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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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U.S. Citizenship
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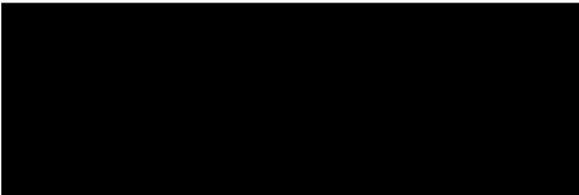
Date: NOV 02 2011 Office: CALIFORNIA SERVICE CENTER

FILE:

IN RE: Petitioner:
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:



INSTRUCTIONS:

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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, 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 remain denied.

The petitioner states on the Form I-129, Petition for Nonimmigrant Worker, that it was established in 2004, provides computer consulting services, employs 24 personnel, and had a gross annual income of \$2,441,603 when the petition was filed. It seeks to continue the employment of the beneficiary as a SAP Technical 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 on the grounds that: (1) the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation; (2) the petitioner failed to establish that it qualifies as a U.S. employer or agent; and (3) the petitioner failed to submit an appropriate and valid Labor Condition Application (LCA).

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) Form I-290B, Notice of Appeal or Motion, with the petitioner's letter and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

In the petition submitted on July 14, 2009, the petitioner indicated that it wished to employ the beneficiary as a SAP Technical Analyst for three years, from July 15, 2009 until July 6, 2012 at an annual salary of \$68,700.

In the July 2, 2009 letter submitted in support of the petition, the petitioner noted that it "is a provider of computer related consulting services" and "provides high technology computer services for a wide range of hardware environments and software applications." The petitioner described the duties of the proffered position as:

The SAP Technical Analyst analyzes the data processing requirements to determine the computer software, which will best serve those needs. Thereafter, he will design a computer system using that software, which will process the data in the most timely and inexpensive manner, and implement that design by overseeing the installation of the necessary system software and its customization to the client's unique requirement.

The SAP Technical Analyst will provide programming, consulting and engineering related services to work on a project titled Catalyst. The responsibilities include design/architect custom solutions based on the business requirements, supervise the development process and build test cases to assist the testing team.

The petitioner explained:

The SAP Technical Analyst must constantly interact with the management, explaining to it each phase of the system development process, responding to its questions, comments and criticisms, and modify the system so that the concerns raised are adequately addressed. Consequently, the SAP Technical Analyst must constantly revise and revamp the system as it is being created to respond to unanticipated software anomalies heretofore undiscovered.

The petitioner indicated that the proffered position required the minimum educational qualifications of a bachelor's degree in computer science, technology, engineering or a related analytic or scientific discipline or its equivalent in education or work-related experience.

The petitioner noted that the beneficiary would work at Kraft Foods in Glenview, Illinois and that this was the beneficiary's complete itinerary.

On September 2, 2009, the director issued an RFE indicating, in part, that the evidence of record was not sufficient to demonstrate that a specialty occupation exists. The petitioner was advised that as it appeared to be engaged in the business of consulting, staffing, or job placement, the petitioner must provide evidence of the specialty occupation work for the beneficiary with the actual end client where the work would ultimately be performed. The RFE also requested copies of signed contracts between the petitioner and the beneficiary, a complete itinerary of services and the names and addresses of the actual employer(s), and copies of signed contractual agreements, statements of work, or other agreements between the petitioner and the authorized officials of the ultimate end-client companies where the work would actually be performed, among other items.

In response, the petitioner submitted a July 6, 2009 employment agreement between the petitioner and the beneficiary that indicated the petitioner was hiring the beneficiary in the capacity of a SAP Technical Analyst and that the "[e]mployee's duties may be reasonably modified at the company's discretion." The petitioner also noted the beneficiary would be working at the client site, ██████████ in Glenview, Illinois. The petitioner submitted a September 15, 2009 letter signed by an ██████████ which stated: "IBM has contracted with ██████████ to provide programming and consulting services for a major SAP implementation/transformation project called Catalyst" and "[a]s an Associate ██████████, I supervise an IBM team, of which [the beneficiary] is a part." The ██████████ further stated that as a senior SAP Technical Analyst, the beneficiary is responsible for the design and development of OTC related objects, he coordinates technical development work between Catalyst team members located in Glenview and the team in India performing development, and he had been a part of the project team since 2007.

The director denied the petition on October 20, 2009.

On appeal, counsel for the petitioner asserts that the proffered position is a specialty occupation, the petitioner will be the beneficiary's employer, and the Labor Condition Application (LCA) submitted is valid and appropriate as it shows the beneficiary's only place of work. The petitioner provides a November 11, 2009 letter signed by its human resources administrator which reiterates the petitioner's previous statement that it will be the beneficiary's actual

employer and that the beneficiary will be operating at all times under the control of the petitioner's management and all activities, "including managerial supervision and hiring and firing decisions, as well as performance evaluations are controlled by [the petitioner]." The petitioner also references the previously submitted employer-employee agreement, the letter signed by an [REDACTED] and its federal tax returns showing a tax identification number. The petitioner contends that it is not an agent and submits an AILA^[1] InfoNet transmission of a document from the Office of Adjudications of the legacy Immigration and Naturalization Service (INS), namely: a memorandum from [REDACTED], Assistant Commissioner, INS Office of Adjudications, *Interpretation of the Term "Itinerary" Found in 8 C.F.R. 214.2(h)(2)(i)(B) as it Relates to the H-1B Nonimmigrant Classification*, HQ 70/6.2.8 (December 29, 1995) (hereinafter referred to as the Aytes memo). The petitioner reiterates that it has submitted a valid and appropriate LCA.

The petitioner also avers that the proffered position is a specialty occupation and includes job postings for a SAP Technical Analyst posted on various job search websites. Although the advertisements identify the proffered positions as SAP Analysts or developer, only one of the three advertisements submitted requires the successful incumbent to have a bachelor's degree in computer science. The remaining two postings cite only a requirement of a bachelor's degree without specifying a particular field of study. The petitioner also provides copies of advertisements it posted for positions of software engineer/programmer analyst, project manager, database administrator, network administrator, or various IT positions. Each of the petitioner's advertisements states that a bachelor's degree or equivalent is required as well as six months to five years of experience; the advertisements also note that some positions may require a master's degree. The petitioner adds that it has provided adequate information to establish that the beneficiary is working on an in-house project at its company's office location. The petitioner states further that it remains the employer whether the hired individual performs the job duties in-house or at a client site.

The AAO will first consider whether the proffered position is 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.

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

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 [(2)] 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 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 at 387. 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 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.

The AAO notes that, as recognized by the court in *Defensor v. Meissner*, 201 F.3d at 387, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. The 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.* at 387-388. Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work. In this matter, the petitioner initially provided a broad overview of the duties of the proffered position. In response to the director's RFE, the petitioner provided a letter from Kraft Foods, the apparent ultimate end-user of the beneficiary's services, which indicated the beneficiary was responsible for the design and development of OTC related objects and that he coordinated technical development work between Catalyst team members in Illinois and a development team in India. This general statement is insufficient to ascertain the day-to-day duties of the beneficiary and whether those duties entail primarily H-1B caliber work. Moreover, the AAO observes that the petitioner acknowledged that the "[e]mployee's duties may be reasonably modified at the company's discretion." Thus, the record does not provide the requisite detailed description of the beneficiary's proposed duties establishing that the beneficiary will be performing H-1B caliber duties for the duration of the petition. Further, even if the petitioner were to demonstrate, which it did not do, that the beneficiary will work as a SAP Technical Analyst for one particular company performing the same duties for the duration of the petition, the petitioner has failed to demonstrate that the proffered position is a specialty occupation.

The AAO recognizes the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹

The duties of the SAP Technical Analyst occupational category as broadly described² is addressed in the chapter of the *Handbook* (2010-11 online edition) – "Computer Software Engineers and Computer Programmers."

The *Handbook* describes computer programmers as follows:

¹ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2010 – 2011 edition available online.

² The petitioner's description of the proffered position's duties is so broad that it is not possible to ascertain if the individual in the proffered position would primarily develop or revise software applications or provide computer engineering services. It is not possible to discern the focus of the proffered position.

[C]omputer programmers write programs. After computer software engineers and systems analysts design software programs, the programmer converts that design into a logical series of instructions that the computer can follow (A section on computer systems analysts appears elsewhere in the Handbook.). The programmer codes these instructions in any of a number of programming languages, depending on the need. The most common languages are C++ and Python.

Computer programmers also update, repair, modify, and expand existing programs. Some, especially those working on large projects that involve many programmers, use computer-assisted software engineering (CASE) tools to automate much of the coding process. These tools enable a programmer to concentrate on writing the unique parts of a program. Programmers working on smaller projects often use “programmer environments,” applications that increase productivity by combining compiling, code walk-through, code generation, test data generation, and debugging functions. Programmers also use libraries of basic code that can be modified or customized for a specific application. This approach yields more reliable and consistent programs and increases programmers' productivity by eliminating some routine steps.

As software design has continued to advance, and some programming functions have become automated, programmers have begun to assume some of the responsibilities that were once performed only by software engineers. As a result, some computer programmers now assist software engineers in identifying user needs and designing certain parts of computer programs, as well as other functions. . . .

* * *

[M]any programmers require a bachelor's degree, but a 2-year degree or certificate may be adequate for some positions. Some computer programmers hold a college degree in computer science, mathematics, or information systems, whereas others have taken special courses in computer programming to supplement their degree in a field such as accounting, finance, or another area of business. . . .

The *Handbook* describes computer software engineers as follows:

Computer software engineers design and develop software. They apply the theories and principles of computer science and mathematical analysis to create, test, and evaluate the software applications and systems that make computers work. The tasks performed by these workers evolve quickly, reflecting changes in technology and new areas of specialization, as well as the changing practices of employers. (A separate section on computer hardware engineers appears in the engineers section of the *Handbook*.)

Software engineers design and develop many types of software, including computer games, business applications, operating systems, network control systems, and middleware. They must be experts in the theory of computing systems, the structure of software, and the nature and limitations of hardware to ensure that the underlying systems will work properly.

Computer software engineers begin by analyzing users' needs, and then design, test, and develop software to meet those needs. During this process they create flowcharts, diagrams, and other documentation, and may also create the detailed sets of instructions, called algorithms, that actually tell the computer what to do. They also may be responsible for converting these instructions into a computer language, a process called programming or coding, but this usually is the responsibility of *computer programmers*.

* * *

Computer systems software engineers coordinate the construction, maintenance, and expansion of an organization's computer systems. Working with the organization, they coordinate each department's computer needs—ordering, inventory, billing, and payroll recordkeeping, for example—and make suggestions about its technical direction. They also might set up the organization's intranets—networks that link computers within the organization and ease communication among various departments. Often, they are also responsible for the design and implementation of system security and data assurance.

* * *

For software engineering positions, most employers prefer applicants who have at least a bachelor's degree and broad knowledge of, and experience with, a variety of computer systems and technologies. The usual college majors for applications software engineers are computer science, software engineering, or mathematics. Systems software engineers often study computer science or computer information systems. Graduate degrees are preferred for some of the more complex jobs.

As evident in the excerpts above, the *Handbook's* information on educational requirements in the computer software engineering occupation indicates that a bachelor's or higher degree, or the equivalent, in a specific specialty may be preferred for certain positions and cites a variety of usual disciplines for the occupation; however, the *Handbook* does not set out a normal minimum entry requirement for this occupational category. Rather, the occupation accommodates a wider spectrum of educational credentials and focuses on technical knowledge of computer software and systems. While the *Handbook* indicates that a bachelor's degree level of education in a specific specialty may be preferred for particular positions, the generically described position duties do not demonstrate a requirement for the theoretical and practical application of highly specialized computer-related knowledge.

As the *Handbook* indicates no specific degree requirement for employment as a SAP Technical Analyst, and as it is not self-evident that, as described in the record of proceeding, the proposed

duties comprise a position for which the normal entry requirement would be at least a bachelor's degree, or its equivalent, in a specific specialty, the AAO concludes that the performance of the proffered position's duties does not require the beneficiary to hold a baccalaureate or higher degree in a specific specialty. Accordingly, the AAO finds that the petitioner has not established its proffered position as a specialty occupation under the requirements of the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively requires a petitioner to establish that a bachelor's degree, in a specific specialty, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. As observed above, the advertisements submitted on appeal do not establish that other companies recruit only degreed individuals in a specific discipline. Moreover, the advertisements do not include sufficient information to determine that the advertised positions are parallel to the proffered position and are for positions in organizations similar to the petitioner.

The petitioner also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "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." The evidence of record does not refute the *Handbook's* information to the effect that a bachelor's degree is not required in a specific specialty. The record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than other generic computer software positions that can be performed by persons without a specialty degree or its equivalent.

On appeal, the petitioner submits job postings it used to recruit for a number of computer positions, none of which required that the successful incumbent have a bachelor's degree in a specific discipline. The petitioner's advertisements thus confirm that it does not normally require individuals with at least a bachelor's degree in a specific specialty. Therefore, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of its position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. The AAO finds that the evidence in the record of proceeding does not support the proposition that the

performance of the proposed duties requires a higher degree of IT/computer knowledge than would normally be required of other information technology professionals not equipped with at least a bachelor's degree, or its equivalent, in a specific specialty. The AAO, therefore, concludes that the proffered position has not been established as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO therefore affirms the director's finding that the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation.

Next, the AAO finds that the petitioner has failed to establish that it will be the beneficiary's employer or agent. Under the test of *Nationwide Mutual Ins. Co. v. Darden* (*Darden*), 503 U.S. 318, 322-323 (1992) (hereinafter "*Darden*"), the United States Supreme Court 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." *Darden*, 503 U.S. 318 at 322-323 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). The Supreme Court stated:

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 *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. at 440 (hereinafter "*Clackamas*"). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).³

³ While the *Darden* court considered only the definition of "employee" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(6), and did not address the definition of "employer," courts have generally refused to extend the common law agency definition to ERISA's use of employer because "the definition of 'employer' in ERISA, unlike the definition of 'employee,' clearly indicates legislative intent to extend the definition beyond the traditional common law definition." See, e.g., *Bowers v. Andrew Weir Shipping, Ltd.*, 810 F. Supp. 522 (S.D.N.Y. 1992), *aff'd*, 27 F.3d 800 (2nd

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 must focus on the common-law touchstone of “control.” *Clackamas*, 538 U.S. at 450; *see also* 8 C.F.R. § 214.2(h)(4)(ii)(2) (defining a “United States employer” as one who “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 ...” (emphasis added)).

Factors indicating that a worker is or will be 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).

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, 844-845 (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 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).

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).⁴

Applying the *Darden* test 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." First, under *Defensor*, it was determined 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. See *Defensor v. Meissner*, 201 F.3d at 388.

The petitioner in this matter does not provide the necessary probative information to establish that it will act as the beneficiary's sole employer. The petitioner's business involves providing consulting and staffing services to other companies. In the matter at hand, the end party user, [REDACTED] indicates that it contracts with IBM to provide individuals who will provide information technology services to [REDACTED]. The petitioner, it appears, has contracted with IBM which has in turn contracted with [REDACTED] to provide information technology services. The record does not reveal that the petitioner has in-house projects or that the beneficiary would be used on an in-house project. Other than putting the beneficiary on its payroll and providing benefits, it is unclear what role the petitioner has in the beneficiary's assignment to [REDACTED]. [REDACTED] indicates he supervises the IBM team of which the beneficiary is a part; thus, the direct day-to-day supervision of the beneficiary and his work, falls to the end user, not the petitioner.

In view of the above, it appears that the beneficiary will not be an "employee" having an "employer-employee relationship" with the petitioner or even with a "United States employer" represented by the petitioner in a documented agent relationship. It has not been established that the beneficiary will be "controlled" by the petitioner or even that the termination of the beneficiary's employment is the ultimate decision of the petitioner. Therefore, based on the tests outlined above, the petitioner has not established that it will be a "United States employer"

⁴ When examining the factors relevant to determining control, USCIS must assess and weigh each actual factor itself as it exists or will exist and not the claimed employer's right to influence or change that factor, unless specifically provided for by the common-law test. See *Darden*, 503 U.S. at 323-324. For example, while the assignment of additional projects is dependent on who has the *right* to assign them, it is the *actual* source of the instrumentalities and tools that must be examined, not who has the *right* to provide the tools required to complete an assigned project. See *id.* at 323.

having an “employer-employee relationship” with the beneficiary as an H-1B temporary “employee.” 8 C.F.R. § 214.2(h)(4)(ii).

The AAO therefore affirms the director’s finding that the petitioner does not qualify as a United States employer, as it failed to establish that it will control the beneficiary’s work such that it will have an employer-employee relationship with the beneficiary.

Third, the AAO will address the issue of whether the petitioner failed to establish that the LCA corresponds to the petition by encompassing all of the work locations and related wage requirements for the beneficiary’s full employment period.

In pertinent part, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B) states:

The petitioner shall submit the following with an H-1B petition involving a specialty occupation: (1) A certification from the Secretary of Labor that the petitioner has filed a labor condition application

The regulation at 8 C.F.R. § 103.2(b)(1) states, in pertinent part:

An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. All required application or petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form’s instructions.

In addition, the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1), states, as part of the general requirements for petitions involving a specialty occupation, that:

Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

Moreover, while DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part:

For H-1B visas . . . DHS accepts the employer’s petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.*

[Italics added.]

The petitioner in this matter has not established that it has sufficient H-1B caliber work for the beneficiary for the duration of the H-1B employment period. The letter from [REDACTED] does not list a specific period of time for which the beneficiary would be employed. Thus, the evidence does not demonstrate conclusively that the beneficiary will work in Glenview, Illinois for the entire duration of the petition. 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 light of the fact that the record of proceeding is insufficient to establish the beneficiary's work location for the duration of the classification, USCIS cannot conclude that this LCA actually supports and fully corresponds to the H-1B petition. 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. at 248.

Finally, the petitioner's reliance on the Aytes memorandum to question the director's request for copies of contractual agreements between the petitioner and third party companies for whom the beneficiary would provide services is misplaced. An agency guidance document, such as the Aytes memo, does not have the force and effect to preempt or countermand the clear mandate of an agency regulation, such as the one at 8 C.F.R. § 214.2(h)(2)(i)(B), that has been properly promulgated, after opportunity for public comment, in accordance with the Administrative Procedure Act (APA). Further, the AAO notes that the Aytes memo has no precedential value and, therefore, no binding effect as a matter of law upon USCIS. See 8 C.F.R. § 103.3(c) (types of decisions that are precedent decisions binding on all USCIS officers). Courts have consistently supported this position. See *Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000) (holding that legacy Immigration and Naturalization Serviced (INS) memoranda merely articulate internal guidelines for the agency's personnel; they do not establish judicially enforceable rights. An agency's internal personnel guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely"); see also *Noel v. Chapman*, 508 F.2d 1023 (2nd Cir. 1975) (finding that policy memoranda to legacy INS district directors regarding voluntary extended departure determinations to be "general statements of policy"); *Prokopenko v. Ashcroft*, 372 F.3d 941, 944 (8th Cir. 2004) (describing a legacy INS Operating Policies and Procedures Memorandum (OPPM) as an "internal agency memorandum," "doubtful" of conferring substantive legal benefits upon aliens or binding the INS); *Romeiro de Silva v. Smith*, 773 F.2d 1021, 1025 (9th Cir. 1985) (describing an INS Operations Instruction (OI) as an "internal directive not having the force and effect of law").

In addition, we observe that pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, 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."

Further, the regulations at 8 C.F.R. §§ 103.2(b)(8) and 214.2(h)(9)(i) provide the director broad discretionary authority to require such evidence as contracts and itineraries to establish that the services to be performed by the beneficiary will be in a specialty occupation during the entire period requested in the petition. As noted above, a service center director may issue an RFE for evidence that he or she may independently require to assist in adjudicating an H-1B petition, and his or her decision to approve a petition must be based upon consideration of all of the evidence as submitted by the petitioner, both initially and in response to any RFE that the director may issue. *See* 8 C.F.R. § 214.2(h)(9). The purpose of an RFE 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)(1), (b)(8), and (b)(12).

The AAO finds that, in the context of the record of proceedings as it existed at the time the RFE was issued, the RFE request for contractual agreements between the petitioner and the companies for which the beneficiary would provide services was not only appropriate but necessary to establish that the beneficiary would perform H-1B caliber work for the period of employment requested in the petition. The petitioner's failure to provide the requested documentation is a further reason for the denial of the petition.

The appeal will be dismissed and the petition denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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 remains denied.