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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

D2

FILE: [redacted] Office: [redacted] Date: APR 05 2011

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

[redacted]

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for Michael T. Kelly
Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is an information technology services company. It seeks to employ the beneficiary as a computer systems analyst and to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner failed to: (1) establish that it was a qualifying United States employer or agent; (2) submit a valid Labor Condition Application (LCA) for all work locations of the beneficiary; and (3) establish that the proposed position qualifies for classification as a specialty occupation. On appeal, counsel for the petitioner submits a brief and additional evidence.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's requests for evidence (RFEs); (3) the petitioner's responses to the RFEs; (4) the notice of decision; and (5) Form I-290B and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

In the letter of support dated March 31, 2009, the petitioner claimed that it is an information technology services company and a subsidiary of [redacted] which has been providing software solutions to global clients for over eighteen years. It further stated:

> With access to [redacted] resources, we are able to employ a scalable, proprietary onsite-offsite offshore development methodology to provide our clients with timely, qualitative and cost effective information technology solutions. Through this process, we have accumulated 6000 man-years of experience while executing more than 700 projects for our Fortune 500 clients.

Additionally, it claimed that its onsite-offsite onshore development model and its internal development procedures and tools were all proprietary in nature. The petitioner also provided an overview of the beneficiary's proposed duties as computer systems analyst, and claimed that he earned a bachelor's degree in Engineering in Electronics and Telecommunication Engineering from the [redacted] in [redacted]

The director found the initial evidence insufficient to establish eligibility, and thus issued an RFE on June 22, 2009.[1] Noting that the petitioner appeared to be engaged in the business of consulting, the director requested additional details regarding the entity for whom the beneficiary would provide services, the locations of his potential assignments, copies of signed agreements, contracts, and/or work orders outlining the nature of these

[1] A prior RFE was issued on May 21, 2009. As the evidence requested in that RFE is not pertinent to the basis for denial or the issues raised on appeal, that RFE and the petitioner's response thereto will not be discussed.

projects or assignments, and a clear contractual path identifying the end client who will ultimately benefit from the beneficiary's work.

In a response dated July 21, 2009, the petitioner, through counsel, addressed the director's queries. The petitioner submitted an employment agreement between the petitioner and the beneficiary dated June 26, 2009 and signed by the beneficiary on July 6, 2009. The letter indicated that, while the position offered was currently based in [redacted] the beneficiary "may be required to relocate to any other place subsequently." The agreement further stated that the position may also require frequent travel and irregular working hours, including travel to India and other countries outside of the United States.

The response also included a letter from the petitioner dated July 21, 2009, explaining that it will act as the beneficiary's employer and relied on the signed employment letter in support of this contention. The petitioner also claimed that the beneficiary would be assigned to work on a project for [redacted] in [redacted] and submitted a letter from [redacted] dated June 30, 2009 as well as a copy of a vendor agreement as evidence of this relationship.

On August 27, 2009, the director denied the petition, finding that the evidence submitted by the petitioner did not establish eligibility in this matter. Specifically, the director found that despite the provision of the vendor agreement between the petitioner and [redacted] the petitioner had failed to submit a work order for the beneficiary's services. The director concluded that the petitioner was simply a consulting company that contracted personnel to client sites as needed, and thus had failed to establish that it was a qualifying employer or agent. The director also found that the petitioner had failed to submit a valid LCA for all work locations of the beneficiary, and that the petitioner likewise failed to establish that the proffered position was a specialty occupation. On appeal, counsel asserts that the denial was arbitrary, capricious, an abuse of discretion, and not based on law or fact. Counsel submits a detailed brief and additional evidence addressing the bases for the director's denial.

The first issue before the AAO is whether the petitioner has established that it meets the regulatory definition of an intending United States employer. § 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, defines an H-1B nonimmigrant as an alien:

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

"United States employer" is defined in the Code of Federal Regulations at 8 C.F.R. § 214.2(h)(4)(ii) as follows:

United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States which:

(1) Engages a person to work within the United States;

(2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and

(3) Has an Internal Revenue Service Tax identification number.

The record is not persuasive in establishing that the petitioner or any of its clients will have an employer-employee relationship with the beneficiary.

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

[2] 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, 387-388. 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.

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 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. at 751-752); *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. at 258 (1968).[3]

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[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

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 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 or any of its clients will be a "United States employer" having an "employer-employee relationship" with the beneficiary

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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).

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 indicates that the petitioner has an Internal Revenue Service Tax Identification Number. While the petitioner's letter of support demonstrates the petitioner's intent to engage the beneficiary to work in the United States, no specific agreement or contract was submitted demonstrating a true employer-employee relationship between the petitioner and the beneficiary.[4] Therefore, the documentation submitted by the petitioner is insufficient to establish that an employer-employee relationship exists.

Although the petitioner submitted evidence such as the vendor agreement discussed above, the petitioner did not submit any document which outlined in detail the nature and scope of the beneficiary's employment. Therefore, the key element in this matter, which is who exercises ultimate control over the beneficiary, has not been substantiated.

The petitioner contends that it will assign the beneficiary to various client projects as needed, and claimed in its support letters to have clients in a wide array of industries throughout the country. Additionally, in response to the RFE, the petitioner indicated that pursuant to the vendor agreement with [redacted] the beneficiary will be assigned to the [redacted] and would work onsite in [redacted] offices. However, no work order specifically identifying the beneficiary as personnel assigned to the project was submitted. While the AAO acknowledges that a June 30, 2009 letter from [redacted] Senior Program Manager claims that the beneficiary will work on the project until September 23, 2012, the date through which approval of the petition was requested, no additional documentation in support of this relationship is submitted.

A review of the vendor agreement indicates that it was signed on June 25, 2008, and would continue to be in effect for five years. Since the petition in this matter was filed on April 1, 2009, it stands to reason that the petitioner was able at the time of filing to provide evidence that the beneficiary would be placed exclusively on the [redacted] project as it now claims. However, it remains unclear, despite the fact that the vendor agreement was in place in 2008, why the employment offer letter dated June 26, 2009 neither identifies the [redacted] project as the beneficiary's assignment for the duration of the validity period nor clarifies why the beneficiary will travel irregularly to foreign countries and other worksites on an as-needed basis. In claiming that the beneficiary will work exclusively with [redacted] in response to the RFE, while simultaneously submitting the offer letter which contradicts this claim, the petitioner has raised significant questions regarding the legitimacy of its claims. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

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[4] Although an offer of employment letter dated June 26, 2009 was submitted in response to the RFE, this letter was created nearly three months after the filing of the petition. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

The fact that the petitioner indicates in the offer letter, executed approximately one year after the vendor agreement with [redacted] that the beneficiary will initially work in [redacted] but that he "may be required to relocate to other places subsequently" and frequent travel to [redacted] and other countries outside of the United States may be required raises valid concerns regarding the ultimate worksite(s) at which the beneficiary will work. Despite the letter from [redacted] which essentially claims that the beneficiary will work onsite at its office through the end of the requested validity period, the petitioner's offer letter fails to corroborate this statement and instead indicates that other potential jobs may be required. If the claims of [redacted] are to be given evidentiary weight, it stands to reason that the petitioner's offer letter would have restated the employment details outlined by [redacted] rather than discussing potential relocation of worksites and international travel requirements.

As such, in determining who will control an alien beneficiary, incidents of the relationship such as who will oversee and direct the work of the beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary's employer. While the AAO notes that it appears that the beneficiary will work at least briefly onsite at [redacted] in [redacted], the petitioner has also indicated that various other assignments are likely. Based on the open-ended assignment potential in the offer letter, combined with the lack of a specific itinerary or confirmation that the beneficiary will work only onsite for [redacted] for the requested three-year period, the AAO is unable to find that the requisite employer-employee relationship will exist between the petitioner and the beneficiary.

The evidence, therefore, is insufficient to establish that the petitioner qualifies as a United States employer, as defined by 8 C.F.R. § 214.2(h)(4)(ii). Merely claiming in its letters, and as claimed by [redacted] in its June 30, 2009 letter, that the petitioner exercises complete control over the beneficiary, without evidence supporting the claim, does not establish eligibility in this matter. The evidence of record prior to adjudication did not establish that the petitioner would act as the beneficiary's employer in that it will hire, pay, fire, or otherwise control the work of the beneficiary. Despite the director's specific request for evidence such as employment contracts or agreements to corroborate its claim, the petitioner failed to submit such evidence.[5]

Based on the tests outlined above, 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." 8 C.F.R. § 214.2(h)(4)(ii).

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[5] As discussed previously, despite the submission of the vendor agreement and offer letter, these documents do not support the petitioner's contentions. The vendor agreement contains no work order or additional appendage identifying the beneficiary as a contractor assigned to the project. Moreover, despite the letter from [redacted] claiming that the beneficiary will work on its project for the entire requested period, the petitioner's offer letter makes no attempt to corroborate this statement. Again, as previously stated, the offer letter, drafted one year after the vendor agreement with [redacted] was signed, fails to specifically identify [redacted] as the beneficiary's assignment and suggests that other projects and frequent travel will be required as a result of accepting the proffered position.

Likewise, the petitioner is not an agent as defined by the regulations. 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." Absent documentation such as work orders or contracts between the ultimate end clients and the beneficiary, the petitioner cannot 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 next issue before the AAO is whether the petitioner submitted a valid LCA covering all work locations for the beneficiary at the time of filing.

The regulations require that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner obtain a certified LCA from the Department of Labor (DOL) in the occupational specialty in which the H-1B worker will be employed. *See* 8 C.F.R. § 214.2(h)(4)(i)(B).

In the instant case, the petitioner filed the LCA with USCIS along with the initial petition. As noted above, on the Form I-129, the petitioner indicated that the beneficiary would work in [redacted] the location of [redacted] offices.

As noted above, the petitioner claimed in its letter of support to have global clients located throughout the country and the world. In the offer letter to the beneficiary, it stated while the beneficiary's position was currently located in [redacted] the location was subject to change as needed. In addition, the petitioner indicated that travel to India and other countries may be required.

The Form I-129 filing requirements imposed by regulation require that the petitioner submit evidence of a certified LCA at the time of filing. Title 20 C.F.R. § 655.705(b) further indicates that an LCA must correspond to the petition with which it is submitted. Upon review of the record, the petitioner failed to submit a certified LCA that corresponds to the petition. While the LCA submitted identifies at least one location where the beneficiary may perform services, the record clearly indicates that the beneficiary will be tasked to various client cites as needed. Since the petitioner indicates in its supporting documentation that it has a diverse client base in the financial, telecommunications, and technology sectors, it is clear that the potential work locations for the beneficiary could vary widely based on client needs during the course of the requested validity period. A petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). The petitioner failed to comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B). For this additional reason, the petition may not be approved.

The next issue is whether the beneficiary will be employed in a specialty occupation. As will be discussed below, the AAO finds that the director's decision to also deny the petition for its failure to establish a specialty occupation was not in error. Accordingly, the appeal will be dismissed for this additional reason.

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.

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

> *Specialty occupation* means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in 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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed 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 occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, fairly represent the types of specialty occupations 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 his services during the requested employment period, and whether his services would be that of a computer 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, contrary to counsel's assertions on appeal, 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 March 31, 2009 support letter submitted by the petitioner described the proffered position and indicated that the beneficiary would be responsible for the following:

- Analyzing and evaluating existing and/or proposed hardware and software systems and devices.
- Conducting requirements analyses.
- Analyzing user requirements, procedures and problems to automate or improve existing systems.
- Reviewing computer system capabilities, workflow and scheduling limitations.
- Testing, maintaining and monitoring computer programs and systems, including coordinating the installation of computer systems as per user requirements.
- Architecting proposed hardware and software systems as per user requirements.
- Preparing charts, diagrams and reports to assist in technical problem analysis.
- Preparing detailed program specifications and flowcharts.
- Coordinating the design, development, testing and implementation of hardware and software systems.

In response to the RFE, which requested more specific information regarding each project upon which the beneficiary would work, the petitioner submitted the documentation pertaining to the vendor agreement with [redacted] and the June 30, 2009 letter from Microsoft restates the vague and generalized duties stated above.

The statement of duties set forth in the record is generic and generalized and fails to specifically discuss the duties of the beneficiary on the alleged [redacted] project. In fact, the letter of support from the petitioner, along with the employment offer letter both indicate that the beneficiary's duties can vary greatly based on client needs and project specifications. Therefore, it is evident that the end client on a particular project determines the exact nature of the beneficiary's duties.

As discussed briefly above, the record is devoid of evidence of an agreement between the petitioner and [redacted] outlining the nature of the proposed project on which the beneficiary will alleged be assigned. Again, the one-paged letter from [redacted] simply restates the generalized and generic duties discussed above, and is not accompanied by any documentation, such as a contract or work order, which outlines the details of the agreement between the parties.

The petitioner indicates that the exact nature of the beneficiary's assignments throughout the validity period will vary based on client needs during the duration of the petition, for which approval was requested through September 23, 2012. Although [redacted] claims in its June 30, 2009 letter that it will have work for the beneficiary through this date, the AAO still questions why, if this claim is true, the petitioner failed to tailor the job offer letter to encompass this project and outline the specific details, requirements, and terms of such a project. Instead, the petitioner's offer of employment leaves the three-year requested validity period open to various other projects which remain unidentified. The uncertainty surrounding the future projects and work assignments of the beneficiary renders it impossible to find that the proffered position is a specialty occupation, since no specific description of the duties that the beneficiary will actually perform is included in the record.

The petitioner is responsible for assigning staff to various client projects as needed. As discussed previously, insufficient details are provided about the beneficiary's specific role in the [redacted] project, and there is no work order or subcontractor agreement demonstrating that a position on this project actually exists for the beneficiary.

The brief description of duties in the petitioner's support letter is generic and fails to specifically describe the nature of the services required by the beneficiary on the project in question. Moreover, the fact that the petitioner acknowledges that the beneficiary's assignments may fluctuate throughout the validity period confirms that his duties and responsibilities are subject to change in accordance with client requirements. Therefore, absent evidence of contracts or statements of work describing the duties the beneficiary would perform and for whom throughout 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, which acknowledges that examination of the ultimate employment of the beneficiary is necessary to determine whether a 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." *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. *Id.* The *Defensor* court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. *Id.* In *Defensor,* the court found that that evidence of the client companies' job requirements is critical if the work is to be performed for entities other than the petitioner. *Id.*

Despite counsel's contentions to the contrary on appeal, 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 probably be working on different projects throughout the duration of the petition. Despite the director's specific request for documentation to establish the ultimate location(s) of the beneficiary's employment, the petitioner failed to comply. The petitioner's failure to provide evidence of valid work orders or employment contracts, which identify the beneficiary as personnel and outline the nature of his duties, 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.

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner's normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4. For this additional reason, the petition must be denied.[6]

[6] It is noted that, even if the proffered position were established as being that of a computer systems analyst, a review of the U.S. Department of Labor's *Occupational Outlook Handbook* (hereinafter the *Handbook*) does not indicate that such a position qualifies as a specialty occupation in that the *Handbook* does not state a normal minimum requirement of a U.S. bachelor's or higher degree in a specific specialty or its equivalent for entry into the occupation of computer systems analyst. *See* Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook*, 2010-11 Edition, "Computer Software Engineers and Computer Programmers," <http://www.bls.gov/oco/ ocos287.htm> (accessed March 7, 2011). As such, absent evidence that the position of software programmer qualifies as a specialty occupation under one of the alternative

Accordingly, the petitioner has not established that the proposed position qualifies as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) or that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii).

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 appeal is dismissed. The petition is denied.

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criteria available under 8 C.F.R. § 214.2(h)(4)(iii)(A), the instant petition could not be approved for this additional reason.