the beneficiary would return to the petitioner's office and "play a supporting role for others who continue to be in the field." We note that the record of proceeding contains two letters from [REDACTED] VP of Procurement for [REDACTED]. In both letters, Mr. [REDACTED] does not provide the job title or any specific details regarding the responsibilities of the proffered position or any information regarding the expected duration of the project, when the project began, whether or not the project has been extended in the past, et cetera. On appeal, the petitioner provided a letter dated November 22, 2013. In the subsection "ESTIMATED DATE OF COMPLETION," the petitioner indicates "18th April 2015 with possibility of extension as mutually agreed." Also on appeal, the petitioner submitted another Statement of Work, which states that "[t]he term of this Statement of Work shall commence on the SOW Effective Date [June 1, 2013] and continue until May 31, 2014."

We find that the petitioner has failed to establish that the petition was filed for non-speculative work for the beneficiary that existed *as of the time of the petition's filing*.⁴ There is insufficient documentary evidence in the record corroborating the availability of work for the beneficiary for the requested period of employment and, consequently, what the beneficiary would do, where the beneficiary would work, as well as how this would impact the circumstances of his relationship with the petitioner. As previously discussed, USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R.

⁴ The agency made clear long ago that speculative employment is not permitted in the H-1B program. For example, a 1998 proposed rule documented this position as follows:

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

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

103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). Moreover, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act. The petitioner has failed to establish that, at the time the petition was submitted, it had located H-1B caliber work for the beneficiary that would entail performing the duties as described in the petition, and that was reserved for the beneficiary for the duration of the period requested.

As detailed above, the record of proceeding lacks sufficient documentation evidencing what exactly the beneficiary would do for the period of time requested or where exactly and for whom the beneficiary would be providing services. Given this specific lack of evidence, the petitioner has failed to establish who has or will have actual control over the beneficiary's work or duties, or the condition and scope of the beneficiary's services. In other words, the petitioner has failed to establish whether it has made a bona fide offer of employment to the beneficiary based on the evidence of record or that the petitioner, or any other company which it may represent, will have and maintain an employer-employee relationship with the beneficiary for the duration of the requested employment period. *See* 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer" and requiring the petitioner to engage the beneficiary to work such that it will have and maintain an employer-employee relationship with respect to the sponsored H-1B nonimmigrant worker). Therefore, the petition must be denied for this additional reason.

III. REVIEW OF THE DIRECTOR'S DECISION

Specialty Occupation

As recognized in *Defensor v. Meissner*, it is necessary for the end-client to provide sufficient information regarding the proposed job duties to be performed at its location(s) in order to properly ascertain the minimum educational requirements necessary to perform those duties. *See Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000). In other words, as the employees in that case would provide services to the end-client and not to the petitioning staffing company, the petitioner-provided job duties and alleged requirements to perform those duties were irrelevant to a specialty occupation determination. *See id.*

Here, the record of proceeding in this case is similarly devoid of sufficient information regarding the specific job duties to be performed by the beneficiary. The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary, therefore, precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

Accordingly, as the petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position qualifies as a specialty occupation. Therefore, the director's decision is affirmed and the petition must be denied for this additional reason.

IV. CONCLUSION AND ORDER

An application or petition that fails to comply with the technical requirements of the law may be denied by us even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143 (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when we deny a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that we abused our discretion with respect to all of our enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *see e.g., Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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