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

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U.S. Citizenship and Immigration Services

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FILE: WAC 07 149 50599 Office: CALIFORNIA SERVICE CENTER Date: SEP 16 2009

IN RE: Petitioner:
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 network administrator from October 1, 2007 to September 29, 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 13, 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. The director also references the beneficiary's lack of a specific degree in the area of computer science and notes that United States Citizenship and Immigration Services (USCIS) is unable to verify the beneficiary's qualifications for 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 Notice of Intent to Deny (NOID) the petition; (5) the petitioner's response to the NOID; (6) the director's denial decision; and, (7) 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 he would be employed as a network and computer systems administrator. The initial record also included a Form ETA 9035E, Labor Condition Application, certified by the Department of Labor on March 29, 2007 for a network administrator position in Arlington Heights, Illinois.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued a RFE on July 3, 2007. In the request, among other things, the director: asked the petitioner to clarify the petitioner's employer-employee relationship with the beneficiary; asked the petitioner to submit evidence of contractual agreements or work orders with the actual end-client firm showing where the beneficiary would work and a comprehensive description of the beneficiary's proposed

duties; asked the petitioner, if it was acting as an agent, to submit an itinerary of definite employment and other evidence establishing that the proffered position exists and substantiating the petitioner's claim of qualifying employment; requested evidence of the beneficiary's qualifications to perform a specialty occupation; and requested information regarding the petitioner's premises, its quarterly wage reports, and copies of its federal income tax returns.

In a response dated September 21, 2007, the petitioner addressed the director's queries. The petitioner contended that it was the beneficiary's actual employer, and not an agent, because it would hire, pay, fire, supervise and control the work of the beneficiary. The petitioner indicated that as a certified SAP partner it implemented industry specific SAP solutions for various industries. The petitioner stated that the beneficiary would be hired as a programmer/analyst[1] upon approval of the petition. The petitioner noted that about 90-95 percent of its personnel are programmers/analysts. The petitioner also included a letter to the beneficiary dated March 29, 2007 which offered the beneficiary a position as a "network and computer systems administrator," at an annual salary of $48,000, health benefits, and payment of legal fees to obtain H-1B status.

On October 24, 2007, the director issued a NOID noting: that the petitioner had indicated that it would be the beneficiary's actual employer, although the beneficiary may work at a client's worksite on occasion; that according to the petitioner's lease agreement, it leased 5,632 square feet of office space that did not appear sufficient to locate the petitioner's claimed 180 employees; and that as the evidence showed that the petitioner contracted with various companies to provide consulting work, USCIS required contracts and an itinerary to confirm the intended location and employment of the beneficiary for the requested validity dates. The director afforded the petitioner 30 days to respond to the NOID.

In an undated response to the NOID, the petitioner reiterated that it was the beneficiary's actual employer, and not an agent, because it would hire, pay, fire, supervise and control the work of the beneficiary. The petitioner noted that as it is a "software developing company that provides consulting and business solutions to a large number of clients from various industries, the beneficiary would be also required to complete assignments at other company's where [the petitioner] would be required to provide services." The petitioner stated: "if and when we enter into a contract with another entity that requires services of a computer analyst like the beneficiary, we may assign him to that worksite. However, the mere fact that the beneficiary would be likely required to perform services elsewhere does not negate the fact that his main, primary worksite is our own premises and that we are his employer."

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[1] The petitioner's use of different titles for the proffered position adds further confusion to the nature of the proffered position. Although the critical element is not the title of the position but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, the petitioner's interchangeable use of titles casts doubt on whether an actual specialty occupation position existed for the beneficiary when the petition was filed.

On December 13, 2007, the director denied the petition. The director found that the petitioner filed an extraordinarily high number of petitions in relation to the number of employees it claimed on the petition and that the few employees who were granted H-1B status actually work for the petitioner according to the originally stated terms of employment. The director provided several examples of H-1B beneficiaries and their stated annual wages and the wages actually paid. The director found that the petitioner had made inconsistent and contradictory claims regarding wages paid to its H-1B employees and found that the evidence raised legitimate concerns regarding the petitioner's compliance with the terms and conditions governing H-1B employment.

Regarding the director's comments concerning the petitioner's failure to comply with the terms and conditions governing H-1B employment, the AAO acknowledges the director's error in referencing Advansoft Worldwide, Inc. and listing Advansoft Worldwide, Inc.'s employees when noting the inconsistencies between wages paid to the petitioner's employees and the wages listed in the LCAs and on the Forms I-129 for those employees. The AAO observes that the petitioner in this matter lists its address as Suite 55, 415 West Golf Road, Arlington Heights, Illinois, on the Form I-129 and lists its address as Suite 54, 415 West Golf Road, Arlington Heights, Illinois on the appeal.[2] Although the director's reference is in error, the AAO notes that the number of petitions filed by this petitioner and by its "sister" company operating out of the same premises makes such an error understandable.

The AAO finds that the director's statement in the NOID that the petitioner's 5,632 square feet of office space as indicated in its lease agreement appears insufficient for the petitioner's claimed 180 employees to work is a valid observation. 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. The AAO also 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.[3] Nevertheless, absent full details regarding the

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[2] USCIS records reveal that Advansoft Worldwide, Inc. is a petitioner that is located at Suite 54, 415 West Golf Road in Arlington Heights, Illinois, and that Advansoft Worldwide, Inc.'s lease is signed and witnessed by the same parties as the petitioner's lease and is also for 5,682 square feet of office space at Suite 54-55, 415 West Golf Road, Arlington Heights, Illinois.

[3] 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

circumstances surrounding the employment of the petitioner's H-1B employees and the petitioner's complete personnel records regarding each of those beneficiaries, the record does not include sufficient evidence to determine whether the petitioner compensated each beneficiary as shown on the LCA; thus the AAO withdraws the director's decision on the issue of non-compliance with the terms and conditions of employment.

The AAO now turns to the director's determination that the petition could not be approved based on the four other grounds delineated in the decision. 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 or an itinerary. The director noted that the petitioner had submitted a copy of an Internet print out showing that the petitioner is a partner with SAP corporation, but that the print out is unsigned and undated and that the petitioner has not provided evidence that the beneficiary had knowledge in SAP or would be a SAP services provider. The director concluded that, without evidence of contracts or an itinerary, the petitioner had not established that the petitioner met the definition of United States employer or agent. The director also 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 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:

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and the employer in non-compliance with the H-1B program requirements.

> *United States employer* means a person, firm, corporation, contractor, or other association, or organization in the United States which:
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> (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."[4] Therefore, for purposes of the H-1B visa classification, these terms are undefined.

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[4] 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*

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).[5]

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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.

[5] 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*

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

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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 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).

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."

On appeal, the petitioner reiterates that it is the beneficiary's actual employer with full control over the beneficiary and thus satisfies the criteria for being a United States employer. The petitioner asserts: "it has full control over the selection and engagement of the beneficiary, control over payment of wages, the power of promotion, demotion or dismissal and the power to control [the] beneficiary's work conduct," and "not only has the control and direction of the employment to which the contract relates, but also of all of its details and the method of performing the work." The petitioner repeated its earlier acknowledgment 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 [sic] like the beneficiary, we may assign him to that worksite." The petitioner again noted: "the mere fact that the beneficiary might be required to perform services elsewhere does not negate the fact that his main, primary worksite is our own premises and that we are his 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 29, 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 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. 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 July 3, 2007 and in the October 24, 2007 NOID that the petitioner provide contracts between the petitioner and the beneficiary or 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).

The minimal information contained in the job offer is not supported by documentary evidence that a valid employment agreement or credible offer of employment exists between the petitioner and the beneficiary. The petitioner did not submit an employment contract or any other document describing the beneficiary's claimed employment relationship with the petitioner. While the petitioner did submit the job offer letter dated March 29, 2007, this document provides no information regarding the nature of the work to be performed. Without evidence of contracts, work orders, or statements of work describing the duties the beneficiary would perform and for whom, the petitioner fails to establish that the beneficiary's services were required, that the petitioner had control over the beneficiary's work product, or that any work assigned would be work performed by the beneficiary as part of the employer's regular business. The AAO agrees with the director's determination that although the petitioner claims to be a SAP partner, the record does not include any signed agreements detailing the type, location, or duration of any SAP services to be performed by the beneficiary for either the petitioner or its clients. 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)).

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 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 29, 2007 letter appended to the petition indicates that the petitioner has offices throughout the United States and the petitioner's September 21, 2007 letter in response to the director's RFE and undated response to the director's NOID reference clients in various industries at different worksites. In addition, the petitioner acknowledged in response to the NOID and again 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 him to that worksite." 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 his employment. 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 "Network Administrator." In the petitioner's March 29, 2007 letter appended to the petition, the petitioner lifts, in part, the description of the beneficiary's duties from the beneficiary's resume. The petitioner indicated the beneficiary's responsibilities would include:

- Setting up new production servers, upgrading of servers and decommission of the servers[.]
- Setting up Development, Testing and Live environments for application deployments[.]
- Migrating Legacy NT servers to Win2k3 servers[.]
- Maintaining, optimizing, troubleshooting the exiting servers remotely and monitoring the servers.
- Installation and configuration of DNS, IIS, iMail, Radmin, Serv-U-FTP, Statistic Server, Cold Fusion Server, Terminal Server and SQL server[.]
- Implementation of security policy to protect internal network against unauthorized access and to make provisions for disaster recovery in the event of successful intrusion/attack.
- Setting up back up strategy procedures for web server farm and developing disaster recovery plan and emergency plan of actions to ensure 100% availability.

- Installation and configuration of IIS web server on the production server.
- Managing IIS servers in a load balancing environment.
- Information Security practices and technologies including Firewalls, Virtual Private Networks and Security and Security Management.
- Maintaining, optimizing, troubleshooting the existing servers remotely and monitoring the server's 24x7[.]
- Design, test and deployment of security solutions for large scale networks.
- Management and troubleshooting of high end series Routers, Switches, Firewalls and other security components.
- Configuring NG installation on Windows and Secure platform.
- Monitoring and generating reports using report central.
- Upgrade versions and hot fixes.
- The break up of the responsibilities would be as follow[s]:

• Network Design	10%
• Installation and configuration	25%
• Onsite and Remote Administration	15%
• Trouble Shooting	20%
• Upgrades and Enhancements	10%
• Security Administration	10%
• User Support	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 contracts and work orders, documentation that would outline for whom the beneficiary would render services and what his duties would include at each worksite. The petitioner provided a copy of an Internet printout showing that it was a partner in providing SAP services. The record, however, does not include any information that would relate the beneficiary's above described duties to providing SAP services. The AAO also notes that the above described duties do not indicate that the beneficiary would be writing, testing, and maintaining instructions for computers to perform their functions, duties that would be indicative of a computer programmer, one of the titles used when describing the proffered position. More importantly, despite the director's specific request for contracts, work orders, or an itinerary detailing for whom the beneficiary would render services and what his duties would be, the petitioner failed to comply. Again, failure to submit requested evidence that precludes a material line of inquiry shall be ground for denying the petition. 8 C.F.R. § 103.2(b)(14).

As discussed above, the record contains only a copy of a job offer to the beneficiary in letter form. However, this document provides no details regarding the nature of the beneficiary's proposed position and 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. 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. Thus, 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.

In support of the above 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.*

The record demonstrates that the petitioner in this matter 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 provided no evidence of in-house projects to which the beneficiary would be assigned. 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)*.

The director references another issue alluding to the fact that the beneficiary is not qualified to perform the duties of a specialty occupation. As the director did not specifically enter a decision on this issue, the AAO finds beyond the decision of the director, that the petitioner has not established that the beneficiary is eligible to perform the duties of a specialty occupation.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess:

> (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
>
> (B) completion of the degree described in paragraph (1)(B) for the occupation, or
>
> (C) (i) experience in the specialty equivalent to the completion of such degree, and
>
> (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, the alien must meet one of the following criteria:

> (*1*) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
>
> (*2*) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
>
> (*3*) Hold an unrestricted State license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
>
> (*4*) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

In this matter, the petitioner provided documentation showing that the beneficiary was awarded a Bachelor of Commerce degree from Andhra University in India in September 1996 and a post graduate diploma in computer applications from the Advance Computer Education also in September 1996. The record shows that the beneficiary also obtained a Cisco Certified Network Associate Certificate from Cisco Systems and a Microsoft Certified Professional Certificate from Microsoft. The record includes

an evaluation of the beneficiary's education and experience prepared by Multinational Education & Information Services, Inc. dated September 18, 2007.

When attempting to establish that a beneficiary has the equivalent of a degree based on his or her combined education and employment experience under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(C)(*4*), a petitioner may not rely on a credentials evaluation service to evaluate a beneficiary's work experience. A credentials evaluation service may evaluate only a beneficiary's educational credentials. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(*3*). To establish an academic equivalency for a beneficiary's work experience, a petitioner must submit an evaluation of such experience from an official who has the authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university that has a program for granting such credit. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(*1*). Thus, the September 18, 2007 evaluation may only be reviewed as it pertains to the beneficiary's educational experience. The evaluation notes that the beneficiary's Bachelor's of Commerce degree is the equivalent of a three-year program of post-secondary academic studies in Business Administration in an accredited university in the United States. The evaluation, although noting the beneficiary's post graduate diploma in computer applications from a technical school in India and the beneficiary's two certificates from Cisco Systems and Microsoft, does not provide the United States university-level equivalent of such study. The record does not provide the transcripts for the beneficiary's technical school study; thus, the AAO is also unable to determine that the beneficiary holds the equivalent of a baccalaureate degree in a field directly related to the proffered position. For this additional reason, the petition will be denied.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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 or is qualified to perform the duties of a specialty occupation, and the petition cannot be approved for these reasons.

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