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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: JUN 12 2014 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 (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.

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the California Service Center on April 5, 2013. In the Form I-129 visa petition, the petitioner describes itself as an information technology (IT) consulting company established in 2004. In order to employ the beneficiary in what it designates as a programmer analyst 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 July 31, 2013, finding that the petitioner failed to establish (1) that it will have a valid employer-employee relationship with the beneficiary; and (2) that the proffered position is a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, counsel for the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements. In support of this assertion, counsel submitted a brief and supporting evidence.

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); (4) the response to the RFE; (5) the director's denial letter; and (6) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

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.

Furthermore, later in the decision, the AAO 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.[1]

I. FACTUAL AND PROCEDURAL BACKGROUND

In this matter, the petitioner states in the Form I-129 petition that it is an IT consulting company and that it seeks the beneficiary's services as a programmer analyst to work on a full-time basis.[2]

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

[2] Within the record of proceeding, the petitioner provides varying job titles for the proffered position. For instance:

- In the Form I-129, LCA and letter of support, the petitioner designates the proffered position as a programmer analyst.
- In an employment agreement, the petitioner states that the proffered position is Manager-Consulting.

Further, the petitioner states that the beneficiary will work at Melville, NY

The petitioner also submitted an LCA in support of the instant H-1B petition. The occupation classification for the proffered position is "Computer Systems Analysts" – SOC (ONET/OES Code) 15-1121, designated as a Level I (entry) position. The places of employment for the beneficiary are identified as:

- Arlington, VA and
- Melville, NY

While the petitioner indicates in Part 5 of the Form I-129 that an itinerary is included, the petitioner did not submit an itinerary. *See* 8 C.F.R. § 214.2(h)(2)(i)(B) (2013) (requiring an itinerary for services performed in more than one location).

In support of the Form I-129, the petitioner submitted a Statement of Work (SOW) dated March 7, 2013 between the petitioner and The SOW states that "[the petitioner] shall provide human resources capital services"; specifically, "EIM Specialist" for an average of 160 hours per month, but it does not name the employee assigned to the project. The SOW further indicates that 'shall provide appropriate facilities necessary at its location for [the petitioner] to work as an on-site resource," and also that "[a]ll consulting services will be performed at the offices." According to the SOW, is located at Washington, DC which is not a location identified in the Form I-129 or the LCA. The SOW is electronically signed by for the petitioner, and for

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on April 23, 2013. The director noted that the petitioner listed Melville, NY, and Arlington, VA as places of employment, but that the petitioner did not provide information about the work to be performed at these locations. The director outlined the types of evidence to be submitted.

Counsel responded to the RFE by submitting a brief and additional evidence including the following:

- In response to the RFE, the petitioner states that the beneficiary "will be working as EIM Specialist." The petitioner did not provide explanation for the discrepancies

Further the petitioner provided inconsistent information regarding the offered salary. For instance:

- In the Form I-129, the petitioner states that the beneficiary will be paid an annual salary of $61,000 per year.
- The Labor Condition Application (LCA) indicates that the beneficiary's wage is $60,507 per year.
- In an offer letter and in an employment agreement, the petitioner states that the beneficiary will be paid a salary of $100,000 per year.

- A letter dated July 17, 2013 allegedly from of The letter is not on company letterhead, and 's signatory line contains an electronic signature. The letter states that the beneficiary will be providing information technology services on s project at Washington DC . The letter further indicates that the beneficiary will be working as an EIM Specialist.

  In addition, the letter states "[i]f you should need additional information on this matter, please feel free to contact me directly at .," which is the contact information for for the petitioner.

- A SOW dated July 17, 2013 between the petitioner and This SOW provides that "shall provide appropriate facilities necessary at its location for [the petitioner's] resources to work as an on-site resource" and that "[a]ll consulting services will be performed at the offices." The document identifies the beneficiary as an EIM Specialist. The signature line and the date for the petitioner are left blank. signed for

- An offer letter dated April 3, 2013. The proffered position is "Manager-Consulting" and job role is "Solutions Architect." It further states that the beneficiary "will join the Delaware Location" but "may be required to travel to and from, or temporarily transfer to, a client engagement or [the petitioner's] project in a location away from [beneficiary's] normal home location." Notably, the beneficiary signed the document on March 6, 2013, one month prior to the date the offer was executed.

- An employment agreement dated April 3, 2013 between the petitioner and the beneficiary.

  In the agreement, the beneficiary "acknowledges and agrees to work anywhere in the United States as assigned by the [petitioner]." The beneficiary also agrees to "provide services as a **Manager-Consulting**" (emphasis in the original).

  Again, it is noted that the beneficiary and the petitioner signed the document on March 6, 2013, one month prior to the date that the employment agreement was executed.

The director reviewed the record of proceeding and determined that the petitioner failed to establish eligibility for the benefit sought. Specifically, the director noted that USCIS contacted and was not able to confirm an existing master services agreement and contract to verify the proposed employment for the beneficiary. USCIS also contacted the signatory for the petitioner, but he was unavailable because of travel. The director concluded that the petitioner failed to establish (1) that it will have a valid employer-employee relationship with the beneficiary; and (2) that the proffered

position is a specialty occupation in accordance with the applicable statutory and regulatory provisions. The director denied the petition on July 31, 2013. Subsequently, counsel for the petitioner filed an appeal.[3]

II. BEYOND THE DECISION OF THE DIRECTOR

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 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.

Additionally, 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.

The petitioner and its counsel indicated that the beneficiary would be employed at multiple the places of employment.

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[3] Throughout the appeal brief, counsel references an individual – who is not the beneficiary. Furthermore, the petitioner submitted documents relating to No explanation was provided.

- Form I-129: Melville, NY
- LCA submitted with the Form I-129: Arlington, VA, and Melville, NY
- Response to the RFE: Washington, DC
- Offer Letter: Delaware and possibly other locations
- Employment Agreement: Anywhere in the United States
- LCA submitted with the appeal: Washington, DC and Elliott City, Maryland

The petitioner did not submit an itinerary with the dates and locations of the services as provided in regulations and the form instructions.

Furthermore, in response to the RFE, the petitioner and its counsel provided new worksites that were not previously stated on the Form I-129 and LCA.

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.

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, the AAO finds 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.

Furthermore, as mentioned in the director's decision, USCIS was not able to verify an existing master services agreement and contract with and through IUI. Again, a petitioner must establish eligibility at the time of filing a 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. 248 (Reg. Comm'r 1978). 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). As a result, even if it were determined that the petitioner overcame the other independent reasons for the denial of the petition (which it has not), the petition could still not be approved.

III. THE DIRECTOR'S GROUNDS FOR DENIAL OF THE PETITION

A. Employer-Employee

The AAO 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. 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). As previously discussed, there is insufficient evidence detailing where the beneficiary will work, the specific projects to be performed by the beneficiary, or for which company the beneficiary will ultimately perform these services. Therefore, the director's decision is affirmed, and the petition must be denied for this additional reason.

B. 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 at 387-388. 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. For this additional reason, the appeal will be dismissed and the petition denied.

IV. CONCLUSION AND ORDER

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 (9th 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).

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

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *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.