

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

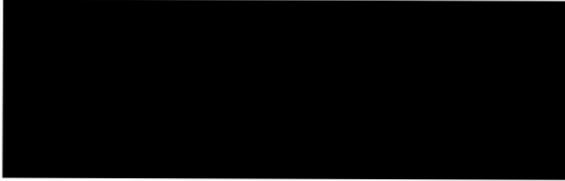
U.S. Department of Homeland Security
I.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529

PUBLIC COPY



U.S. Citizenship and Immigration Services

D2



SEP 15 2009

FILE: WAC 08 072 50323 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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)

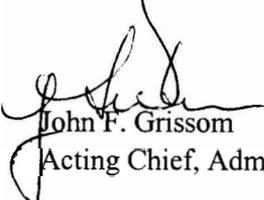
ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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 Director, California Service Center, denied the nonimmigrant 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.

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner states that it engages in software consulting, training, and development, that it was established in 1998, employs 180 persons, has a gross annual income of \$28,000,000, and has a net annual income of \$2,500,000.¹ It seeks to extend the employment of the beneficiary as a programmer analyst from May 7, 2008 to May 6, 2011. Accordingly, the petitioner 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).

On September 18, 2008, the director denied the petition, determining that the petitioner failed to establish that: (1) it is in compliance with the terms and conditions of employment; (2) it meets the regulatory definition of an intending United States employer at 8 C.F.R. § 214.2(h)(4)(ii); (3) it meets the definition of “agent” at 8 C.F.R. § 214.2(h)(2)(i)(F); (4) it submitted a valid labor condition application (LCA) for all locations; or (5) the proffered position is a specialty occupation.

On appeal, the petitioner submits a statement in support of the Form-I-290B, and contends that the director’s decision is erroneous on each of the issues discussed.

The record includes: (1) the Form I-129 and supporting documentation filed with United States Citizenship and Immigration Services (USCIS) on January 11, 2008; (2) the director’s request for evidence (RFE); (3) the petitioner’s response to the director’s RFE; (4) the director’s denial decision; and, (5) the Form I-290B and the petitioner’s brief submitted in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

When filing the Form I-129 petition, the petitioner averred in its January 8, 2008 letter in support of the petition that it is in the business of “designing and developing software solutions for a wide range of commercial and scientific applications.” It further stated that its mission was “to help our clients succeed in the global market place by exceeding their expectations and delivering value in everything we do.” Regarding the beneficiary, the petitioner stated that he would be employed as a programmer analyst with an annual salary of \$65,000. The petitioner submitted an offer of employment dated January 8, 2008 offering the beneficiary the position of programmer analyst with an annual salary of \$65,000, health insurance, and legal fees to obtain H-1B classification. The initial record also included the petitioner’s approval notice for the beneficiary’s H-1B classification valid from November 14, 2005 to May 25, 2008. The initial record further included a Form ETA 9035E, Labor Condition Application, certified by the Department of Labor on January 8, 2008 for a

¹ In response to the director’s request for further evidence, the petitioner submitted “an amended Form I-129” changing the LCA case number, increasing its number of employees to 210, projecting its gross annual income in 2008 as \$35 million, and projecting its net annual income in 2008 as \$1.2 million.

programmer analyst position in Arlington Heights, Illinois with a prevailing annual wage of \$43,368 and the annual rate of pay for the intended beneficiary at \$45,000.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued a RFE on April 2, 2008. In the request, among other things, the director: asked the petitioner to clarify the petitioner's employer-employee relationship with the beneficiary; requested evidence that a specialty occupation exists for the beneficiary; requested copies of signed contracts between the petitioner and the beneficiary; requested a complete itinerary of services or engagements that specifies the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed for the period of time requested; requested copies of signed contractual agreements, statements of work, work orders, service agreements, and letters between the petitioner and the authorized officials of the ultimate end-client companies where the work will actually be performed that specifically lists the beneficiary by name on the contracts and provides a detailed description of the duties the beneficiary will perform; requested information regarding the petitioner's premises and its organizational chart; and copies of its federal tax returns and its state and federal quarterly wage reports.

In an undated response, the petitioner addressed the director's queries. The petitioner noted that it had provided conflicting information regarding the beneficiary's wages and submitted a new LCA certified by the Department of Labor on May 7, 2008 for a programmer analyst position for locations in Waukesha, Wisconsin with a prevailing annual wage of \$44,429 and the Chicago, Illinois metro area with a prevailing annual wage of \$43,368 and listing the annual rate of pay for the intended beneficiary at \$65,000. The petitioner noted that its services could be "broadly classified into two segments: One, development of software for clients' applications at petitioner's main office at 415 W. Golf Rd., Suite #55, Arlington Heights, IL 60005; and second, if requested by the client, providing SAP services to client's worksites." The petitioner emphasized: "that the petitioner is an agent performing the function of the employer and it is the actual employer and controls the beneficiary's work/services." The petitioner contended that at the time of filing the petition in January 2008, the beneficiary was engaged in in-house software development at the petitioner's main office in Arlington Heights, Illinois but that due to a change in the business scenario² and needs of the client it was determined that the beneficiary would work at the client-site in Waukesha, Wisconsin; thus the petitioner submitted a new LCA amending the annual salary of the intended beneficiary and adding a new work location.

The petitioner contended that it is a SAP Services Partner, offers SAP implementation, and is a genuine employer. The petitioner submitted its corporate brochure, a SAP Services Partner

² The petitioner uses the same premise - that a change in business scenario requires the petitioner to relocate other beneficiaries - in other petitions for H-1B employment. See for example, receipt numbers WAC 08 096 51260, WAC 08 096 51220, WAC 08 079 50553, and WAC 08 090 50423. Rather than a change in business scenario, it appears the petitioner's standard practice is to seek to hire H-1B individuals without specific work to be performed by the beneficiary and then when a contract is executed that requires the beneficiaries' services, move the beneficiary to the new location.

agreement, information regarding a licensing agreement with the University of Kansas, copies of advertisements placed for specialized job positions, and copies of contracts entered into between the petitioner and its clients. The petitioner asserted that the documentation demonstrated that it has regular, systematic, and continuous operations and it is not a placement agency having no specialization of its own.

In support of its assertion that it is an agent performing the function of the employer and has the absolute right to control the beneficiary's work/services, the petitioner provided a copy of an employment agreement between the petitioner and the beneficiary dated April 15, 2008 which provided an overview of the beneficiary's duties as a programmer analyst and listed his salary. The petitioner also submitted an undated letter on the letterhead of eLogic Group, LLC, (eLogic) a company located in Pittsford, New York that indicated that the beneficiary had been providing services to eLogic since April 2008, that the beneficiary was not eLogic's employee, and that eLogic provided the assignments that need to be completed. The petitioner explains that eLogic provides information technology services to Waukesha Electric Systems and that the beneficiary is the contract resource.

The petitioner also submitted a document titled "itinerary" that showed that the beneficiary would perform duties at the petitioner's Arlington Heights, Illinois location 10 percent of the time and at Waukesha Electric Systems³ in Waukesha, Wisconsin 90 percent of the time during the petitioner's requested employment period from May 2008 to May 2011. The petitioner reiterated that the client would have no control over the beneficiary, "other than for the purpose of providing him with assignments to be completed." The petitioner emphasized that the beneficiary's job is not contingent upon the existence of a client contract and would be paid as a salaried employee.

The petitioner provided more general information regarding the duties of a programmer analyst and asserted that it is an industry standard to require a baccalaureate degree in a specific field of study for the position of programmer analyst. The petitioner included copies of six job announcements for positions of programmer analyst of which only one indicates that a bachelor's degree in computer engineering, computer science or a related field is required. The remaining five job announcements note that a general bachelor's degree is required or note the preference of a bachelor's degree in a specific field.

The petitioner provided a copy of its lease for [REDACTED], Arlington Heights, Illinois. The petitioner noted that it operated out of Suite 55 while its "sister" company operated out of Suite 54 and that each company had separate employees and separate clientele, but shared the same work labs and training facilities. The lease agreement shows the leased premises include 5,682 square feet. The petitioner also noted that "due to clients' requirement and

³ In the petitioner's response to the director's RFE, the petitioner noted that it and eLogic Group, LLC had attempted to procure statements from Waukesha Electric Systems regarding the contractual arrangement between Waukesha Electric Systems and eLogic Group, LLC but that Waukesha Electric Systems did not respond due to company policy and the confidential business information involved.

confidential nature of work involved, it becomes an absolute necessity that the petitioner's employees work from the client's site"; however, "the overall control, supervision and direction of all the petitioner's employees is centered at petitioner's business premises."

The petitioner also submitted documentation in the form of corporate tax returns, quarterly wage reports, W-2 forms, and a list of other H-1B employees in response to the RFE.

On September 18, 2008, the director denied the petition. 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 found that the petitioner filed an extraordinarily high number of petitions in relation to the number of employees it claimed on its petition, that many of the petitioner's H-1B employees had not been compensated at the rates of pay which were originally stated in the Form I-129 petitions and the corresponding LCAs, and that it appeared that there is no work for the H-1B beneficiaries when they first start their job with the petitioner. The director noted several perceived inconsistencies and determined that the evidence and the petitioner's unusual pattern of H-1B petition filings and conflicting statements regarding wages paid to beneficiaries raised legitimate concerns regarding the petitioner's compliance with the terms and conditions of employment as shown on the Form I-129.

Preliminarily, the AAO will review the director's comments regarding the petitioner's failure to comply with the terms and conditions of employment shown on the Form I-129. The director noted that the proposed salary for the beneficiary, as claimed on the LCA is \$45,000 annually which contradicts the \$65,000 annual salary in the petitioner's January 8, 2008 job offer letter and the January 8, 2008 employment letter signed by the beneficiary. On appeal, the petitioner references the amended LCA provided in response to the director's RFE showing the rate of pay for the beneficiary as \$65,000. The AAO notes the inconsistency between the job offer and the LCA but does not find the petitioner's error demonstrates its non-compliance with the terms and conditions of employment. The AAO does find, however, as will be discussed later, that the amended LCA was not certified when the petitioner filed the petition and thus is invalid. Nevertheless, the director's comment regarding the perceived inconsistent salary is withdrawn.

Also on appeal, the petitioner explained that it files a high number of H-1B petitions because of the high competition among companies in the "IT sector" looking for qualified personnel. The petitioner notes that USCIS did not provide examples of the petitioner's H-1B beneficiaries that had not been compensated according to certified LCAs and Form I-129 petitions. The petitioner acknowledges, generally, that some discrepancies in compensation may arise because a beneficiary takes unpaid leave for medical reasons or extended home visits. The petitioner notes again that at the time of filing the petition in January 2008, the beneficiary was working in-house on software development and it was not contemplated that the beneficiary would be relocated to a client site; but that at the time the petitioner responded to the director's RFE, the petitioner had relocated the beneficiary to a client site in Wisconsin and submitted an amended LCA to reflect the new location.

The AAO observes that the petitioner's lease agreement for 5,682 square feet of office space at Suite 54-55, 415 West Golf Road, could not accommodate the petitioner and its sister company's⁴ claimed number of employees. This limited amount of office space and the petitioner's note that "due to clients' requirement and confidential nature of work involved, it becomes an absolute necessity that the petitioner's employees work from the client's site" substantiates the fact that the petitioner operates as a contracting company that places H-1B beneficiaries in various locations. This fact and the petitioner's pattern⁵ of changing a beneficiary's work location after submitting a petition and certified LCA suggests that the petitioner does not have a viable position in place when the petition is filed. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 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. 1978). The AAO acknowledges the petitioner's claim that its beneficiaries initially work in-house; however, the petitioner has not provided any work product or substantive evidence supporting its claim that it has ongoing in-house work or could accommodate the number of individuals for which it files petitions to work at its office location. More importantly, the AAO observes that alien beneficiaries accorded H-1B status must have an actual job offer with a comprehensive description of the actual duties comprising the specialty occupation position and not be in the United States for speculative employment that has not been so defined.

The AAO notes that voluminous documentation pertaining to the petitioner's H-1B beneficiaries was submitted into the record and acknowledges that absent full details regarding the circumstances surrounding the employment of each H-1B employee and the petitioner's complete personnel records regarding each of these beneficiaries, the record does not include sufficient evidence to determine whether the petitioner compensated each beneficiary as shown on the LCA. That being said, the AAO agrees that the number of petitions filed by this petitioner and its pattern of changing the beneficiaries' location raises concerns regarding the legitimacy of the H-1B petitions it files. Although the record in this matter is insufficient to determine that the petitioner failed to comply with the terms and conditions of employment of other beneficiaries in other petitions, the AAO finds that the director's concerns are justified; thus, the AAO will not disturb the director's decision with regard to this issue.⁶

⁴ USCIS records shows that Advansoft Worldwide, Inc. claims to employ 180 individuals.

⁵ The AAO again notes that the petitioner has filed numerous H-1B petitions and corresponding LCAs that indicate the beneficiaries will work in the petitioner's Arlington Heights, Illinois office, but then changes the beneficiary's work location for "business reasons" when a contract is executed and the beneficiary is placed. The AAO find that the petitioner's business pattern indicates that these changes are contemplated and routine occurrences.

⁶ While the Department of Labor regulations at 20 C.F.R. § 655.731(c)(7)(ii) may permit the non-payment of wages by an H-1B employer "due to conditions unrelated to employment which take the nonimmigrant away from his/her duties at his/her voluntary request and convenience," this has no bearing on a Department of Homeland Security (DHS) determination regarding an alien's maintenance of status in the United States and a petitioner's compliance with DHS H-1B program requirements. In general, except in situations in which the Family and Medical Leave Act (29 U.S.C. § 2601 et seq.) or the Americans with Disabilities Act (42 U.S.C. § 12101 et seq.) may apply,

The AAO now turns to the director's determination that the petition could not be approved based on the four other grounds set out in the decision. As noted above, 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 determined that the petitioner had not provided a statement of work between the petitioner and any of the consulting firms that further contract the beneficiary's services, had not provided a complete itinerary, and had not provided information demonstrating that it required the beneficiary's services to complete in-house projects. The director concluded that, without evidence of contracts, the petitioner had not established that it is the beneficiary's employer and that it met the definition of United States employer or agent. Moreover, the director determined that the lack of documentation pertaining to an actual work location where work existed for the beneficiary to perform rendered the LCA invalid. Finally, the director determined that it was impossible to determine that the beneficiary would be employed in a specialty occupation based on the lack of contracts detailing the beneficiary's ultimate duties. The AAO affirms the director's conclusions on these issues and finds that for these reasons the petition in this matter is not approvable.

The AAO first addresses the issue in this matter of whether the petitioner established that it met 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:

(i) 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).

"United States employer" is defined in the Code of Federal Regulations 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;

DHS generally requires that the failure to carry on the specific activities for which the H-1B status was obtained constitutes a failure to maintain status and renders the alien immediately deportable and the employer in non-compliance with the H-1B program requirements.

- (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, the AAO concurs with the director's decision. 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 "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 U.S. Citizenship and Immigration Services (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."⁷ Therefore, for purposes of the H-1B visa classification, these terms are undefined.

⁷ 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.

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.” *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)).⁸

⁸ 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 similar 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

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 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,

States employer” not only requires H-1B employers and employees to have an “employer-employee relationship” as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms “employee,” “employed,” “employment” or “employer-employee relationship” indicates that the regulations do not intend to extend these terms beyond “the traditional common law definition.” Thus, 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).

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 petitioner has not established 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.”

In response to the director’s RFE and again on appeal, the petitioner asserts that it is an agent performing the functions of an employer. The petitioner contends that it has regular, systematic and continuous operations and the ability to support the number of workers it currently employs and that it submitted an itinerary of the services the beneficiary would be providing. The petitioner’s itinerary for the beneficiary re-stated the generic duties of a programmer analyst and provided an overview of the beneficiary’s proposed duties for its client’s client – Waukesha Electric Systems and noted that the beneficiary would spend 10 percent of his time at the petitioner’s location and 90 percent of his time at its client’s (eLogic) client’s (Waukesha Electric Systems) location in Waukesha, Wisconsin. The petitioner does not submit further evidence in support of its contentions.

To qualify as a United States employer, all three criteria at 8 C.F.R. § 214.2(h)(4)(ii) must be met. The Form I-129 and the petitioner’s federal tax returns contained in the record indicate that the petitioner has an Internal Revenue Service Tax Identification Number. While the petitioner’s job offer dated January 8, 2008 indicates its engagement of the beneficiary to work in the United States, this employment letter merely outlines the beneficiary’s salary and benefits and provides an overview but no comprehensive details regarding the nature of the job offered or its location.

The record in response to the director’s RFE added a copy of an employment agreement between the petitioner and the beneficiary dated April 15, 2008 which indicates the beneficiary’s duties as a programmer analyst include: “Programming Designing, Planning, Consulting, Testing, Coding, Analysis, Development and new documents preparation etc.; and “other tasks suitable for Programmer Analyst and to which [the petitioner] may assign.” The contract also includes the statement that “[the petitioner] will provide you with task-specific instructions for each task assigned to you.” The record also includes a contract between the petitioner and eLogic, a company located in Pittsford, New York, dated January 28, 2008, that provides an overview of a generic project and notes the duration of services as outlined in the statement of work begins on April 21, 2008 through June 13, 2008. The January 28, 2008 contract includes the beneficiary’s April 18, 2008 signature on an attachment “A” to the agreement which acknowledges that the beneficiary had been given a copy of the agreement. The record further includes a letter from eLogic that indicated that the beneficiary had been providing services to eLogic since April 2008, that the beneficiary was not its employee, and that it provided the assignments that need to be completed. Although the record includes information regarding eLogic, the record does not include any contracts, statements of work, or work orders related to the beneficiary and Waukesha Electric Systems, the organization for which the beneficiary will ultimately provide services.

The AAO finds that the above documentation, even when reviewed in totality, does not provide sufficient details regarding the specifics of the job offered or the location(s) where the services will be performed. Although the petitioner provided more detail regarding the duties the beneficiary would perform at its offices in its response to the director's RFE, the information is generic; it is not related to any specific project. The AAO acknowledges the petitioner's claim that it is a SAP services provider, but we are unable to discern from the record, the nature of the beneficiary's purported duties while ostensibly located at the petitioner's offices. The record does not include information regarding specific projects, tasks, or other information regarding what the beneficiary will be working on. The record does not include any substantive evidence that the petitioner's regular business involves "analysis, design, programming and implementation of application systems." 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's contract with eLogic, dated January 28, 2008, provides an overview of generic services and does not describe the ultimate services eLogic's client, Waukesha Electric Services, requires and further is limited in duration from April 21, 2008 through June 13, 2008. Not only does this contract fail to describe the beneficiary's ultimate duties as well as limiting the duration of the services, but it also was entered into subsequent to the date the petition was filed on January 11, 2008. Again, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. at 248. Moreover, 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. 1998). In addition, the letter signed on behalf of eLogic notes that although it does not consider the beneficiary to be its employee, it provides the assignments that need to be completed. Thus, the petitioner's assertion that it controls the beneficiary's work assignments is in question. Upon review, the evidence in the record does not establish that the petitioner qualifies as an employer, as defined by 8 C.F.R. § 214.2(h)(4)(ii).

Despite the director's specific requests in the RFE dated April 2, 2008 that the petitioner provide contracts between the petitioner and its end clients, the petitioner did not fully respond to the director's request. The regulations state that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Merely claiming in its letters in response to the director's RFE and on appeal that the petitioner would be the actual employer of the beneficiary because it would hire, pay, fire, supervise and otherwise control his work at the petitioner's Arlington Heights and other locations is insufficient. The record is without evidence of the actual work to be performed or other evidence to support the

petitioner's claim that it has work to assign to the beneficiary. Similarly, failing to provide evidence of end contracts in effect when the petition was filed that substantiate that the beneficiary would be providing specialty occupation services precludes eligibility in this matter. Again, 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. at 165. Despite the director's specific request for evidence such as contracts or agreements, or other details of projects, the petitioner failed to submit such evidence that relates specifically to the beneficiary. Thus, the record does not demonstrate that the petitioner had specific projects for which the beneficiary's services were required, had control over the beneficiary's work product, or that any work assigned would be work performed by the worker as part of the employer's regular business.

Therefore, based on the tests outlined above, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii).

When discussing whether the petitioner was an agent, the director stated that 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." The director found that absent documentation such as work orders or contracts between the ultimate end clients and the beneficiary, the petitioner could not alternatively be considered an agent in this matter. The AAO reiterates that an agent functioning as an employer must establish that it has an employer-employee relationship as described above. The petitioner in this matter failed to substantiate that such a relationship existed. As stated above, 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. at 165. Furthermore, the AAO notes that an agent functioning as an employer must submit an itinerary. Although the petitioner in this matter submitted a document titled "itinerary," the document did not specify the dates the beneficiary would be employed in the different locations, and thus does not disclose when the beneficiary would be moved from one location to another. Finally, it is again noted that the petitioner did not have employment for the beneficiary in the "new location" until after the petition was filed. The petitioner submits no new evidence on appeal to support a finding that the petitioner is an agent. For these additional reasons, the director's decision will not be disturbed.

The next 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). The director specifically noted that the LCA submitted with the petition listed only the beneficiary's work location as Arlington Heights, Illinois. The director properly did not consider the LCA submitted in response to her RFE, as the "amended" LCA was not certified prior to filing the petition. The Form I-129 filing requirements imposed by regulation require that the petitioner submit evidence of a certified LCA at the time of filing. A petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 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. 1978). The petitioner failed to comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B).

In addition, upon review, the AAO finds that the January 8, 2008 letter appended to the petition indicates that the petitioner has offices throughout the United States and the petitioner's response to the director's RFE confirms that the petitioner outsources H-1B beneficiaries. Absent end-agreements with clients in effect when the petition was filed and an itinerary of definite employment, USCIS is unable to determine the duration and location of work sites to which the beneficiary will be sent during the course of the petitioner's requested employment period. Absent this evidence, the petitioner has not established that the LCA submitted is valid.

The next issue is whether the beneficiary will be employed in 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 determined to be a specialty occupation. Therefore, of greater importance to this proceeding 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)(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 term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which 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 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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a 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, the 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, 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. To determine

whether a particular job qualifies as a specialty occupation, 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, to determine whether the position qualifies as a specialty occupation. *Defensor v. Meissner*, 201 F. 3d 384.

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)(I) 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.

On the Form I-129, the petitioner stated that the proffered position is that of a "Programmer Analyst." In the petitioner's January 8, 2008 letter appended to the petition, the petitioner indicated the beneficiary's responsibilities would include:

- Developing customer software for enterprise resource planning needs;
- Customizing functional modules on GUI mode like financial accountancy, material management, Human Resources management, sales and distribution and production planning;
- Coding in programming languages that suite [sic] the particular front end package;
- Writing algorithms required to develop programs using system analysis and design;
- Preparing flowcharts and entity-relationship models and diagrams to illustrate sequence of steps that program must follow and to describe logical operations;
- Using graphic files and text data from a database and presenting it on web;
- Collecting user requirements and analyzing coding to be done;
- Evaluating an existing system's software, hardware, business bottlenecks, configuration and networking issues, understanding the client's requests for enhancements and new business functions;
- Interface programming, debugging and executing of programs;
- Monitoring the database using backup, archive and restoring procedures.

Daily task activity would be as follows:

- | | |
|--|-----|
| • System Analysis | 25% |
| • System Design | 20% |
| • Writing the source code and develop programs | 30% |
| • Unit and System Testing | 15% |
| • Implementation and Documentation | 10% |

The petitioner noted the beneficiary worked as a SAP MM/WM Programmer/Analyst using particular programs and languages. However, the petitioner did not provide independent

documentation to further explain the nature and scope of these duties. Noting that the petitioner, as a software consultant company, was engaged in an industry that typically outsourced its personnel to client sites to work on particular projects, the director requested documentation such as end-user contracts. Despite the director's specific request for these documents, the petitioner failed to fully comply. The record does not include the scope and nature of work the petitioner's client's client requires from the beneficiary.

As discussed above, the record contains only a copy of a job offer to the beneficiary in letter form, an employment agreement that provides a general statement regarding the beneficiary's proposed duties but no description of the specific project to which the beneficiary would be assigned, and information that the beneficiary would be given task specific instructions for each task assigned. Although the petitioner has indicated that the beneficiary will provide programmer analyst-SAP R/3 duties for Waukesha Electric Systems, the record does not include statements from Waukesha Electric Systems detailing those duties. The AAO observes that due to the wide range of skills required for many computer positions, there are many paths of entry into such positions including associate degrees, technical certificates, and general fields of study at the baccalaureate level. *See* the Department of Labor's *Occupational Outlook Handbook* on Computer Specialists. In addition, the petitioner's submission of job announcements confirms that there is not an industry standard that requires programmer analysts to possess a baccalaureate degree in a specific discipline.

To establish that a specific position in the computer field is a specialty occupation, the petitioner must provide evidence of the nature of the employing organization, the particular projects planned, and evidence that the duties described require the theoretical and practical application of a body of highly specialized knowledge attained through a baccalaureate program in a specific discipline. In this matter, the petitioner has failed to provide such evidence. Without evidence of contracts, work orders, in-house projects, or statements of work describing the specific duties the end use company requires the beneficiary to perform, USCIS is unable to 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 a baccalaureate program. 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. at 165.

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 this matter, the record demonstrates that the petitioner acts as an employment contractor. The job description provided by the petitioner, as well as various statements from the petitioner both prior to adjudication and on appeal, indicate that the beneficiary will be working on client projects and will be assigned to various clients worksites when contracts are executed. **The petitioner has not** provided substantive evidence of in-house projects to which the beneficiary would be assigned. The petitioner's personnel record shows it locates individuals in a number of different states to perform services. 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. Similar to the circumstances in *Defensor*, the petitioner has provided a generic description of the duties for a position in a computer-related field that does not provide the necessary detail to establish that the proffered position is actually a specialty occupation. The AAO is unable to 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)(A)(iii) 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).

For the reasons set forth above, even if the other stated grounds of ineligibility were overcome on appeal, the petitioner has failed to supplement the record with sufficient evidence to establish that the beneficiary would be performing the duties of a specialty occupation, and the petition cannot be approved for this reason.

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