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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
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U.S. Citizenship  
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Services



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FILE: WAC 07 146 50582 Office: CALIFORNIA SERVICE CENTER Date: AUG 03 2009

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:

SELF-REPRESENTED

INSTRUCTIONS:

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

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

John F. Grissom,  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director of the California Service Center (CSC) 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 systems 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 development and consulting.

The director denied the petition on several independent grounds, namely, her findings that the evidence of record failed to establish: (1) that the petitioner is qualified to file an H-1B petition, that is, as either (a) a U.S. employer as defined at 8 C.F.R. § 214.2(h)(4)(ii), or (b) a U.S. agent, in accordance with the regulation at 8 C.F.R. § 214.2(h)(2)(i)(F); (2) that the Labor Condition Application (LCA) filed with the petition is valid for all locations where the beneficiary will be employed; and (3) that the petitioner is in compliance with the terms and conditions of employment stated on the Form I-129; and (4) that the proffered position is a specialty occupation.

Along with the Form I-290B, the petitioner submits on appeal: (1) an October 11, 2007 letter from the petitioner to CSC, addressing apparent wage discrepancies noted in the director's decision; (2) a brief for the appeal; and (3) copies of W-2 Forms relating to the employees whose apparent wage discrepancies are discussed in the aforementioned October 11, 2007 letter to the CSC.

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.

Some general orienting comments about the petition are appropriate at this point.

The petition was filed on April 3, 2007. It seeks to classify the beneficiary as an H-1B employee for the employment period October 1, 2007 to October 1, 2010. The related LCA was certified on April 2, 2007 for the same employment period.

According to item 5, Part 5 of the Form I-129, the beneficiary will work at the petitioner's address in Sacramento, California. Likewise, Section E of the LCA states that the beneficiary's work location will be Sacramento, California; and Subsection A of Section E (Information for Additional or Subsequent Work Location) is blank.

Both the Form I-129 and the LCA identify the beneficiary's job title as Computer Systems Analyst; and both forms indicate that the beneficiary will be paid \$55,000 per year.

*Preliminary Findings*

The AAO is not persuaded by the petitioner's contention, central to the appeal, that the beneficiary will be employed on what the petitioner describes as its SAP Optimizer Reporting Tool (SORT) Product Development Project (hereinafter referred to as the SORT project). The petitioner presents the SORT project as an in-house project that the petitioner is developing on its own initiative and expense, without dependence on or control by any client. The petitioner maintains that the beneficiary will be working exclusively on this project, and that the project's in-house worksite establishes that the beneficiary's work location is as specified in Form I-129 and the LCA (that is, the petitioner's office address in Sacramento). Accordingly, argues the petitioner, there is no basis to question the petitioner's status as a U.S. employer, as it alone will supervise the beneficiary, control her as a worker, pay her, and hold the power to fire her.

As will now be discussed, review of the evidence of record leads the AAO to conclude that the petitioner's claims about the SORT project's role in this petition are not credible.

The AAO finds it significant that neither the Form I-129 nor any of the documents filed with it indicate that the petition was filed to secure the beneficiary's services in the SORT project. Significantly, none of those documents mentions the SORT project or any other petitioner-initiated in-house project. The petitioner's April 2, 2007 letter, which was filed with the Form I-129, is also significant, not only for the absence of any mention of in-house project work for the beneficiary, but also because, as evident in the excerpt below, the letter focuses exclusively on providing direct services to clients:

THE PETITIONER

[The petitioner] is a fast growing consulting firm specializing in implementing ERP solutions to clients all over North America, Europe, Asia and Australia. [The petitioner] is linked with ERP SAP, the world leader in enterprise resource planning, for SAP projects Implementation, providing SAP resources, support and services. [The petitioner] currently employs approximately 100 people in offices located in India, Canada, Singapore and the United States. In the United States our work force is expected to increase from our current level of fifteen employees to about twenty or more depending on the demand for resources. Our consultants are highly experienced, and most are SAP certified, and bring with them a wide range of knowledge on the various modules of SAP and industry specific experience. Our consultants' skill sets enable them to have a clear understanding of the client's business and ensure a smooth and cost effective implementation of [a] SAP Solution. In order to continue to meet the expectations of our clients and to build upon our recent success we require the continued professional services of Systems Analyst[s] such as [the beneficiary].

### THE PROFESSIONAL POSITION OFFERED

[The beneficiary] is being offered temporary employment in the position of Systems Analyst, which is a specialty occupation. The position of Systems Analyst requires the incumbent to analyze a client's IT situation and hardware infrastructure. The employee will then develop a customized solution based on the client's needs, budget and time frame. The Systems Analyst is expected to initiate, implement and trouble shoot applications in order to deliver efficient and effective technology based solution[s]. In this position, the Systems Analyst will employ a combination of techniques including structured analysis, data modeling, information engineering, mathematical model building, sampling and cost accounting to plan System Programming procedures to resolve IT problems. In order to successfully perform this array of tasks, the employee must have at least a degree in the related field.

The AAO reviewed the Employment Agreement for mention of the SORT project or any other in-house project, but found none. Likewise, the 15-page SORT Project Description Document, which the petitioner submitted in response to the RFE, does not specify a need for a systems analyst.<sup>1</sup>

The AAO observes some other aspects of the SORT Project Description Document which, in the evidentiary context being discussed and combined with the lack of mention of any in-house project prior to the response to the RFE, leads the AAO to accord no weight to the SORT Project Description Document as evidence of work that, at the time that the petition was filed, was definite for the beneficiary for the employment period specified in the petition. As the Project Description Document bears no date or other internal indication of when it was produced, and as neither it nor the project it describes were mentioned before the RFE reply, it cannot be determined that the document or the project existed when the petition was filed. Further, the Project Description Document contains no project calendar, chronological milestones, worker assignment sequences or any other internal indicia that the project had actually progressed beyond a conceptual stage. Moreover, as already mentioned, the SORT Project Description Document does not specify a systems analyst as a required resource.

The AAO also notes that the SORT Project Description Document is rife with instructions that suggest that large segments of the document address how to utilize already existing processes, and not the creation of an original computer software or systems product. Examples include, but are not limited to: section 3.1.2, Change of Indent after release at Legacy; section 3.1.3, Line Item deletion in Indent at Legacy after approval; and the instructional comments at section 4. The document also contains descriptions of already existing processes. Examples include, but are not limited to, the discussion of the Configurable SORT, in the document's System Statement of Scope, and the

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<sup>1</sup> This document's paragraph 2.1, Resource Schedule, lists the following personnel requirements: one Project Manager; two Leads; 11 Functional Consultants; 24 Technical Consultants (Programmers); and six Developers.

document's Background Summary discussion about what "XI" does and what the "z function" captures. These aspects appear to be inconsistent with a document submitted as outlining a new-product project. The AAO also notes that the petitioner has excised portions of the SORT Project Description Document, thus rendering it impossible for the AAO to determine the document's actual intent. The AAO notes for instance that the copy submitted into the record skips from section 3.4 to section 4.3. For these reasons the AAO also accords no weight to the document as being what the petitioner purports it to be, that is, according to the RFE reply letter, as described in the petitioner's RFE response letter of response to the RFE, a detailed description of the project to which the beneficiary will be assigned.

The AAO accords no weight to the Work Itinerary, which the petitioner also submitted as part of its reply to the RFE. As this document bears no date or internal indicia that it existed prior to the issuance of the RFE, the AAO will not treat it as documentary evidence existing prior to the filing of the petition. The AAO will not accept the Work Itinerary document as a credible description of the work, duties, and responsibilities that belonged to the proffered position at the time the petition was filed. This is because the content of the Work Itinerary document is materially different than the position description in the letter initially filed with the petition, in the petitioner's support letter of April 2, 2007. The April 2, 2007 letter presented the duties in general terms whose specific details would be decided by as-yet-unnamed clients through their as-yet-to-be-determined contract requirements. In stark contrast, the Work Itinerary document has the petitioner itself generating the specific duties that the beneficiary is to perform. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits the classification sought. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record.

For the reasons discussed above, the AAO finds that the record's documents and comments about SORT project work do not constitute credible evidence that SORT project work was the object of the petition when it was filed, or that SORT project work for the beneficiary for the period specified in the petition was definite when the petition was filed. Accordingly, it should be noted that the AAO finds irrelevant all of the record's SORT project evidence, including, but not limited to, the SORT Project Description Document and the Work Itinerary.

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

### **The Issue of the Petitioner's Qualification to File an H-1B Petition**

There are two prongs to the director's adverse determination on this issue, namely, her finding that the evidence of record does not establish that, with regard to this particular petition, the petitioner qualifies as either a U.S. employer or agent.

***The U.S. Employer Issue***

The director correctly found that the petitioner "depends on its clients in order to have work for its employees to do." As indicated in the director's decision, the RFE requested copies of whatever contractual documents pertained to the work that the beneficiary would perform for such clients. However, the petitioner provided no such evidence, claiming that the beneficiary would be working exclusively on the SORT project. As already noted in this decision, the AAO rejects the claim, because it is not supported by credible evidence and is materially inconsistent with the evidence submitted before the RFE was issued.

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 the record does not establish the petitioner as the party controlling the manner and means of whatever work the beneficiary would perform. The record indicates that control over whatever work would be assigned to the beneficiary would depend upon whatever degree of management, supervision, and direction such clients would choose to retain by the contractual terms to which they agree. However, as the petitioner has provided no evidence of any contracts involving the beneficiary, it is impossible to gauge how control over the beneficiary's work would be exercised.

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 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."<sup>2</sup> Therefore, for purposes of the H-1B visa classification, these terms are undefined.

The Supreme Court of the United States has determined that where federal law fails to clearly define

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<sup>2</sup> 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 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.

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)).<sup>3</sup>

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<sup>3</sup> 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 (2<sup>nd</sup> Cir. 1994), *cert. denied*, 513 U.S. 1000 (1994). However, in this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. Instead, in the context of the H-1B visa classification, the term "United States employer" was defined in the regulations to be even more restrictive than the common law agency definition. A federal agency's interpretation of a statute whose administration is entrusted to it is to be accepted unless Congress has spoken directly on the issue. See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984).

The regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to employ persons in the United States, and to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United

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 (5<sup>th</sup> 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 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

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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.

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 generally indicates its engagement of the beneficiary to work in the United States, the petitioner does not establish either definite work that the beneficiary would perform if this petition were approved or the nature and relative degrees of control that would be exercised by various parties responsible for providing the work that the beneficiary would perform. Therefore, as the petitioner has failed to establish definite work to be performed and where control over any such work would reside if it existed, the record does not establish that (1) a bona fide offer of employment was ever made to the beneficiary, or (2) an employer-employee relationship exists or will exist.

Based on the tests outlined above, the petitioner has not established that it or any of its clients will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii). Therefore, the director's determination that the petitioner has not established itself as a U.S. employer is correct.

### *The U.S Agent Issue*

The petitioner does not contend that it filed as an agent, and it does not contest the director's determination on this issue. Therefore, the AAO shall not disturb the director's determination to that the petitioner did not file the petition as an agent.

For the reasons discussed above, the AAO shall not disturb the director's determination that the petitioner has not established that it was qualified to file this petition.

### **The LCA Issue**

As will now be discussed, the AAO finds that the director was correct to deny the petition on the LCA issue.

The director determined that the validity of the LCA could not be determined without evidence establishing 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.

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 a certified 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 director was correct in finding that the actual work locations related to this petition would depend upon client contracts identifying them, and that there are no client contracts in the record.

The petitioner correctly notes that an LCA is certified for a particular position rather than a particular person. The AAO also agrees that authority over the LCA certification process resides exclusively with the Department of Labor. However, the full context of the director's decision makes it clear that she is not questioning the integrity of the LCA. Nor is she questioning the LCA's value and efficacy if filed with an H-1B petition which agrees with the LCA's terms about position type, position location, rate of pay, and period of employment. Rather, the director finds that the record does not establish that the location certified in the LCA agrees with the location or locations where work under this petition would likely be performed. This is a question of the relevance of the LCA to the particular petition with which it was filed. It is not a question of the LCA's validity as a DOL document that, in this particular case, certifies that it was filed with the DOL for, and supports or "corresponds with," an H-1B petition for a Systems Analyst position to be performed in Sacramento, California, at the rate of \$55,000 a year, during the period October 1, 2007 to October 1, 2010.

It should be noted that a petition consists of all of the documents submitted with it, and that its content with regard to any particular issue consists not just of entries on the Form I-129 but also of all relevant information within the four corners of the record of proceeding. Therefore, the extent to which the terms of an LCA conform to the terms of an H-1B petition depends upon the totality of relevant information provided within the record of proceeding.

The AAO finds that, while the LCA submitted in this petition would be relevant to and support an H-1B petition for a systems analyst position in Sacramento, California, the record does not establish where the present petition's systems analyst position would actually be performed. Accordingly, the relevance of the LCA to the present petition has not been established. Therefore, the validity of the LCA as a document supporting this particular position has not been established.

Beyond the decision of the director, the AAO further finds that the record affirmatively establishes that the LCA is not relevant to this particular petition. 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 initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

Although not noted by the director, the Employment Agreement clearly establishes that the petitioner disregards its obligation to comply with material terms of the LCA. This fact alone precludes USCIS from recognizing the LCA as a document that supports this particular petition. More specifically, the Employment Agreement contradicts the petitioner's affirmations in the Form I-129 and the LCA that it would pay the beneficiary \$55,000 per year. By stating that the beneficiary's annual salary depends upon the "actual hours" that she works but will always conform to at least the local, state or federally mandated minimum wage, the petitioner indicates that it will not abide by its salary representations in the Form I-129 and the LCA. Read in the context of the entire Employment Agreement, clause 3 of the agreement also contradicts the petitioner's commitment on the Form I-129 and the LCA to employ the beneficiary on a full-time basis, as

clause 3 suggests that the beneficiary's work status and pay is dependent upon the availability of projects for her assignment.

Also not noted by the director, but nevertheless an aspect that renders the LCA irrelevant to this petition, is the fact that the Employment Agreement indicates that the petitioner's intention to employ the beneficiary as a Systems Analyst is questionable. Not only does the Employer Agreement not specify the position in which the beneficiary would work, but also Clause 2 (Duties and Position) states, in pertinent part: "Employer requires and Employee acknowledges that Employee's position and duties may change at Employer's discretion."

For all of the reasons discussed above, the director's decision on the LCA issue shall not be disturbed.

### **The Specialty Occupation Issue**

Next, the AAO finds that the director's determination that the petitioner failed to establish the proffered position as a specialty occupation is correct.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation.

Section 214(i)(1) of 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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a 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 which [2] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States."

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5<sup>th</sup> Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

The record of proceedings is fatally defective because it fails to include documentary evidence corroborating the H-1B petition's claim that for the period requested the beneficiary would be employed on matters requiring her to apply the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty.

It is self-evident that a position cannot qualify as a specialty occupation unless the substantive nature of its work and the attendant educational requirements are established. This the record of proceedings fails to do.

The AAO here incorporates and applies its earlier finding that the petitioner's assertions about the petition having been filed for the beneficiary to work on the petitioner's in-house SORT project are not credible and thus have no evidentiary weight on the specialty occupation issue. Therefore, the AAO looks to the record for evidence of other work that was definite for the beneficiary at the time the petition was filed. Not only does the record lack any such evidence, but the petitioner acknowledges that no such work exists.<sup>4</sup> The petitioner's assertions that the beneficiary will perform specialty occupation work have no value in the absence of evidence documenting the existence of such work. 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)).

Further, the record's Employment Agreement is affirmative evidence that the petitioner does not consider itself bound to employ the beneficiary in the position specified in the petition. The pertinent part of the Employment Agreement is this statement at Clause 2 (Duties and Position): "Employer requires and the Employee acknowledges that Employee's position and duties may change at Employer's discretion."

For the reasons discussed above, the AAO affirms the director's determination that the petitioner has not established a specialty occupation.

Finally, the director was correct in denying the petition on the basis of indications that the petitioner will not comply with the terms and conditions of employment that apply to this particular petition.

The director's decision stated specific paid-salary information with regard to three of the petitioner's H-1B employees that suggests that they were not paid the salaries stated in the respective petitions. The appeal provided the petitioner ample opportunity to refute the director's conclusion that the salary information that she cited in her decision indicated a practice of not paying the salaries

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<sup>4</sup> For instance, the appellate brief, at page 3, states: "There are no contracts with clients or other firms relating to [the] Beneficiary."

required by H-1B petitions. The petitioner's explanation on appeal is not persuasive. It partly consists of assertions that the discrepancies noted by the director reflect unpaid vacations taken by the employees. However, the petitioner does not present business records or affidavits from the employees to substantiate its assertions. 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)).

Further, the AAO here reiterates its earlier finding that the Employment Agreement contradicts the petitioner's affirmations in the Form I-129 and the LCA that it would pay the beneficiary \$55,000 per year. By stating that the petitioner's annual salary depends upon the "actual hours" that she works but will always conform to at least the local, state or federally mandated minimum wage, the petitioner indicates that it will not abide by its salary representations in the Form I-129 and the LCA. Read in the context of the entire Employment Agreement, clause 3 of the agreement also contradicts the petitioner's commitment on the Form I-129 and the LCA to employ the beneficiary on a full-time basis, as clause 3 suggests that the beneficiary's work status and pay is dependent upon the availability of projects for assignment.

Accordingly, the AAO finds that the record establishes sufficient cause for denial of the petition on the ground of well founded doubt that the petitioner will comply with its obligation to pay the salary required by the pertinent attestations on this petition's Form I-129 and LCA. Therefore, the director's decision on this issue will not be disturbed.

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

**ORDER:** The appeal is dismissed, and the petition is denied.