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U.S. Citizenship
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Services

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FILE: EAC 08 157 51356 Office: VERMONT SERVICE CENTER

Date: AUG 03 2009

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom,
Acting Chief, Administrative Appeals Office

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

To employ the beneficiary in what it designates a programmer analyst position, the petitioner filed this nonimmigrant petition seeking to classify the beneficiary as an H-1B nonimmigrant in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b). On the Form I-129, the petitioner describes its type of business as software consulting and development.

The director denied the petition on three independent grounds, namely, his findings that the petitioner failed to: (1) establish that it qualifies to file an H-1B petition as a U.S. employer as defined at 8 C.F.R. § 214.2(h)(4)(ii); and (2) submit a valid Labor Condition Application (LCA). With regard to the latter issue, the director determined that the evidence of record indicates that the petitioner did not provide a valid LCA for every location where the beneficiary would work.

On appeal, counsel contends that the evidence of record does not support either of the grounds for denial cited by the director, and that, therefore, the appeal should be sustained and the petition approved. In addition to the Form I-129B, a copy of the director's decision, and a brief, counsel submits copies of: (1) a host of contractual documents illustrating the types of contract relationships it has entered with its clients; (2) the LCA at issue on appeal; (3) and various tax documents filed by the petitioner.

As will be discussed below, the AAO finds that the director was correct in denying the petition on each of the grounds that she cited. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied. The AAO reaches this conclusion on the basis of its review of the entire record of proceeding, as supplemented by the submissions on appeal.

The AAO will now address the grounds of the director's decision in the order in which she discussed them.

THE U.S. EMPLOYER ISSUE

The AAO will first note some salient facts derived from the evidence of record relevant to control of the beneficiary and his work during the employment period specified in the petition.

The petition was filed on April 1, 2008. It seeks to classify the beneficiary as an H-1B employee from October 1, 2008 until September 12, 2011.

The petitioner is a client-oriented firm whose business is generated by contracts with its clients for Information Technology (IT) Services. Those services include, but are not limited to: consulting on computer and information requirements; creating original software programs; providing and developing computer applications; implementing hardware; updating and modifying existing programs and systems; and working with clients in converting and migrating systems; and the

development of turnkey solutions, systems analysis, and design in a variety of areas. The petitioner's clientele includes large and medium-sized U.S. companies throughout the United States.

The record of proceeding contains only one set of documents relating to work that was definite for the petitioner at the time the petition was filed. These documents are copies of: (1) a Subcontracting Agreement between the petitioner and Avion Systems, Inc. (ASI) of Roswell, Georgia, which was signed on January 14, 2008; and (2) Exhibit A of the Agreement, which is a Task Order signed by Avion Systems, Inc. and the petitioner on April 10, 2008.

The Subcontracting Agreement contains terms to be automatically incorporated into any Task Order signed by the petitioner and ASI. The Agreement refers to the petitioner as "the Sub-Contracting Corporation" and ASI as the Company. The Scope of Services section of the Subcontracting Agreement reads:

SCOPE OF SERVICES

The Sub-Contracting Corporation [that is, the petitioner] shall provide employees with the computer consulting and programming services to the Company's Clients as specified in the TASK Order which is attached and made a part hereof (See Exhibit A [the Task Order], and the services specified in any future TASK ORDER which may be agreed to between the parties.

The Task Order, which refers to the beneficiary by name, specifies the following as its Scope of Work:

- Works with users to gather requirements and provide follow-up and user training for assigned tasks, programs, projects, applications, etc.
- Analyzes, defines, and documents requirements for data, workflow, logical processes, hardware and operating system environment, interfaces with other systems, internal and external checks and controls, and outputs.
- Writes and maintains technical specifications by developing documents, high-level interface flow diagrams, data models, data mappings, [and] unit test case scenarios.
- Analyzes and estimates feasibility, costs, time, and compatibility with web site development and other applications. Develop and maintain plans outlining steps and timetables for systems projects.
- Conduct program testing, audits and reviews of data and documentation on new programs and program enhancements of medium [or] large scale.
- Work with project managers and business groups to analyze and report on application performance with use of Software Development Lifecycle.
- Develop test strategies and work with QA in developing test plans. Analyze user department needs, including procedures, programs, security, etc. and assist in eliminating redundancy and automating manual processes.
Evaluate and improve efficiency and effectiveness of operations.

- Assist in developing standards and criteria for successful implementation of new systems.
- Work with the user on development of the software specifications. Ability to create and document a conceptual and detailed design and write a code based on a conceptual description of business logic.

The final line of the Task Order consists of these designations: "Location: Atlanta, Ga"; "Duration: 36 months"; "Rate: \$7,000/month"; and "Start Date: 10/01/2008."

The Scope of Services section of the Subcontracting Agreement and the wording of the Scope of Work section of the Task Order indicate that, by the petitioner's assignment of the beneficiary to ASI, the beneficiary and his work will be subject to the direction and control of such ASI clients to which ASI decides to apply the beneficiary's services. The record indicates that those ASI clients would be the primary determiners and the end-users of the actual work that the beneficiary will perform. The AAO observes that the record of proceedings specifies neither the ASI clients to which the beneficiary would be assigned nor the particular projects of these end-users that would require the beneficiary's services. Also, the record of proceedings contains no documentation of whatever terms and conditions may be imposed upon the beneficiary by ASI or its clients.

The AAO further notes that the record does not contain any employment agreement with the beneficiary.

On application of the analytical framework discussed below, the AAO finds that the director was correct in denying the petition for failure to establish that the petitioner qualifies as an intending U.S. employer in accordance with section 101(a)(15)(H)(i)(b) of the Act and the implementing regulation at 8 C.F.R. § 214.2(h)(4)(ii). Specifically, the AAO finds that the petitioner has not established that it will have "an employee-employer relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii)(2). The AAO reaches this conclusion because, as reflected in the discussion above about the evidence relating to the petitioner's agreement with ASI, the record does not establish the petitioner as the party controlling the manner and means of the work that the beneficiary would perform, the requirements of which would be ultimately determined by yet-to-be-identified clients of ASI.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), defines an H-1B nonimmigrant as an alien:

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

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

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.

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

¹ It is noted that, in certain limited circumstances, a petitioner might not necessarily be the "employer" of an H-1B beneficiary. Under 8 C.F.R. § 214.2(h)(2)(i)(F), it is possible for an "agent" who will not be the actual "employer" of the H-1B temporary employee to file a petition on behalf of the actual employer and the beneficiary. However, the regulations clearly require H-1B beneficiaries of "agent" petitions to still be employed by "employers," who are required by regulation to have "employer-employee relationships" with respect to these H-1B "employees." *See id.*; 8 C.F.R. §§ 214.2(h)(1) and 214.2(h)(4)(ii) (defining the term "United States employer"). As

The Supreme Court of the United States has determined that where federal law fails to clearly define the term "employee," courts should conclude that the term was "intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (hereinafter "*Darden*") (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). That definition is as follows:

In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Darden, 503 U.S. at 323-324; see also *Restatement (Second) of Agency* § 220(2) (1958); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) (hereinafter "*Clackamas*"). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).²

such, the requirement that a beneficiary have a United States employer applies equally to single petitioning employers as well as multiple non-petitioning employers represented by "agents" under 8 C.F.R. § 214.2(h)(2)(i)(F). The only difference is that the ultimate, non-petitioning employers of the H-1B employees in these scenarios do not directly file petitions.

² While the *Darden* court considered only the definition of "employee" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(6), and did not address the definition of "employer," courts have generally refused to extend the common law agency definition to ERISA's use of employer because "the definition of 'employer' in ERISA, unlike the definition of 'employee,' clearly indicates legislative intent to extend the definition beyond the traditional common law definition." See, e.g., *Bowers v. Andrew Weir Shipping, Ltd.*, 810 F. Supp. 522 (S.D.N.Y. 1992), *aff'd*, 27 F.3d 800 (2nd Cir. 1994), *cert. denied*, 513 U.S. 1000 (1994). However, in this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. Instead, in the context of the H-1B visa classification, the term "United States employer" was defined in the regulations to be even more restrictive than the common law agency definition. A federal agency's interpretation of a statute whose administration is entrusted to it is to be accepted unless Congress has spoken directly on the issue. See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984).

Therefore, in considering whether or not one is an "employee" in an "employer-employee relationship" with a "United States employer" for purposes of H-1B nonimmigrant petitions, USCIS will focus on the common-law touchstone of control. *Clackamas*, 538 U.S. at 450. Factors indicating that a worker is an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. 503 U.S. at 323-324; *see also Restatement (Second) of Agency* § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. *See Clackamas*, 538 U.S. at 448-449; *cf. New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1), (EEOC 2006) (adopting a materially identical test and indicating that said test was based on the *Darden* decision); *see also Defensor v. Meissner*, 201 F.3d 384, 388 (5th Cir. 2000) (determining that hospitals, as the recipients of beneficiaries' services, are the true "employers" of H-1B nurses under 8 C.F.R. § 214.2(h), even though a medical contract service agency is the actual petitioner, because the hospitals ultimately hire, pay, fire, supervise, or otherwise control the work of the beneficiaries).

The regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to employ persons in the United States, *and* to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements, thus indicating that the regulations do not indicate an intent to extend the definition beyond "the traditional common law definition." Therefore, in the absence of an intent to impose broader definitions by either Congress or USCIS, the "conventional master-servant relationship as understood by common-law agency doctrine," and the *Darden* construction test, apply to the terms "employee," "employer-employee relationship," "employed," and "employment" as used in section 101(a)(15)(H)(i)(b) of the Act, section 212(n) of the Act, and 8 C.F.R. § 214.2(h). That being said, there are instances in the Act where Congress may have intended a broader application of the term "employer" than what is encompassed in the conventional master-servant relationship. *See, e.g.*, section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F) (referring to "unaffiliated employers" supervising and controlling L-1B intracompany transferees having specialized knowledge); section 274A of the Act, 8 U.S.C. § 1324a (referring to the employment of unauthorized aliens).

Finally, it is also noted that, if the statute and the regulations were somehow read as extending the definition of employee in the H-1B context beyond the traditional common law definition, this interpretation would likely thwart congressional design and lead to an absurd result when considering the \$750/\$1,500 fee imposed on H-1B employers under section 214(c)(9) of the Act, 8 U.S.C. § 1184(c)(9). As 20 C.F.R. § 655.731(c)(10)(ii) mandates that no part of the fee imposed under section 214(c)(9) of the Act shall be paid, "directly or indirectly, voluntarily or involuntarily," by the beneficiary, it would not appear possible to comply with this provision in a situation in which the beneficiary is his or her own employer, especially where the requisite "control" over the beneficiary has not been established by the petitioner.

It is important to note that the factors listed in *Darden* and *Clackamas* are not exhaustive and must be evaluated on a case-by-case basis. Other aspects of the relationship between the parties may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met; however, the fact finder must weigh and compare a combination of the factors in analyzing the facts of each individual case. The determination must be based on all of the circumstances in the relationship between the parties, regardless of whether the parties refer to it as an employee or as an independent contractor relationship. See *Clackamas*, 538 U.S. at 448-449; *New Compliance Manual* at § 2-III(A)(1).

Likewise, the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450. "Rather, as was true in applying common-law rules to the independent-contractor-versus-employee issue confronted in *Darden*, the answer to whether a shareholder-director is an employee depends on 'all of the incidents of the relationship . . . with no one factor being decisive.'" *Id.* at 451 (quoting *Darden*, 503 U.S. at 324).

Applying the *Darden* and *Clackamas* tests to this matter, the petitioner has not established that it or any of its clients will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee."

To qualify as a United States employer, all three criteria at 8 C.F.R. § 214.2(h)(4)(ii) must be met. The Form I-129 and other documents in the record indicate that the petitioner has an Internal Revenue Service Tax Identification Number. While the petitioner's letter of support indicates its engagement of the beneficiary to work in the United States, the petitioner does not establish the requisite control over the beneficiary's work in the context of this petition, where the beneficiary will be subject to control by both ASI and whatever ASI clients the beneficiary is assigned to serve. Therefore, as the petitioner has failed to establish the extent to which it and the other entities responsible for the work ultimately to be performed by the beneficiary would exercise control over her and that work, the record does not establish that the requisite employer-employee relationship exists or will exist.

Therefore, based on the tests outlined above, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii).

THE LCA ISSUE

The AAO concurs with the director's finding that the LCA is not valid for this petition, as it is not shown to relate to the location where the beneficiary would perform work under the petition.

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.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(1) states that, when filing an H-1B petition, the petitioner must submit with the petition “[a] certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary.” Thus, in order for a petition to be approvable, the LCA must have been certified before the H-1B petition was filed. The submission of an LCA certified subsequent to the filing of the petition satisfies neither 8 C.F.R. § 214.2(h)(4)(i)(B)(1) nor 8 C.F.R. § 214.2(h)(4)(iii)(B)(1). USCIS regulations affirmatively 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).

While the Department of Labor (DOL) is the agency that certifies LCA applications 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. . . .

(Italics added.)

The LCA submitted with this petition is for one work location only, namely, Duluth, Georgia. While the ASI Task Order’s “Location” designation is Atlanta, Georgia, a location within the same Metropolitan Statistical area as Duluth, Georgia, the record of proceedings does not establish where the beneficiary would actually be assigned. Read together, the ASI Task Order and the Scope of Services section of the Subcontracting Agreement to which it is appended indicate that the beneficiary’s actual work locations would depend upon the ASI clients to which the beneficiary would be assigned. As the record does not document those ASI clients and the locations to which they would assign the beneficiary, the petitioner has not established that the LCA submitted with the petition is valid for the locations where the beneficiary would perform his services. Therefore, the director’s decision to deny the petition based on the petitioner’s failure to submit certified LCAs for all of the beneficiary’s work locations was correct and shall not be disturbed.

ADDITIONAL GROUNDS FOR DENYING THE PETITION

Beyond the decision of the director, the AAO finds that the petitioner failed to establish that the beneficiary is qualified to serve in a specialty occupation position requiring a U.S. bachelor's degree, or the equivalent, in a computer specialty closely related to the proffered position.³ For this reason also, the petition must be denied.

In implementing 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C) states that an alien must meet one of the following criteria in order to qualify to perform services in a specialty occupation:

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

The record contains no evidence of the degree or licensure factors specified in the first three criteria of 8 C.F.R. § 214.2(h)(4)(iii)(C), above. Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), equating the beneficiary's credentials to a United States baccalaureate or higher degree under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) would require one or more of the following:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);

³ Although the proffered position of programmer analyst has not been established as being a specialty occupation, the petitioner would have to establish that the beneficiary possessed the required degree or its equivalent in a closely related specialty in order to qualify for the benefit sought in this matter.

- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;⁴
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that [a] the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and [b] that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience. . .

The petitioner has submitted no evidence regarding the first second, and fourth criteria of 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), above. The Evaluation Summary submitted by Multinational Education & Information Services (MEIS) relates to the third criterion, as an evaluation of education by a credentials evaluation service specializing in foreign-educational-credentials evaluations. However, the MEIS evaluator opines that the beneficiary's formal post-secondary education in India is the equivalent of only three years of post-secondary studies in Business Administration at an accredited U.S. university. In addition to indicating that the beneficiary's formal education is not the equivalent of a U.S. baccalaureate degree, the MEIS document also indicates that the beneficiary's post-secondary education is in Commerce or Business Administration, which the AAO finds not to be an academic area closely related to the performance requirements of the proffered position.

The AAO accords no weight to the MEIS evaluator's opinion about the educational equivalency of the beneficiary's training and work experience. As evident at 8 C.F.R. § 214.2(h)(4)(iii)(D)(3), USCIS recognizes educational evaluation services, such as MEIS, as competent to testify only in the area of the U.S. educational equivalency of a beneficiary's foreign formal education, and not on the educational equivalency of training and/or work experience. Therefore, the MEIS opinion about the educational equivalency of the beneficiary's training and experience carries no weight in these proceedings. USCIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988). Consequently, the MEIS Evaluation Summary establishes no more than that the beneficiary folds the equivalent of three years of study in Business Administration at an accredited U.S. university.

Next, according to its express terms, to satisfy the beneficiary qualification criterion at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), a petitioner must demonstrate three years of specialized training and/or

⁴ The petitioner should note that, in accordance with this provision, USCIS accepts a credentials evaluation service's evaluation of *education only*, not experience.

work experience for each year of college-level training the alien lacks. This provision allows crediting only training and/or work experience that the petitioner establishes as “specialized” according to the following standards:

[I]t must be clearly demonstrated [1] that the alien’s training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; [2] that the alien’s experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and [3] that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation⁵;
- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

The evidence of record regarding the beneficiary’s training and work experience does not meet the above standards and, therefore, has no relevance to a USCIS determination on this beneficiary’s qualification to serve in a specialty occupation.

Also beyond the decision of the director, the AAO finds that the petitioner has failed to establish that it is proffering a specialty occupation position. For this additional reason, the petition must be denied. The evidence of record indicates that the scope and nature of the beneficiary’s work, and therefore, whether the proffered position actually qualifies as a specialty occupation, depend upon the projects to which the clients of the petitioner client ASI assign the beneficiary. However, the record contains no evidence that, at the time the petition was filed, there existed any commitment

⁵ *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority’s opinion must state: (1) the writer’s qualifications as an expert; (2) the writer’s experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. 8 C.F.R. § 214.2(h)(4)(ii).

from any ASI client for definite work for the beneficiary in the period of employment specified in the petition. USCIS regulations affirmatively 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). The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Because the petitioner failed to establish that, at the time the petition was filed, definite H-1B caliber work assignment for the beneficiary existed for the period specified in the petition, the petition must be denied.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the

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, and the petition is denied.