identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

PUBLIC COPY

D2

[redacted]

FILE: WAC 07 144 53809 Office: CALIFORNIA SERVICE CENTER Date: AUG 25 2009

IN RE: Petitioner: [redacted]
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:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

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

The petitioner is a software development and consulting company that seeks to employ the beneficiary as a software engineer. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on the basis of his determination that the petitioner had failed to establish: (1) that it meets the regulatory definition of an intending United States employer as defined at 8 C.F.R. § 214.2(h)(4)(ii); (2) that it meets the regulatory definition of an agent as defined at 8 C.F.R. § 214.2(h)(2)(i)(F); (3) that the proposed position qualifies for classification as a specialty occupation; and (4) that the petitioner had failed to establish that it had submitted a valid labor condition application (LCA).

The record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request for additional evidence; (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.

In its April 1, 2007 letter of support, the petitioner stated that it provides professional information technology consulting services, as well as software development and related services. The petitioner stated that the beneficiary "will be actively involved in various roles" which would include providing services at the locations of the petitioner's clients. In the "Itinerary of Definite Employment," which was also dated April 1, 2007, the petitioner stated that the beneficiary "will be providing software development and implementation services to our client companies located here in Fremont and San Jose."

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued a request for additional evidence on May 4, 2007. In her request, the director requested that the petitioner submit evidence demonstrating who the actual employer of the beneficiary would be. The director requested documentation such as contractual agreements or work orders from the actual end-client firm where the beneficiary would work. Additionally, the director noted that if the petitioner was acting as an agent, documentation such as an itinerary and a letter discussing the conditions of the employment from the end-client firms must be submitted.

The petitioner responded to the director's request on July 26, 2007. The petitioner submitted a subcontracting agreement with Cyber Professionals, Inc., a purchase order issued pursuant to that subcontracting agreement, and another self-issued itinerary in support of its contention that the petitioner would be the beneficiary's employer. In its July 25, 2007 letter, the petitioner stated that the beneficiary "will be deployed to Cyber Professionals" upon his arrival in the United

States. The petitioner also submitted a July 23, 2007 letter from the president of Cyber Professionals, who stated that the beneficiary would be working under his direct supervision from October 2007 through September 2010.

The director denied the petition on November 20, 2007. The director found that the petitioner is a contractor that subcontracts workers with a variety of computer skills to other companies who need computer programming services. The director concluded that, because the petitioner is a contractor, it was required to submit the requested end contracts and itinerary and, without this documentation, the petitioner could not establish that it met the definition of United States employer or agent. The director also noted that absent contracts between Cyber Professionals and the end-user clients for whom the beneficiary would actual provide services, the petitioner had failed to establish any work to be performed and, therefore, that the petitioner had failed to establish that the proposed position qualifies for classification as a specialty occupation. Finally, the director found that the petitioner had failed to demonstrate that it had submitted a valid LCA.

The first issue before the AAO on appeal is whether the petitioner has established that it satisfies the regulatory definition of an intending "United States employer." Section 101(a)(15)(H)(i)(b) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). Specifically, the AAO must determine whether the petitioner has established that it will have "an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii)(*2*).

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), defines an H-1B nonimmigrant as an alien:

> who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 1184(i)(1) . . ., who meets the requirements of the occupation specified in section 1184(i)(2) . . ., and with respect to whom the Secretary of Labor determines . . . that the intending employer has filed with the Secretary an application under 1182(n)(1).

The term "United States employer" is defined at 8 C.F.R. § 214.2(h)(4)(ii) as follows:

> *United States employer* means a person, firm, corporation, contractor, or other association, or organization in the United States which:
>
> (1) Engages a person to work within the United States;
>
> (2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
>
> (3) Has an Internal Revenue Service tax identification number.

Upon review of the entire record of proceeding, the AAO concurs with the director's determination that the record is not persuasive in establishing that the petitioner or any of its clients will have an employer-employee relationship with the beneficiary.

Although the term "United States employer" is defined in the regulations, it is noted that "employee," "employed," "employment," and "employer-employee relationship" are not defined for purposes of the H-1B visa classification, even though these terms are used repeatedly in both the Act and the regulations, including within the definition of "United States employer" at 8 C.F.R. § 214.2(h)(4)(ii). Section 101(a)(15)(H)(i)(b) of the Act indicates that an alien coming to the United States to perform services in a specialty occupation will have an "intending employer" who will file a labor condition application with the Secretary of Labor pursuant to section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). The intending employer is described as offering full-time or part-time "employment" to the H-1B "employee." Sections 212(n)(1)(A)(i) and 212(n)(2)(C)(vii) of the Act, 8 U.S.C. §§ 1182(n)(1)(A)(i) and 1182(n)(2)(C)(vii). Further, the regulations indicate that "United States employers" must file Form I-129 in order to classify aliens as H-1B temporary "employees." 8 C.F.R. §§ 214.2(h)(1) and 214.2(h)(2)(i)(A). Finally, the definition of "United States employer" indicates in its second prong that the petitioner must have an "employer-employee relationship" with the "employees under this part," i.e., the H-1B beneficiary, and that this relationship be evidenced by the employer's ability to "hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer"). Accordingly, neither the legacy Immigration and Naturalization Service (INS) nor USCIS has defined the terms "employee," "employed," "employment," or "employer-employee relationship" by regulation for purposes of the H-1B visa classification, even though the law describes H-1B beneficiaries as being "employees" who must have an "employer-employee relationship" with a "United States employer."[1] Therefore, for purposes of the H-1B visa classification, these terms are undefined.

The Supreme Court of the United States has determined that where federal law fails to clearly define the term "employee," courts should conclude that the term was "intended to describe the conventional master-servant relationship as understood by common-law agency doctrine."

---

[1] It is noted that, in certain limited circumstances, a petitioner might not necessarily be the "employer" of an H-1B beneficiary. Under 8 C.F.R. § 214.2(h)(2)(i)(F), it is possible for an "agent" who will not be the actual "employer" of the H-1B temporary employee to file a petition on behalf of the actual employer and the beneficiary. However, the regulations clearly require H-1B beneficiaries of "agent" petitions to still be employed by "employers," who are required by regulation to have "employer-employee relationships" with respect to these H-1B "employees." *See id.*; 8 C.F.R. §§ 214.2(h)(1) and 214.2(h)(4)(ii) (defining the term "United States employer"). As such, the requirement that a beneficiary have a United States employer applies equally to single petitioning employers as well as multiple non-petitioning employers represented by "agents" under 8 C.F.R. § 214.2(h)(2)(i)(F). The only difference is that the ultimate, non-petitioning employers of the H-1B employees in these scenarios do not directly file petitions.

Nationwide Mutual Ins. Co. v. Darden, 503 U.S. 318, 322-323 (1992) (hereinafter "*Darden*") (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). That definition is as follows:

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Darden, 503 U.S. at 323-324; *see also Restatement (Second) of Agency* § 220(2) (1958); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) (hereinafter "*Clackamas*"). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968).[2]

---

[2] While the *Darden* court considered only the definition of "employee" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(6), and did not address the definition of "employer," courts have generally refused to extend the common law agency definition to ERISA's use of employer because "the definition of 'employer' in ERISA, unlike the definition of 'employee,' clearly indicates legislative intent to extend the definition beyond the traditional common law definition." *See, e.g., Bowers v. Andrew Weir Shipping, Ltd.*, 810 F. Supp. 522 (S.D.N.Y. 1992), *aff'd*, 27 F.3d 800 (2nd Cir. 1994), *cert. denied*, 513 U.S. 1000 (1994). However, in this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. Instead, in the context of the H-1B visa classification, the term "United States employer" was defined in the regulations to be even more restrictive than the common law agency definition. A federal agency's interpretation of a statute whose administration is entrusted to it is to be accepted unless Congress has spoken directly on the issue. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984).

The regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to employ persons in the United States, *and* to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and

Therefore, in considering whether or not one is an "employee" in an "employer-employee relationship" with a "United States employer" for purposes of H-1B nonimmigrant petitions, USCIS will focus on the common-law touchstone of control. *Clackamas*, 538 U.S. at 450. Factors indicating that a worker is an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. 503 U.S. at 323-324; *see also Restatement (Second) of Agency* § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. *See Clackamas*, 538 U.S. at 448-449; *cf. New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1), (EEOC 2006) (adopting a materially identical test and indicating that said test was based on the *Darden* decision); *see also Defensor v. Meissner*, 201 F.3d 384, 388 (5th Cir. 2000) (determining that hospitals, as the recipients of beneficiaries' services, are the true "employers" of H-1B nurses under 8 C.F.R. § 214.2(h), even though a medical contract service agency is the actual petitioner, because the hospitals ultimately hire, pay, fire, supervise, or otherwise control the work of the beneficiaries).

It is important to note that the factors listed in *Darden* and *Clackamas* are not exhaustive and must be evaluated on a case-by-case basis. Other aspects of the relationship between the parties

---

employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements, thus indicating that the regulations do not indicate an intent to extend the definition beyond "the traditional common law definition." Therefore, in the absence of an intent to impose broader definitions by either Congress or USCIS, the "conventional master-servant relationship as understood by common-law agency doctrine," and the *Darden* construction test, apply to the terms "employee," "employer-employee relationship," "employed," and "employment" as used in section 101(a)(15)(H)(i)(b) of the Act, section 212(n) of the Act, and 8 C.F.R. § 214.2(h). That being said, there are instances in the Act where Congress may have intended a broader application of the term "employer" than what is encompassed in the conventional master-servant relationship. *See, e.g.*, section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F) (referring to "unaffiliated employers" supervising and controlling L-1B intracompany transferees having specialized knowledge); section 274A of the Act, 8 U.S.C. § 1324a (referring to the employment of unauthorized aliens).

Finally, it is also noted that, if the statute and the regulations were somehow read as extending the definition of employee in the H-1B context beyond the traditional common law definition, this interpretation would likely thwart congressional design and lead to an absurd result when considering the $750/$1,500 fee imposed on H-1B employers under section 214(c)(9) of the Act, 8 U.S.C. § 1184(c)(9). As 20 C.F.R. § 655.731(c)(10)(ii) mandates that no part of the fee imposed under section 214(c)(9) of the Act shall be paid, "directly or indirectly, voluntarily or involuntarily," by the beneficiary, it would not appear possible to comply with this provision in a situation in which the beneficiary is his or her own employer, especially where the requisite "control" over the beneficiary has not been established by the petitioner.

may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met; however, the fact finder must weigh and compare a combination of the factors in analyzing the facts of each individual case. The determination must be based on all of the circumstances in the relationship between the parties, regardless of whether the parties refer to it as an employee or as an independent contractor relationship. *See Clackamas*, 538 U.S. at 448-449; *New Compliance Manual* at § 2-III(A)(1).

Likewise, the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450. "Rather, as was true in applying common-law rules to the independent-contractor-versus-employee issue confronted in *Darden*, the answer to whether a shareholder-director is an employee depends on 'all of the incidents of the relationship . . . with no one factor being decisive.'" *Id.* at 451 (quoting *Darden*, 503 U.S. at 324).

Applying the *Darden* and *Clackamas* tests to this matter, the AAO finds that the petitioner has failed to establish that it, or any of its clients, will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee."

Counsel asserts on appeal that the petitioner qualifies a United States employer. Counsel states that although the petitioner does not have direct, day-to-day control over the activities of its employees once they are assigned to client projects, it nonetheless determines which tasks and job duties the beneficiary will perform because it assigns its employees to the various client projects. Counsel states that it is the petitioner who hires, pays, fires, and supervises the beneficiary, and it is the petitioner with whom the beneficiary has entered into a contract. Counsel also asserts that an employer cannot control all details or all methods of performance, and that USCIS sets an unreasonable standard.

To qualify as a United States employer, all three criteria set forth at 8 C.F.R. § 214.2(h)(4)(ii) must be met. The Form I-129 and the petitioner's tax records establish that it has an Internal Revenue Service tax identification number. While the materials submitted by the petitioner, such as its letter of support, itinerary, and offer letter of employment indicate its engagement of the beneficiary to work in the United States, they do no establish that it will be a "United States employer" having an "employee-employer relationship" with the beneficiary as an H-1B temporary "employee."

Counsel asserts on appeal that the submitted consulting services agreement and accompanying statement of work between the petitioner and Cisco Systems stipulates that the petitioner may assign any consultant to the project. However, the AAO notes that the consulting services agreement specifically states, at page 4, that statements of work are not valid unless Cisco has issued a purchase order number covering the work. The statement of work contains similar language, stating in bold typeface, at page 1, that no work is authorized until Cisco issues a purchase order. As the record contains no evidence of a purchase order or a purchase order number, the consulting services agreement and statement of work are of little evidentiary value. As these materials do not establish that the petitioner has work for the beneficiary to perform, the

nature of the beneficiary's employment relationship with Cisco and the petitioner is, therefore, unclear.

Nor does the subcontracting agreement and accompanying purchase order from Cyber Professionals explain the nature of the beneficiary's employment relationship with the petitioner. The AAO notes that the subcontracting agreement between the petitioner and Cyber Professionals states, at page 1, that Cyber Professionals has identified the consulting requirements of its clients, and that it will utilize the resources of the petitioner in fulfilling those requirements. The agreement also states that the petitioner will supply "temporary consultants" to fulfill the requirements of Cyber Professionals' customers. As the purchase order did not identify the client of Cyber Professionals to whom the beneficiary would provide services, the nature of the beneficiary's employment relationship with Cyber Professionals and its clients is also unclear.

The evidence of record is insufficient to establish that a valid employment agreement or credible offer of employment existed between the petitioner and the beneficiary at the time the petition was filed. The evidentiary deficiencies in the materials submitted with regard to the Cisco Systems and Cyber Professionals contracts were set forth previously. Nor is the offer letter of employment sufficient, as it merely outlines the beneficiary's salary and benefits, and provides no details regarding the nature of the job offered or its location. The record is clear that the beneficiary would perform duties for the petitioner's clients, or for clients of the petitioner's clients, pursuant to the various subcontractor agreements. Although the itineraries submitted at the time the petition was filed and in response to the director's request for additional information do set forth certain duties proposed for the beneficiary, there is no information from any of the end-user clients of the petitioner, for whom the beneficiary would actually be providing services, describing the duties he would perform. For all of these reasons, it has not been established that the beneficiary will be "controlled" by the petitioner or that the beneficiary's employment could be terminated. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The petitioner, therefore, has failed to establish that an employer-employee relationship exists. Accordingly, it has not established that it will be a "United States employer" having an "employee-employer relationship" with the beneficiary as an H-1B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii).

Furthermore, absent documentation such as purchase orders or contracts between the ultimate end clients and the beneficiary, the petitioner cannot alternatively be considered an agent in this matter. The definition of agent at 8 C.F.R. § 214.2(h)(2)(i)(F) provides for two types of agents: (1) "an agent performing the function of an employer"; and (2) "a company in the business as an agent involving multiple employers as the representative of both the employers and the beneficiary." Again, absent such documentation, the petitioner cannot be considered an agent.

Accordingly, the AAO agrees with the director's determination that the petitioner has failed to establish that it meets the definition of a "United States employer." Having made such a determination, the AAO turns next to the director's determination that the petitioner failed to submit documentation establishing the specific duties that the beneficiary would perform and, as such, that USCIS is unable to analyze whether such duties would qualify for classification as a specialty occupation.

It should be noted that for purposes of the H-1B adjudication, the issue of bona fide employment is viewed within the context of whether the petitioner has offered the beneficiary a position that is viewed as a specialty occupation. Of greater importance to this proceeding, therefore, is whether the petitioner has provided sufficient evidence to establish that the services to be performed by the beneficiary are those of a specialty occupation.

Section 214(i)(l) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(l), 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 requires theoretical and practical application of a body of highly specialized knowledge in field 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 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 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, 8 U.S.C. § 1184(i)(1), 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), USCIS consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

In addressing whether the proffered position is a specialty occupation, the AAO agrees with the director's determination that the record is devoid of documentary evidence as to where and for whom the beneficiary would be performing his services, and therefore whether his services would actually be those of a programmer-analyst, and the petitioner's testimonial evidence is insufficient.

The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation." Moreover, the regulation at 8 C.F.R. § 214.2(h)(4)(iv)(A)*(1)* specifically

lists contracts as one of the types of evidence that may be required to establish that the services to be performed by the beneficiary will be in a specialty occupation.

The petitioner proposed the following duties for the beneficiary in its April 1, 2007 letter of support:

- Plan, develop, test, and document computer programs, applying his knowledge of programming techniques in Cisco IOS, Solaris, UNIX, Windows, C, C++, TCL/Expect, xGCPi, ACH, Casim, Callgen, IXIA, Adtech GUI/RPT, TCP/IP, ATM and MPLS, AAA, PPP, PPPoa, PPPoeOX, L2TP, QoS MECHANISMS, MGCP, H323, RTP, RIP, IGRP, EIGRP, OSPF, BGP, and Cvs;
- Design, develop, test, and implement vendor management applications using Cisco IOS, Solaris, UNIX, Windows, C, C++, TCL/Expect, xGCPi, ACH, Casim, Callgen, IXIA, Adtech GUI/RPT, TCP/IP, ATM and MPLS, AAA, PPP, PPPoa, PPPoeOX, L2TP, QoS MECHANISMS, MGCP, H323, RTP, RIP, IGRP, EIGRP, OSPF, BGP, and Cvs;
- Evaluate user requests for new or modified programs to determine feasibility, cost and time required, compatibility with current systems, and computer capabilities;
- Consult with users to identify current operating procedures and clarify program objectives;
- Read manuals, periodicals, and technical reports to learn ways to develop programs that meet user requirements;
- Formulate plans outlining the steps required to develop programs, using structured analysis and design;
- Submit plans to users for approval;
- Prepare flowcharts and diagrams to illustrate the sequence of steps that programs must follow and to describe the logical operations involved;
- Design computer terminal screen displays to accomplish the goals of user requests;
- Convert project specifications, using flowcharts and diagrams, into sequences of detailed instructions and logical steps for coding into language processable by computers;
- Enter program codes into computer systems;
- Enter commands into computers to generate reports for end-users;
- Read computer printouts, or observe display screen, to detect syntax or logic errors during program tests, or use diagnostic software to detect errors using Rational Rose and Erwin;
- Replace, delete, or modify codes to correct errors;
- Analyze, review, and alter programs in order to increase operating efficiency or adapt to new requirements;
- Write documentation to describe program development, logic, coding, and corrections;
- Write manuals for users to describe installation and operating procedures;
- Assist users to solve operating problems;
- Recreate steps taken by users to locate sources of problems and rewrite programs to correct errors;

- Use computer-aided software tools, such as flowchart design and code generation, in each stage of system development;
- Train users to use software programs;
- Oversee installation of hardware and software;
- Provide technical assistance to program users;
- Install and test programs at user sites;
- Monitor performance of programs after implementation; and
- Develop programs for business or technical applications.

In the document entitled "itinerary of definite employment," the petitioner added that it requires the services of the beneficiary because it had secured software development contracts with Logitech and Cisco Systems. Those contracts, however, were not submitted. As such, no independent documentation to further explain the nature and scope of these duties was submitted. As the petitioner is engaged in an industry that typically outsources its personnel to client sites to work on particular projects, the director requested documentation such as contracts and work orders, documentation that would outline for whom the beneficiary would render services and what his duties would include at each worksite. Despite the director's specific request for these documents, the petitioner failed to comply: the evidentiary deficiencies in the materials submitted with regard to the Cyber Professionals and Cisco Systems projects were set forth previously.

As discussed above, the only evidence of record discussing the beneficiary's duties are the letter of support and the itineraries prepared by the petitioner. However, these documents provide no details regarding the nature of the beneficiary's proposed position and accompanying duties. Without evidence of contracts, work orders, or statements of work describing the duties the beneficiary would perform and for whom, the petitioner fails to establish that the duties that the beneficiary would perform are those of a specialty occupation. Providing a generic job description that speculates what the beneficiary may or may not do at each worksite is insufficient. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici,* 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California,* 14 I&N Dec. 190 (Reg. Comm. 1972)).

In support of this analysis, USCIS routinely cites *Defensor v. Meissner,* 201 F.3d 384 (5th Cir. 2000), in which an examination of the ultimate employment of the beneficiary was deemed necessary to determine whether the position constitutes a specialty occupation. The petitioner in *Defensor*, Vintage Health Resources (Vintage), was a medical contract service agency that brought foreign nurses into the United States and located jobs for them at hospitals as registered nurses. The court in *Defensor* found that Vintage had "token degree requirements," to "mask the fact that nursing in general is not a specialty occupation." *Id.* at 387.

The court in *Defensor* held that for the purpose of determining whether a proffered position is a specialty occupation, the petitioner acting as an employment contractor is merely a "token

employer," while the entity for which the services are to be performed is the "more relevant employer." *Id.* at 388. The *Defensor* court recognized that evidence of the client companies' job requirements is critical where the work is to be performed for entities other than the petitioner. The *Defensor* court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. *Id.* In *Defensor,* the court found that that evidence of the client companies' job requirements is critical if the work is to be performed for entities other than the petitioner. *Id.*

In this matter, it is unclear whether the petitioner will be an employer or will act as an employment contractor. The job description provided by the petitioner, as well as various statements from the petitioner, indicate that the beneficiary will be working on client projects and will be assigned to various clients worksites when contracts are executed. Despite the director's specific request for documentation to establish the ultimate location(s) of the beneficiary's employment, the petitioner failed to comply. Moreover, the petitioner's failure to provide evidence of a credible offer of employment and/or work orders or employment contracts between the petitioner and its clients renders it impossible to conclude for whom the beneficiary will ultimately provide services and exactly what those services would entail. The AAO, therefore, cannot analyze whether the beneficiary's duties at each worksite would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation. Accordingly, the petitioner has not established that the proposed position qualifies as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) or that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(1)(B)*(1)*. Accordingly, the AAO finds that the director properly denied the petition on this ground.

The final issue is whether the petitioner submitted a valid LCA for all work locations, as required by 8 C.F.R. § 214.2(h)(2)(i)(B). In reviewing the petitioner's supporting documentation, the director concluded that without ultimate end-client agreements, the actual work location(s) for the beneficiary could not be determined. Upon review, the AAO concurs with the director's finding. Absent end-agreements with clients, the duration and location of work sites to which the beneficiary will be sent during the course of his employment cannot be determined. Absent this evidence, the AAO cannot conclude that the LCA submitted is valid for the beneficiary's intended work locations.

The petitioner has failed to demonstrate that the petitioner meets the definition of a United States employer, that the proposed position qualifies for classification as a specialty occupation, or that it has submitted a valid LCA. Accordingly, the AAO will not disturb the director's denial of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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