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U.S. Department of Homeland Security
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Office of Administrative Appeals MS 2090
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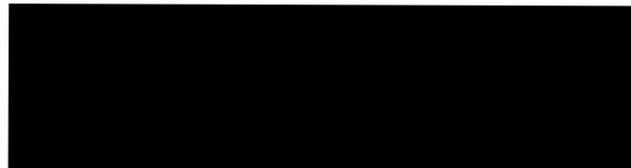


FILE: WAC 08 167 51525 Office: CALIFORNIA SERVICE CENTER Date: SEP 28 2009

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:



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 of the California Service Center denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary in the position of computer programmer/systems analyst as an H-1B nonimmigrant in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The petitioner describes itself as a software development and consultancy firm and indicates that it currently employs 152 persons.

The director denied the petition because the petitioner failed to establish that: (1) it meets the regulatory definition of an intending United States employer 8 C.F.R. § 214.2(h)(4)(ii); (2) it meets the definition of “agent” at 8 C.F.R. § 214.2(h)(2)(i)(F); (3) a valid Labor Condition Application (LCA) was filed for all locations; (4) the proffered position is a specialty occupation; or (5) it complied with the terms and conditions of employment.

On appeal, counsel for the petitioner submits a brief and additional evidence, and contends that the director erroneously found that the petitioner would not be the beneficiary’s employer.

When filing the I-129 petition, the petitioner averred in its May 19, 2008 letter of support that it is an IBM business partner involved in developing IBM based portal applications and also providing computer programming consultancy services to various organizations all over the United States. The petitioner further claimed that the “venue, establishment and location of the beneficiary’s services shall be performed in New Hudson, Michigan.” The petitioner concluded by stating that this was the beneficiary’s complete itinerary and no other working location is anticipated.

The director found the initial evidence insufficient, and issued a request for evidence on June 26, 2008. In the request, the director asked the petitioner to submit evidence clarifying the actual location and address at which the beneficiary will work. In addition, the director requested documentation such as contractual agreements or work orders from the actual end-client firm where the beneficiary would work.

In a response dated August 5, 2008, counsel for the petitioner addressed the director’s queries. The petitioner claimed that the beneficiary would be working for Blue Cross Blue Shield (Blue Cross), and provided an affidavit from the petitioner’s owner and president, dated August 5, 2008, attesting to the details of the beneficiary’s employment. Specifically, the affidavit indicated that the beneficiary would work for Blue Cross through the petitioner’s approved vendor, Jawood Management Associates (Jawood). In support of this contention, the petitioner submitted a copy of an Independent Contractor Agreement between the petitioner and Jawood, for services on behalf of Vision’s end-user, Blue Cross. Also included were documents outlining the beneficiary’s itinerary and services to be performed, which also provided the beneficiary’s hourly wage.

On August 5, 2008, the director denied the petition. The director found that the petitioner is a contractor that subcontracts workers with a variety of computer skills to other companies who need computer programming services. The director concluded that, because the petitioner was a contractor, it was required to submit the

requested end contracts and itinerary, and without this documentation, the petitioner could not establish that it met the definition of United States employer or agent.

On appeal, counsel contends that the petitioner is a bona fide employer, and claims that despite the beneficiary's employment onsite at a client location, the petitioner retains control over the beneficiary and therefore serves as her employer.

The first issue in the present 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 H-1B nonimmigrants 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 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."¹ Therefore, for purposes of the H-1B visa classification, these terms are undefined.

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

¹ 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 a beneficiary to file an H petition on behalf of the actual employer and the alien. While an employment agency may petition for the H-1B visa, the ultimate end-user of the alien's services is the "true employer" for H-1B visa purposes, since the end-user will "hire, pay, fire, supervise, or otherwise control the work" of the beneficiary "at the root level." *Defensor v. Meissner*, 201 F.3d 384, 387-8 (5th Cir. 2000). Accordingly, despite the intermediary position of the employment agency, the ultimate employer must still satisfy the requirements of the statute and regulations: "To interpret the regulations any other way would lead to an absurd result." *Id.* at 388.

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

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

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

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 at 388 (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 will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee."

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 tax returns contained in the record indicate that the petitioner has an Internal Revenue Service Tax Identification Number. While the petitioner's letter of support indicates its engagement of the beneficiary to work in the United States, this documentation alone provides no details regarding the nature of the job offered or the location(s) where the services will be performed. Therefore, the petitioner has failed to establish that an employer-employee relationship exists.

Despite the director's specific request that the petitioner provide contracts between the petitioner and the beneficiary, or between the petitioner and end clients in the request for evidence, the petitioner did not fully respond to the director's request. The petitioner submitted a "Independent Contractor Agreement" between Jawood and the petitioner for services on behalf of Jawood's end user, Blue Cross, which identifies the beneficiary as the contractor assigned to the project. Also included was a copy of an email message apparently created by Blue Cross outlining in brief the terms of the beneficiary's renewal contract. However, this document lacks sufficient detail regarding the nature of the position and the actual agreement upon which the alleged employment is based.

Therefore, the agreement and email message are insufficient to show that a valid employment agreement between the petitioner and the beneficiary, or the beneficiary and the end clients, for the entire validity period. It has not been established that the beneficiary will be "controlled" by the petitioner or that the beneficiary's

employment could be terminated. Despite the petitioner's claim in its letter of support dated May 19, 2008 that it will hire, fire, pay and supervise the beneficiary, it also claims in that same letter that it provides consulting services to its clients which are based all over the United States. Absent evidence pertaining specifically to the requested validity period of this petition, the AAO is prohibited from concluding that the petitioner would be the beneficiary's employer. 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)).

In conclusion, 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 second issue in this matter, 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 again that, absent documentation such as work orders or contracts between the ultimate end clients and the beneficiary for the entire validity period, the petitioner could neither 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 third issue is whether the petitioner has provided a valid LCA for all locations. According to the Independent Contractor Agreement, the beneficiary will be working in New Hudson, Michigan. While the petitioner claims, and the independent contractor agreement indicates, that the client site is in fact located in New Hudson, 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 as necessary. Despite the director's specific request for documentation to establish the ultimate location(s) of the beneficiary's employment, the petitioner failed to completely comply with this request prior to the adjudication of the petition. Moreover, while the requested validity dates of the petition are from June 27, 2008 to June 26, 2011 and while the petitioner submits documentation demonstrating that the beneficiary intends to work in New Hudson, the submitted agreements expire before June 26, 2011, and therefore do not fairly represent the beneficiary's employment through the entire validity period. Therefore, the petitioner's failure to provide evidence of an employer-employee relationship and/or complete work orders or employment contracts between the petitioner and clients renders it impossible to conclude for whom the beneficiary will ultimately provide services, and exactly where those services will be needed. As such, it cannot be found that the petitioner submitted the requisite LCAs to cover the beneficiary's duty locations, and the petition must be denied for this additional reason.

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 viewed as a specialty occupation. Of greater importance to this proceeding, therefore, is whether the petitioner has provided

sufficient evidence to establish that the services to be performed by the beneficiary are those of a specialty occupation.

Section 214(i)(1) of the Immigration and Nationality Act (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.

Section 214(i)(1) of the Immigration and Nationality Act (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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii):

Specialty occupation means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

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

In addressing whether the proffered position is a specialty occupation, the record contains insufficient evidence as to where and for whom the beneficiary would be performing her services during the duration of the validity period, and whether her services would be those of a systems analyst.

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

The petitioner’s letter of support dated April 12, 2007 provided a vague overview of the beneficiary’s proposed duties. Specifically, the petitioner stated:

[The beneficiary] is offered a temporary, fulltime employment position as a **Software Engineer**. The primary responsibilities of this position will include the following duties:

1. Perform computer system analysis and programming to meet clients’ business needs and develop optimization of enterprise applications (approximately 25% of daily work time);
2. Develop business session beans and container managed entity beans (approximately 15% of daily work time);

3. Involve in troubleshooting and Performance tuning using Wily and Tivoli Performance Viewer (approximately 15% of daily work time);
4. Define synchronized and persistent IBM MQSeries Queue Manager (approximately 15% of daily work time);
5. Channel Managers and Queues (approximately 10% of daily work time);
6. Maintain Websphere servers on different Unix platforms, conduct JSP and Distributed programming (approximately 10% of daily work time);
7. Use various computer technologies, languages and environments including WebSphere application server 4.0/3.5/3.0, WSCP Script, XML Config, Workload Management, Resource analyzer, iPlanet, LDAP, J2EE, XML, JavaBeans, JNDI, Visual Age, Rational Rose Modeler, Struts 1.1, LDAP, IBM HTTP Server, Apache Tomcat 4.1, Weblogic (approximately 10% of daily work time).

However, no independent documentation to further explain the nature and scope of these duties was submitted. Noting that the petitioner 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 outlining for whom the beneficiary would render services and what his duties would include. Despite the director's specific request for these documents, the petitioner failed to comply.

Upon review of the evidence, the AAO concurs with the director's findings. The only document submitted, entitled Independent Contractor Agreement between the petitioner and Jawood, indicates under "Services to be Performed" that the beneficiary will be responsible for "Application Developer Sr." No additional information regarding the nature of the beneficiary's duties is submitted. This abbreviated description sheds little light on the actual nature of the beneficiary's duties to be performed under this agreement. Since the petitioner acknowledges its vast client base throughout the United States, it is clear that the beneficiary's duties could potentially vary widely based on the requirements of a client at any given time. In order to ascertain the true nature of the beneficiary's duties, it is necessary to examine the ultimate end clients for whom the beneficiary will actually work to determine the exact nature and scope of the beneficiary's duties for each client, since it is logical to conclude that the services provided to one client may differ vastly from the services provided to another depending on the nature of the project and the services to be provided by the beneficiary.

As discussed above, the record contains simply the petitioner's letter of support, which outlines the proposed duties of the beneficiary, and this deficient agreement which provides no information regarding the requirements for the beneficiary other than indicating that he will be a systems analyst. Without evidence of contracts, work orders, or statements of work describing the duties the beneficiary would perform and for whom for the entire validity period, the petitioner fails to establish that the duties that the beneficiary would perform are those of a specialty occupation. 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.

USCIS routinely looks to *Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000), for guidance, which requires an examination of the ultimate employment of the beneficiary to determine whether the position constitutes a specialty occupation. The petitioner in *Defensor*, Vintage Health Resources (Vintage), is 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.”

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.” 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. In *Defensor*, the court found that evidence of the client companies’ job requirements is critical if the work is to be performed for entities other than the petitioner.

In this matter, it is unclear whether the petitioner will be an employer or will act as an employment contractor. The job description provided by the petitioner, as well as various statements from the petitioner 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 as necessary. Despite the director’s specific request for documentation to establish the ultimate location(s) of the beneficiary’s employment, the petitioner failed to completely comply with this request prior to the adjudication of the petition. Therefore, the petitioner’s failure to provide evidence of an employer-employee relationship and/or complete work orders or employment contracts between the petitioner and its clients renders it impossible to conclude for whom the beneficiary will ultimately provide services, and exactly what those services would entail. The AAO, therefore, cannot analyze whether his duties 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)(I).

The final issue in this matter is whether the petitioner has complied with the terms and conditions of employment. The director found that based on the beneficiary’s individual tax returns (IRS Form 1040) for 2006 and 2007, the beneficiary had not received compensation as specified on her previous petitions. In conclusion, the director found that the petitioner’s statements regarding the beneficiary’s proffered wage and hours worked were not true and correct.

On appeal, the petitioner explains the discrepancies by noting that the beneficiary did not enter the United States until June 15, 2006, and did not report to work until August 26, 2006. The petitioner notes that the beneficiary’s wages for this four month period were on track with the proffered wage set forth in the LCA. Moreover, the petitioner claims that the beneficiary worked for ten months in 2007, earning just slightly under the proffered wage. In support of these contentions, the petitioner submits an affidavit by its president attesting to these facts.

Upon review, the AAO finds the petitioner’s explanation for the discrepancy in wages to be insufficient. The Act and the H-1B regulations do not permit a grace period during which an employee may take two and a half

months to find an apartment or otherwise settle affairs and run personal errands. *See generally* 8 C.F.R. §214.2(h)(4). In addition, neither the statute nor the H-1B regulations permit H-1B beneficiaries to stop working to engage in activities that should otherwise be undertaken in F-1, J-1, or M-1 student status. *See generally id.* While the non-payment of the beneficiary's wages during this time period may be excused under U.S. Department of Labor Standards, these activities or rather non-H-1B activities represent a violation of status and further do not excuse the petitioner under USCIS H-1B program rules from not employing the beneficiary. As such, the director's finding with regard to this issue shall not be disturbed.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The director's decision is dismissed. The petition is denied.