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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

Date: JUN 19 2013 OFFICE: CALIFORNIA SERVICE CENTER FILE: [redacted]

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]

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for
Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

On the Form I-129 visa petition, the petitioner describes itself as an "Engineering Design, Development/Consulting" firm with ten employees. In order to employ the beneficiary in what it designates as a systems analyst position, the petitioner seeks 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 concluding that the petitioner had not established (1) that it has standing to file the instant visa petition as the beneficiary's prospective United States employer, (2) that the Department of Labor (DOL) Form ETA 9035E, Labor Condition Application (LCA) submitted to support the visa petition in this case is valid for all of the locations where the beneficiary would work, and (3) that the proposed position qualifies for classification as a specialty occupation. On appeal, counsel asserted that the director's bases for denial were erroneous, and contended that the petitioner satisfied all evidentiary requirements.

The AAO bases its decision upon its review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's submissions on appeal.

The AAO will first address whether the petitioner has established that it meets the regulatory definition of a United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii). Specifically, as the petitioner has satisfied the first and third prongs of the definition of United States employer, the remaining question is 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).

Section 101(a)(15)(H)(i)(b) of the Act defines an H-1B nonimmigrant in pertinent part as an alien:

> subject to section 212(j)(2), who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 214(i)(1) . . ., who meets the requirements for the occupation specified in section 214(i)(2) . . ., and with respect to whom the Secretary of Labor determines and certifies to the [Secretary of Homeland Security] that the intending employer has filed with the Secretary [of Labor] an application under section 212(n)(1) . . . .

The term "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.

(Emphasis added); *see also* 56 Fed. Reg. 61111, 61121 (Dec. 2, 1991).

Although "United States employer" is defined in the regulations at 8 C.F.R. § 214.2(h)(4)(ii), it is noted that the terms "employee" and "employer-employee relationship" are not defined for purposes of the H-1B visa classification. 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) (2011). 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) (2011). Further, the regulations indicate that "United States employers" must file a Petition for a Nonimmigrant Worker (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").

Neither the legacy Immigration and Naturalization Service ("INS") nor U.S. Citizenship and Immigration Services ("USCIS") defined the terms "employee" or "employer-employee relationship" by regulation for purposes of the H-1B visa classification, even though the regulation describes H-1B beneficiaries as being "employees" who must have an "employer-employee relationship" with a "United States employer." *Id.* Therefore, for purposes of the H-1B visa classification, these terms are undefined.

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." *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)). 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)).

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. *See generally* 136 Cong. Rec. S17106 (daily ed. Oct. 26, 1990); 136 Cong. Rec. H12358 (daily ed. Oct. 27, 1990). On the contrary, in the context of the H-1B visa classification, the regulations define the term "United States employer" to be even more restrictive than the common law agency definition.[1]

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[1] 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.), *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

Specifically, the regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to engage a person to work within 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" or "employer-employee relationship" combined with the agency's otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition" or, more importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. *Cf. Darden*, 503 U.S. at 318-319.[2]

Accordingly, in the absence of an express congressional intent to impose broader definitions, both the "conventional master-servant relationship as understood by common-law agency doctrine" and the *Darden* construction test apply to the terms "employee" and "employer-employee relationship" 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).[3]

Therefore, in considering whether or not one will be an "employee" in an "employer-employee relationship" with a "United States employer" for purposes of H-1B nonimmigrant petitions, USCIS

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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).

[2] To the extent the regulations are ambiguous with regard to the terms "employee" or "employer-employee relationship," the agency's interpretation of these terms should be found to be controlling unless "'plainly erroneous or inconsistent with the regulation.'" *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359, 109 S.Ct. 1835, 1850, 104 L.Ed.2d 351 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945)).

[3] That 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).

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) (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)).

The factors indicating that a worker is or will be an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. *Darden*, 503 U.S. at 323-324; *Clackamas*, 538 U.S. at 445; *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 445; *see also New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1) (adopting a materially identical test and indicating that said test was based on the *Darden* decision); *see also Defensor v. Meissner*, 201 F.3d 384, 388 (5th Cir. 2000) (determining that hospitals, as the recipients of beneficiaries' services, are the "true employers" of H-1B nurses under 8 C.F.R. § 214.2(h), even though a medical contract service agency is the actual petitioner, because the hospitals ultimately hire, pay, fire, supervise, or otherwise control the work of the beneficiaries).

It is important to note, however, 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 relevant to control 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).

Furthermore, 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.

Lastly, 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, . . . the answer to whether [an individual] 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."

The AAO notes, initially, that various discrepancies appear in the petitioner's financial information. The petitioner's Form 941 quarterly reports agree with its Form 940 FUTA and its Illinois

Employer's Contribution and Wage Reports that the petitioner paid salaries and wages of $164,011.77 in 2008. However, the federal quarterly tax return for the first quarter of 2008 indicates that the petitioner had five employees during that quarter, whereas the petitioner's Illinois Employer's Contribution and Wage Report indicates that it employed six named employees. Further, the federal quarterly tax return for the third quarter of 2008 reports that the petitioner had two employees, whereas the Illinois Employer's Contribution and Wage Report for the same quarter identifies five employees.

Further still, although the petitioner's 2008 Form W-3 transmittal concurs that the petitioner paid wages and salaries of $164,011.77 during that year, the petitioner's 2008 Form 1120 U.S. Corporation Income Tax Return indicates, at Line 13, Salaries and wages (less employment credits) of $172,227 for that year.[4] The record contains no explanation of the difference between those figures.

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). It is incumbent upon the petitioner to resolve any inconsistencies in the record with independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.*

An important inquiry in the determination of whether the petitioner would be the beneficiary's actual employer is where the beneficiary would work. On the Form I-129, the petitioner gave its address as in Burr Ridge, Illinois. It further stated that the beneficiary would work at that address. The LCA submitted to support the visa petition also states that the beneficiary would work there. The LCA is not approved for employment outside of that area.

The petitioner submitted a certificate of occupancy issued by the to the petitioner for that address on October 21, 2009. It states that the floor area of that suite is 2,344 square feet. The AAO observes that the evidentiary value of that certificate of occupancy is somewhat clouded by the fact that it was issued on October 21, 2009, whereas the instant visa petition, which lists that address as the petitioner's own address, was submitted on October 19, 2009. The record contains no evidence that, when the visa petition was filed, the petitioner was ready to do business as an engineering, design, development/consulting firm at the location.

It is noted that the 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'r 1978). As such, eligibility for the benefit sought must be assessed and weighed based on the facts as they existed at the time the instant petition was filed and not based on what were merely speculative facts not then in existence.

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[4] That amount is exclusive of the petitioner's $9,923 compensation of officers. The petitioner listed no Schedule A, Line 3, Costs of Labor during that year.

The agency made clear long ago that speculative employment is not permitted in the H-1B program. A 1998 proposed rule documented this position as follows:

> Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. See section 214(i) of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998). While the petitioner is certainly permitted to petition for H-1B classification on the basis of facts not in existence at the time the instant petition was filed, it must nonetheless file a new petition to have these facts considered in any eligibility determination requested, as the agency may not consider them in this proceeding pursuant to the law and legal precedent cited, *supra.*

Further, although a 2,344 square foot space could be suitable for the petitioner's claimed ten employees, some doubt exists pertinent to whether the petitioner actually occupies a space of that size at that location and employs its workers there. The petitioner submitted web content from the petitioner's own website stating that the petitioner has locations in Burr Ridge, Illinois; Moline, Illinois; New Holland, Pennsylvania; and Tamil Nadu, India. Other content from the petitioner's website indicates that it has locations in North Dakota, California, Chicago, Iowa, Pennsylvania, Portugal, United Kingdom, Belgium, Italy, the Middle East, and four locations in India. Further, although the petitioner's 2007 W-2 forms and W-3 transmittals show its [redacted] its 2007 tax return shows an address in Willowbrook, Illinois address, and a letter from the firm that prepared the petitioner's quarterly payroll tax returns for the third quarter of 2008 was also addressed to the petitioner's [redacted].

However, the petitioner's 2007 and 2008 tax returns state that the petitioner paid rent of $13,814 and $6,875 during those years, respectively. Those amounts equate to $1,151.17 and $572.92 monthly. Notwithstanding that the price of commercial space leases varies widely throughout the United States, and from one time to another, those amounts are unlikely to have covered the leases of numerous locations. In fact, the amount paid during 2008 seems insufficient even for the 2,344 square foot location in [redacted], and the depreciation deductions shown on the petitioner's tax

returns suggest that it does not own business property sufficient to reconcile this apparent discrepancy.

Further still, an itemization of expenses shown at Line 26, Other Deductions of the petitioner's 2008 return shows Computer and Internet Expenses of $1,010. The petitioner purports to be an engineering design, development, and consulting firm. If the petitioner's workers are performing their duties at the petitioner's offices, then that expense is low.

Much of the evidence in the record pertains to . The record contains a Professional Services Agreement outlining the terms pursuant to which the petitioner might provide workers to In an undated letter submitted in response to the RFE, the petitioner's manager stated:

> In pursuant to request for evidence, we are submitting detailed job duties for [the beneficiary]. As a team member, [the beneficiary] designed, developed and analyzed our company's in-house software "[the petitioner] Workflow Tool." Our company uses this software to integrate our engineering design and development projects, we do for our customers. This software is an integral part of our business. [The beneficiary] will modify, enhance, update, test and debug the application as per our customer's requirements. Our company is working on designs, development and implementation on various projects for our global customers and one of our major customer is

[Errors in original].

The petitioner's manager thus indicated that the beneficiary would work on the projects of pursuant to the terms of the agreement with Those terms include the provision of work space by to the petitioner's personnel when they are working at a location, the right of to require the petitioner to replace anyone working at a location, and the provision of travel expenses by to the petitioner's personnel. These provisions make clear that the petitioner and anticipate that at least some of the petitioner's personnel will work at locations.

A statement, dated March 1, 2010, and signed by the petitioner's CFO states:

> USCIS is wrong in its assertion that [the petitioner] does not use employees for its own projects rather contract or sub contract workers to other companies. [The petitioner] does not contract or sub contract its workers to any one. Work is submitted by clients to [the petitioner] on a project basis, and [the petitioner] completes these projects at our physical locations, not at client sites. [The petitioner] has direct supervisory control over our employees, and manages the performance of our employees on client projects.

However, invoice summaries provided show that the petitioner provides, *inter alia*, on-site engineering and staffing services. More specifically, as to , they indicate that the petitioner

typically provided it with staffing services, rather than engineering services, and often billed for travel expenses.

Further, a letter, dated October 10, 2009, issued by the petitioner's manager to the beneficiary describing the employment offered to the beneficiary states:

> **Duties**: You shall use your best energies and abilities on a full-time basis to perform, *at locations designated by the* [petitioner] and *including customer offices*, the employment duties assigned to you. You shall comply with all rules, regulations and procedures of the [petitioner]. You shall also comply with periodic employment reviews and provide reports of your work activities as requested.

[Emphasis added].

Notwithstanding the reiteration by the petitioner's manager that the beneficiary would work at the petitioner's own location, and that the petitioner's workers never work elsewhere, the AAO finds that the evidence presented in this case shows that the petitioner provides its workers to work on other companies' projects at those other companies' locations and that, more likely than not, the beneficiary would not work at the petitioner's own location, either in Burr Ridge or elsewhere.

Given that the petitioner has not demonstrated with sufficient evidence that the beneficiary would work at the petitioner's own location, and that the beneficiary would apparently, therefore, work at a worksite of or some other client, the AAO questions who would assign tasks to the beneficiary and supervise his day-to-day performance of them. These are among the indices of what company would have an employer/employee relationship with the beneficiary.

The evidence provided contains insufficient evidence that the petitioner would provide a supervisor to assign the beneficiary's work and oversee his performance. Rather, the October 10, 2009 letter from the petitioner's manager to the beneficiary indicates, as was noted above, that "[the beneficiary would] provide reports concerning [his] work activities as requested." If the petitioner were assigning the beneficiary his work and supervising his performance, such reports would be superfluous.

Notwithstanding the assertions to the contrary, the AAO finds that, more likely than not, an employee of or of some other client of the petitioner, would assign the beneficiary's duties and supervise his performance while he worked at that client's location. Further, the agreement between the petitioner and makes clear that would be able to dismiss the beneficiary from employment at their location. Under these circumstances, the AAO finds that the petitioner would not be the beneficiary's actual employer, and that the petitioner, therefore, does not have standing to file the instant visa petition. The appeal will be dismissed and the visa petition denied for this reason.

The AAO will next address whether the petitioner has established that the proffered position qualifies as a specialty occupation. Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one that requires:

(A) theoretical and practical application of a body of highly specialized knowledge, and

(B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

> An occupation which requires [(1)] 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 [(2)] 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 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 providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and 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. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular 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 directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

In this matter, the petitioner seeks the beneficiary's services as a "Systems Analyst." A support letter from the petitioner's human resources manager, dated October 2, 2009 and submitted with initial filing, states the following as the duties of the proffered position:

Develop full system model for clients, 40%

- Complete detail system specifications;
- Plan and design complex software systems programs for customers;
- Determine data processing system that will provide system capabilities required for projects;
- Plan and layout of new system capabilities required for projects and existing projects;
- Analyze software requirements in conjunction with hardware project development to determine feasibility of design within time and cost constraints;

- Formulate and design software systems using mathematical models to predict and measures outcomes and consequences of design.

Determine the software that best serves the client's needs, 25%

- Analyze the client's data processing requirements and computer hardware;
- Translate the client's needs into software requirement specifications;
- Determine feasibility, cost, time requirements and compatibility of new functions or enhancements with current systems and computing capabilities; and
- Provide client with oral and written recommendations in line with current technologies.

Formulate plans for implementation using project management tools, 10%

- Document the scope and objectives of the new development or enhancement to make it more friendly and use the features available to improve business;
- Outline the steps required to develop new or modified program;
- Identify the system integration, linkage, and security issues.

Develop architectural model/system architect, 15%

- Prepare data model for technical reference;
- Prepare process model for functional reference;
- Determine the database level changes for enhancement or new program;
- Write scripts to perform the database changes;
- Develop prototype using front-end GUI development tools;
- Provide demonstration of the functional prototype to the client.

Test and debug new applications and enhancements, 10%

- Set up test environment;
- Perform environmental tests;
- Build test bed, create test data for various test cases; and
- Write conversion scripts if required.

However, the AAO notes that, as recognized by the court in *Defensor*, *supra*, 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.

The record contains no description of the duties of the proffered position provided by or by whatever other entity would be the end-user of the beneficiary's services that would assign the beneficiary's work and supervise his performance, nor even any indication that any such entity is prepared to provide work to the beneficiary.

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 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.

The petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this additional reason.

Also, at a more basic level, as reflected in this decision's discussion of the evidentiary deficiencies, the record lacks sufficient evidence that when the petitioner filed the petition, the petitioner had secured work of any type for the beneficiary to perform during the requested period of employment. Although the evidence shows that the petitioner would likely not work on the petitioner's own projects or at the petitioner's offices, there is insufficient evidence in the record that, when it filed the instant visa petition the beneficiary had located any work for the beneficiary to do for any client. USCIS regulations require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 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'r 1978). For this reason also, the appeal will be dismissed and the petition denied.

The remaining basis for the decision of denial is the director's finding that the petitioner has not demonstrated that the LCA provided is valid for all of the locations where the beneficiary would work.

The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) stipulates the following:

> 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.

While the DOL is the agency that certifies LCAs before they are submitted to USCIS, the DOL regulations note that it is within the discretion of the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) to determine 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. . . .

The regulation at 20 C.F.R. § 655.715 – Definitions, states,

> *Place of employment* means the worksite or physical location where the work actually is performed.

In the instant case, the AAO has found, based on the evidence described and analyzed above, that, if the visa petition were approved, the beneficiary would likely not work at the petitioner's Illinois location as claimed in the visa petition. The record does not reveal the location or locations where the beneficiary would, in fact, work. As such, the petitioner has not established that the LCA is valid for the location, or for all of the locations, where the beneficiary would work, and has not demonstrated, therefore, that the LCA corresponds to the instant visa petition and may be used to support it. The appeal will be dismissed and the visa petition denied for this additional reason.

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd.* 345 F.3d 683.

The petition will be denied and the appeal dismissed 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 is denied.