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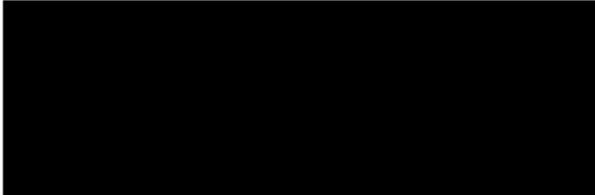


U.S. Department of Homeland Security
I.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529

U.S. Citizenship
and Immigration
Services

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FILE: WAC 07 138 50338 Office: CALIFORNIA SERVICE CENTER Date: **SEP 16 2009**

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)

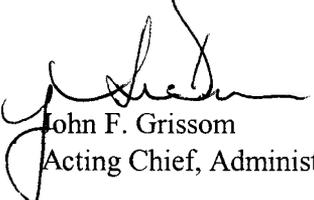
ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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. It seeks to employ the beneficiary as a programmer analyst from October 1, 2007 to September 28, 2010. 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 December 28, 2007, 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; (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 March 28, 2007 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 she would be employed as a programmer analyst. The initial record also included a Form ETA 9035E, Labor Condition Application, certified by the Department of Labor on March 29, 2007 for a programmer analyst position in Arlington Heights, Illinois with a prevailing wage of \$42,952.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued a RFE on October 25, 2007. In the request, among other things, the director: asked the petitioner to clarify the petitioner’s employer-employee relationship with the beneficiary; requested a detailed description of any in-house projects that the beneficiary would be involved in; asked the petitioner to submit evidence of contractual agreements with the actual end-client firm showing the scope of the contracted work; asked the petitioner to submit documentation regarding the beneficiary’s ultimate employment; requested information regarding the petitioner’s premises; and copies of its federal tax returns and its state and federal quarterly wage reports.

In a response dated November 12, 2007, the petitioner addressed the director's queries. The petitioner contended that it was the beneficiary's actual employer because it would hire, pay, fire, supervise and control the work of the beneficiary. The petitioner acknowledged that "although some assignments to clients' sites most likely would be required, the beneficiary will be working at our premises located at 415 W. Golf Road, Arlington Heights, IL 60005 for the whole requested period until 9/28/2010." 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.

The record before the director also included: a letter to the beneficiary dated March 28, 2007 which offered the beneficiary an annual salary of \$48,000, health benefits, and payment of legal fees to obtain H-1B status; an undated sample letter addressed to Mr. [REDACTED] but apparently signed by the beneficiary to confirm that the individual understood the terms of employment with the petitioner; and a March 28, 2007 employment letter addressed confirming that the beneficiary understood the terms of employment with the petitioner that is signed by both the petitioner and the beneficiary and lists a salary of \$48,000.

On December 28, 2007, 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 had made inconsistent and contradictory claims regarding its gross annual income, wages paid to its H-1B employees, and its business premises and had filed an extraordinarily high number of petitions in relation to the number of employees it claimed on its petition. The director determined that the evidence raised concerns regarding the petitioner's compliance with the terms and conditions 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 shown on the Form I-129. The AAO observes that the petitioner's claim that its gross annual income is \$28 million appears to be a rounding computation and is not significantly inconsistent from the petitioner's 2006 Internal Revenue Services (IRS) Form 1120, U.S. Corporation Tax Return, showing the petitioner's reported income for 2006 is \$25,505,940. The figure of \$28 million claimed by the petitioner on the Form I-129 in light of its income for 2005 and 2006 which shows a steady increase in funds appears to be an accurate estimated figure. The AAO finds no fault with the petitioner for making this claim and withdraws the director's comments regarding the petitioner's gross annual income.

The director also noted that the proposed salary for the beneficiary, as claimed on the LCA and Form I-129 is \$48,000 annually which contradicts the \$60,000 annual salary in the undated sample employment letter signed by the beneficiary. The AAO finds that the sample letter, not signed by the petitioner, is insufficient to establish the beneficiary's salary at \$60,000; rather the March 28, 2007 letters show that the petitioner offered the beneficiary an annual salary of \$48,000 which is not significantly different than the \$45,000 proposed wage listed on the LCA. The director's comment regarding the perceived inconsistent salary is withdrawn.

Additionally, the director found that the petitioner's office is actually a virtual office shared by other companies. While the petitioner submitted in response to the director's RFE, a lease agreement for

5,682 square feet of office space at Suite 54-55, 415 West Golf Road, the AAO observes that not all of the petitioner's claimed number of employees could work in 5,682 square feet of space. This limited amount of office space accentuates the fact that the petitioner cannot employ the majority of its workforce at this location and that it must operate as a contracting company that places H-1B beneficiaries in various locations. More importantly, however, the submitted lease does not appear to be complete, making it insufficient by itself to corroborate the petitioner's claims. As such, the director's findings with regard to this part of this issue will not be disturbed.

Finally, the director noted that the petitioner had filed an extraordinarily high number of petitions in relation to the number of employees it claimed on its petition. The director determined that the evidence raised concerns regarding the petitioner's compliance with the terms and conditions as shown on the Form I-129. The AAO notes that voluminous documentation pertaining to the petitioner's H-1B beneficiaries was submitted into the record. The petitioner asserted on appeal that it could not control a number of employees transferring to other companies and that it strives to comply with the H-1B regulations by withdrawing all approved H-1B petitions for employees who are not longer employed by it. The petitioner provides a number of letters to USCIS cancelling H-1B visa petitions for employees who it no longer employs. The AAO acknowledges the letters sent to USCIS but 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 pertinent LCA. That being said, the AAO agrees that the number of petitions filed by this petitioner under its various names and another employment identification number raises concerns regarding the legitimacy of the H-1B petitions. 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 observes that the director's concerns are justified; thus, the AAO will not disturb the director's decision with regard to this issue.¹

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 end-use contracts and had not provided the information requested regarding the petitioner's

¹ 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, 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.

“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 a programmer analyst position existed for the beneficiary when she entered the United States, and that the petitioner 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 first substantive issue in this matter is whether the petitioner has established that it meets 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;
- (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.”² 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.” *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

² 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 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)).³

³ 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 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

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, 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.”

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).

On appeal, the petitioner asserts that it is a genuine employer with full control over the beneficiary and thus satisfies the criteria for being a United States employer. The petitioner contends that it will evaluate the beneficiary's performance and promote, demote, or fire her based on her performance and will have power to control the beneficiary's work conduct. The petitioner stated that "the beneficiary may be also required to complete assignments at other company's where we would be required to provide services" and "if and when we enter into a contract with another entity that requires services of a programmer/analyst like the beneficiary, we may assign her to that worksite," and that "the mere fact that the beneficiary might be required to perform services elsewhere does not negate the fact that her main, primary worksite is our own premises and that we are her employer." The petitioner does not submit additional evidence to support its claim.

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 March 28, 2007 indicates its engagement of the beneficiary to work in the United States, this letter merely outlines the beneficiary's salary and benefits but provides no details regarding the nature of the job offered or its location. The AAO has also reviewed the March 28, 2007 employment letter signed by the beneficiary and the confidentiality and non-disclosure agreement effective October 1, 2007.

The March 28, 2007 employment agreement includes the general clause that the beneficiary "will be working full-time as a Programmer Analyst." The employment agreement states:

[Y]our duties will include analysis, design, programming and implementation of application systems. Your duties may also include other tasks suitable for programmer analysts and to which [the petitioner] may assign you. [The petitioner] will provide you with task-specific instructions for each task assigned to you.

The AAO finds, however, that the above documentation, even when reviewed in totality, does not provide any details regarding the specifics of the job offered or the location(s) where the services will be performed. The record does not include information regarding specific projects, tasks, or otherwise establish that the petitioner has the right to control the manner and means by which the beneficiary's work product is accomplished. The record does not include any evidence that the petitioner's regular business involves "analysis, design, programming and implementation of application systems." Thus, the record does not include sufficient evidence to establish that an employer-employee relationship exists. The evidence is insufficient to 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 October 25, 2007 that the petitioner provide contracts between the petitioner and its end clients or detailed descriptions of the in-house projects to which the beneficiary would be assigned, 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 her work at the petitioner's Arlington Heights location, without evidence of the actual work to be performed or other evidence to support the claim, is insufficient to establish eligibility in this matter. 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)). Despite the director's specific request for evidence such as contracts or agreements, or details regarding any in-house projects, the petitioner failed to submit such evidence that relates specifically to the beneficiary. 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. 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. The petitioner submits no new evidence on appeal to support a finding that the petitioner is an agent. For this additional reason, 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 listed the beneficiary's work location as Arlington Heights, Illinois. 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. Moreover, the director noted that the petitioner made specific claims that it would outsource the beneficiary to client sites as necessary.

On appeal, the petitioner asserts that it did submit a valid LCA, and that it therefore fully complied with the requirements for a valid LCA at the time of filing.

Upon review, the AAO concurs with the director's finding. The March 28, 2007 letter appended to the petition indicates that the petitioner has offices throughout the United States and the petitioner's November 12, 2007 letter in response to the director's RFE references clients in various industries at different worksites. In addition, the petitioner acknowledged on appeal that "the beneficiary may also be required to complete assignments at other company's, where we would be required to provide services" and that "if and when we enter into a contract with another entity that requires services of a programmer/analyst like the beneficiary, we may assign her to that worksite." Upon review of the petitioner's 2005 and 2006 IRS Forms W-2, Wage and Tax Statement, the petitioner issued Forms W-2 to individuals residing in a number of U. S. states and the record does not include any evidence that the petitioner has in-house projects to which the beneficiary would be assigned. Absent end-agreements with clients and information regarding specific in-house projects, as well as the petitioner's acknowledgement that the beneficiary may be assigned to different worksites, 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)(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.

On the Form I-129, the petitioner stated that the proffered position is that of a “Programmer Analyst.” In the petitioner’s March 28, 2007 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%

However, no independent documentation to further explain the nature and scope of these duties was submitted. Noting that the petitioner, as a software development 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. Acknowledging the petitioner's claim that the beneficiary would work in-house, the director requested specific details regarding the purported in-house projects documentation that would outline for whom the beneficiary would render services and what her duties would include. Despite the director's specific request for these documents, the petitioner failed to comply.

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. These documents provide no details regarding the nature of the beneficiary's proposed position and specific details regarding the accompanying duties. Without evidence of contracts, work orders, in-house projects, 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 or in-house 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. 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 client worksites when contracts are executed. The petitioner has provided no 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. The AAO, therefore, 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.