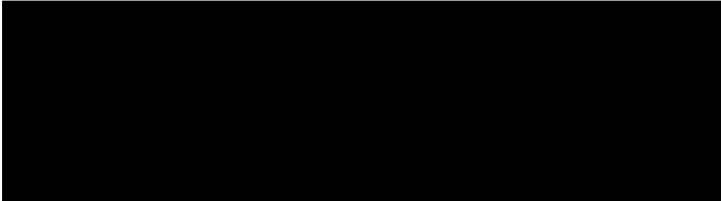




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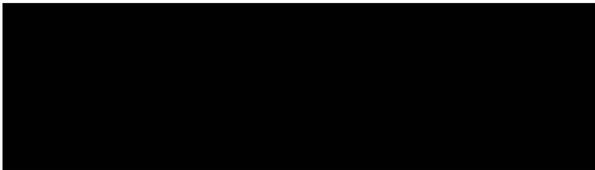
FILE: WAC 07 148 54408 Office: CALIFORNIA SERVICE CENTER Date: DEC 03 2009

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:



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).

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, California 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.

The petitioner is engaged in the temporary and permanent placement of medical professionals, and seeks to employ the beneficiary as a physical therapist in the United States for a period of three years. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner failed to establish that (1) the beneficiary possessed the appropriate license to be immediately eligible to engage in the proposed position; and (2) the petitioner was a qualified employer or agent.

On appeal, counsel submits a brief statement on Form I-290B and additional evidence.

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

In a letter dated April 1, 2007, the petitioner stated that it "has been providing exciting career opportunities for healthcare professionals, all the while providing strategic solutions for the medical employer." It further indicated that it was essentially a "people-provider" and matched appropriate healthcare professionals with healthcare facilities such as hospitals, physicians groups, pharmaceutical firms, and insurance companies. The labor certification application (LCA) submitted in support of the petition indicated that the beneficiary will be employed in Cleveland, Ohio.

The petitioner further indicated that it intended to employ the beneficiary as a physical therapist, and provided evidence of the beneficiary's credentials, including his educational degrees and his Foreign Credentialing Commission on Physical Therapy (FCCPT) certificate to demonstrate his eligibility to practice in the United States.

The director found the initial evidence insufficient, and issued a request for evidence (RFE) on June 5, 2007. The director requested evidence demonstrating who the actual employer of the beneficiary would be. The director requested documentation such as contractual agreements or work orders from the actual end-client firm where the beneficiary would work. Additionally, the director noted that if the petitioner was acting as an agent, documentation such as an itinerary and a letter discussing the conditions of the employment from the end-client firms must be submitted.

In a response dated August 27, 2007, the petitioner acknowledged that it is a medical staffing agency and that in an effort to provide additional benefits to its employees and to more efficiently manage the administration of benefits and payroll, the petitioner has outsourced all of its positions to ADP Employer Services. It further claimed that its arrangement with ADP can be considered "co-employment," although ADP's role is restricted to payroll and benefits administration whereas the petitioner is in charge of hiring, scheduling, and termination of the employees. In support of this contention, the petitioner submitted a sample employment agreement.

On September 19, 2007, the director denied the petition. The director found that the petitioner had failed to establish that the beneficiary possessed the appropriate license to practice in the State of Ohio, and further concluded that the petitioner was not an employer or agent as contemplated by the regulations. On appeal, counsel submits a brief and additional evidence.

The primary issue in the present matter is whether the petitioner has established that it meets the regulatory definition of an intending United States employer. Section 101(a)(15)(H)(i)(b) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). Specifically, the AAO must determine whether the petitioner has established that it will have "an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii)(2).

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

Upon review, the AAO concurs with the director's decision. The record is not persuasive in establishing that the petitioner or its clients will have an employer-employee relationship with the beneficiary.

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

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<sup>1</sup> Under 8 C.F.R. §§ 214.2(h)(2)(i)(F), it is possible for an "agent" who will not be the actual "employer" of a beneficiary to file an H petition on behalf of the actual employer and the alien. While an employment agency may petition for the H-1B visa, the ultimate end-user of the alien's services is the "true employer" for H-1B visa purposes, since the end-user will "hire, pay, fire, supervise, or otherwise control the work" of the beneficiary "at the root level." *Defensor v. Meissner*, 201 F.3d 384, 387-8 (5th Cir. 2000). Accordingly, despite the intermediary position of the employment agency, the ultimate employer must still satisfy the requirements of the statute and regulations: "To interpret the regulations any other way would lead to an absurd result." *Id.* at 388.

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>2</sup>

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<sup>2</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 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

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

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

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

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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).

*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."

When concluding that the petitioner did not meet the definition of a United States employer, the director stated, "The rule for determining whether an individual is employed by an employer is stated in 53 Am.Jur.2d, Master and Servant, S.2." The director stated further that, according to the Master and Servant definition, the most important factor is not which entity pays the alien's wages, but which entity controls the alien's work.<sup>3</sup> The director concluded that, as a supplemental staffing agency, the petitioner will not exercise control over the beneficiary and, therefore, cannot be considered a United States employer.<sup>4</sup>

On appeal, the petitioner reiterates the terms and conditions of the beneficiary's employment, and claims that it has the authority to hire the beneficiary, pay his wages, and control all aspects of the beneficiary's work. The petitioner also submits for the first time an employment agreement executed by both the petitioner and the beneficiary, which states that the beneficiary "will be employed by [the petitioner] and work as assigned in client facilities. . . ."

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 the petitioner's tax returns contained in the record indicate that the petitioner

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<sup>3</sup> Although not stated in the denial letter, it appears that the director's discussion of the Master and Servant definition was taken from *Matter of Pozzoli*, 14 I&N Dec. 569 (Reg. Comm. 1974) and *Matter of Allan Gee, Inc.*, 17 I&N Dec. 296 (Acting Reg. Comm. 1979). Regardless, and as indicated above, the Supreme Court indicated in *Darden* in 1992 that the payment of wages, as it relates to the provision of employee benefits and the tax treatment of the hired party, is part and parcel of the analysis of whether a hired party is or will be an employee. *Darden*, 503 U.S. at 323-324. As such, the Court thereby implies that who pays the hired party is just one factor in the analysis and that "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Id.* at 324.

<sup>4</sup> The AAO further notes that while the petitioner claims to have 130 employees, a review of its Forms 1120S, U.S. Income Tax Return for an S Corporation for 2005 and 2006, indicates that it paid no wages to employees in 2005, and paid only \$1,828 in salaries in 2006. In support of the premise that it actually paid wages to employees, the petitioner submitted copies of ADP payroll records and claimed that since administrative processing and pay is handled by ADP, the petitioner handles hiring, scheduling, work assignments and termination and therefore the arrangements between these two companies can be considered "co-employment." Absent clear evidence that the petitioner itself paid wages, for this additional reason it does not appear that the petitioner meets the definition of "employer."

has an Internal Revenue Service Tax Identification Number. While the petitioner's letter of support and the employment agreement submitted on appeal indicate its engagement of the beneficiary to work in the United States, this documentation alone provides insufficient and somewhat conflicting information regarding the nature of the job offered and the location(s) where the services will be performed. Therefore, the petitioner has failed to establish that an employer-employee relationship exists or will exist.

Despite the director's specific request in the RFE that the petitioner provide specific evidence, such as contracts or letters from authorized officials of the ultimate client companies outlining the beneficiary's duties and other relevant information, in addition to itineraries outlining dates and locations for the beneficiary's proposed employment, the petitioner did not fully respond to the director's request. The petitioner failed to submit the requested evidence, and maintained instead that the petitioner was the beneficiary's employer. While the petitioner did submit an employment agreement between the petitioner and the beneficiary, no documentation was submitted which indicated the name of the proposed client(s) or that the beneficiary would act as the client's consultant. Nor does any documentation exist which indicates the types of duties that the beneficiary would be required to perform, or stipulates the qualifications that the client requires the beneficiary to possess.

The regulations state that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Therefore, based on the tests outlined above and the petitioner's failure to provide evidence documenting who will control the beneficiary's work at each worksite, 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). In addition, due to the petitioner's failure to submit requested evidence, the petition must be denied for this additional reason.

When discussing whether the petitioner was an agent, the director stated that the definition of agent at 8 C.F.R. § 214.2(h)(2)(i)(F) provides for two types of agents: (1) "an agent performing the function of an employer"; and (2) "a company in the business as an agent involving multiple employers as the representative of both the employers and the beneficiary." The director found again that, absent documentation such as work orders or contracts between the ultimate end clients and the beneficiary, the petitioner could neither be considered an agent in this matter. As stated above, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

While not addressed by the director, the AAO questions whether the petitioner submitted a valid LCA for all work locations, as required by 8 C.F.R. § 214.2(h)(2)(i)(B). The director specifically

noted that the LCA listed the beneficiary's work location as Cleveland, Ohio. In reviewing the petitioner's supporting documentation, however, the AAO finds that the actual work location(s) for the beneficiary cannot be determined. The April 1, 2007 letter of support and the August 27, 2007 letter submitted in response to the RFE claim that as a medical staffing agency, the petitioner "employs" between 100 to 250 employees at a given time. While it did not list the geographical regions in which it ultimately places these persons, it is interesting to note that the April 1, 2007 cover letter indicates a Fort Lauderdale, Florida address for the petitioner, whereas the August 27, 2007 letter lists a Columbus, Georgia address for the petitioner, clearly indicating that the petitioner has offices throughout the country. Moreover, the employment agreement contained in the record indicates that the beneficiary will be assigned to clients' sites, or, more specifically, to "any contracted client facility" throughout the United States for extended periods of time as deemed necessary. Absent end-agreements with clients, the duration and location of worksites to which the beneficiary will be sent during the course of his employment cannot be determined. Absent this evidence, the AAO cannot conclude that the LCA submitted is valid for the beneficiary's intended work locations. For this additional reason, the petition may not be approved.

The final issue in this matter is whether the beneficiary possessed the appropriate license to be immediately eligible to engage in the proposed position.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess full state licensure to practice in the occupation, if such licensure is required to practice in the occupation, and completion of the degree in the specialty that the occupation requires.

Prior to addressing this issue, however, the AAO notes that when a petitioner is an employment contractor, the entity ultimately employing the alien or using the alien's services must submit a detailed job description of the duties that the alien will perform and the qualifications that are required to perform the job duties. From this evidence, USCIS will determine whether the duties require the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree, or its equivalent, in the specific specialty as the minimum for entry into the occupation as required by the Act.

In this matter, the director failed to adequately determine the most critical factor in the adjudication of this petition: whether the beneficiary's ultimate job responsibilities involve the theoretical and practical application of a body of highly specialized knowledge. The director's failure to address this issue is harmless, however, because the AAO conducts a *de novo* review, evaluating the sufficiency of the evidence in the record according to its probative value and credibility. The AAO maintains plenary power to review each appeal on a *de novo* basis, which has long been recognized by the federal courts. See *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

In addressing whether the proffered position is a specialty occupation, the record contains insufficient evidence as to where and for whom the beneficiary would be performing his services, and whether his services would be that of a physical therapist.

The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that “[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation.” Moreover, the regulation at 8 C.F.R. § 214.2(h)(4)(iv)(A)(1) specifically lists contracts as one of the types of evidence that may be required to establish that the services to be performed by the beneficiary will be in a specialty occupation.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii):

*Specialty occupation* means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, 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, 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 at 387. To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), USCIS consistently interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such 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 petitioner’s letter of support dated April 1, 2007 provided a vague overview of the beneficiary’s proposed duties. Specifically, the petitioner stated:

As a Physical Therapist, [the beneficiary] will be responsible for evaluating, developing, a plan and providing appropriate therapeutic treatment for inpatients and outpatients. He will perform accurate evaluations, plan and implement appropriate treatments and follow-up of patients effectively and efficiently. He will perform initial assessments, reassessments and record discharge notes in permanent chart of patients. He will complete daily reports of patients within a specific time frame and communicate with physicians regarding treatment goals and discharge plans.

In addition to being vague, this general description of duties of a physical therapist sheds little light with regard to the actual duties which the beneficiary would perform when assigned to client sites.

No independent documentation, such as agreements with end clients or contracts for the beneficiary to work on specific projects, was submitted. By its own admission, the petitioner is engaged in an industry that typically outsourced its personnel to client sites. The director observed this, and requested documentation such as contracts and work orders that would outline for whom the beneficiary would render services and what his duties would include at each worksite. Despite the director's specific request for these documents, the petitioner failed to comply.

The petitioner's overview of the beneficiary's duties offered in support of the petition provides a generic summary of the duties of a physical therapist. Moreover, the petitioner acknowledges that the beneficiary will be assigned to various locations in the United States as necessary to render his services to clients, yet fails to provide any documentation addressing these assignments. Based on this claim alone, it is clear that the beneficiary's duties could potentially vary widely based on the requirements of a client at any given time. Once again, this statement renders it necessary to examine the ultimate end clients of the petitioner to determine the exact nature and scope of the beneficiary's duties for each client, since it is logical to conclude that the services provided to one client may differ vastly from the services provided to another.

In support of this analysis, USCIS routinely cites *Defensor v. Meissner*, 201 F.3d 384, in which an examination of the ultimate employment of the beneficiary was deemed necessary to determine whether the position constitutes a specialty occupation. The petitioner in *Defensor*, Vintage Health Resources (Vintage), was a medical contract service agency that brought foreign nurses into the United States and located jobs for them at hospitals as registered nurses. The court in *Defensor* found that Vintage had "token degree requirements," to "mask the fact that nursing in general is not a specialty occupation." *Id.* at 387.

The court in *Defensor* held that for the purpose of determining whether a proffered position is a specialty occupation, the petitioner acting as an employment contractor is merely a "token employer," while the entity for which the services are to be performed is the "more relevant employer." *Id.* at 388. The *Defensor* court recognized that evidence of the client companies' job requirements is critical where the work is to be performed for entities other than the petitioner. The *Defensor* court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. *Id.* In *Defensor*, the court found that evidence of the client companies' job requirements is critical if the work is to be performed for entities other than the petitioner. *Id.*

In this matter, the petitioner will act as an employment contractor. The job description provided by the petitioner, as well as various statements from the petitioner both prior to adjudication and on appeal, indicate that the beneficiary will be assigned to various clients' worksites as necessary. Despite the director's specific request for documentation to establish the ultimate location(s) of the

beneficiary's employment, the petitioner failed to comply and provide this evidence prior to the adjudication of the petition. For example, despite a specific request for contracts identifying the beneficiary as a subcontractor, no such documentation was submitted prior to adjudication. Moreover, the petitioner's failure to provide evidence of an employer-employee relationship and/or work orders or employment contracts between the petitioner and its clients renders it impossible to conclude for whom the beneficiary will ultimately provide services and exactly what those services would entail. The AAO, therefore, cannot analyze whether the beneficiary's duties at each worksite would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation. This is particularly important since the petitioner acknowledges that it will outsource its personnel to various healthcare companies, including but not limited to hospitals, pharmaceutical firms, and insurance companies. It seems logical to conclude that the duties one would perform at a hospital would vastly differ from the duties required by an insurance company. Accordingly, the petitioner has not established that the proposed position qualifies as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) or that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(1)(B)(1).

In view of the foregoing, the petitioner's failure to submit a clear description of duties from the beneficiary's ultimate employer(s) renders it impossible to find that the proffered position is a specialty occupation. However, even if the proffered position had been determined to be a specialty occupation, the beneficiary would not have been qualified to provide services as a physical therapist in the state of Ohio.

The regulation at 8 C.F.R. § 214.2(h)(4)(v)(A), which relates to licensure for the H classification, states that if an occupation requires a licensure for an individual to fully perform the duties of the occupation, an alien seeking H classification in that occupation must have that license prior to approval of the petition to be found qualified to enter the United States and immediately engage in employment in the occupation.

Pursuant to 8 C.F.R. 214.2(h)(4)(v):

*General.* If an occupation requires a state or local license for an individual to fully perform the duties of the occupation, an alien (except an H-1C nurse) seeking H classification in that occupation must have that license prior to approval of the petition to be found qualified to enter the United States and immediately engage in employment in the occupation.

*Temporary licensure.* If a temporary license is available and the alien is allowed to perform the duties of the occupation without a permanent license, the director shall examine the nature of the duties, the level at which the duties are performed, the degree

of supervision received, and any limitations placed on the alien. If an analysis of the facts demonstrates that the alien under supervision is authorized to fully perform the duties of the occupation, H classification may be granted.

The beneficiary holds a diploma from Lorma College in San Fernando, Philippines, awarding him a Bachelor of Science degree in Physical Therapy. The beneficiary has also been a registered Physical Therapist in the Philippines since April 26, 2002, as evidenced by his professional license issued by the Filipino Professional Regulation Commission. Finally, the record contains a Visa Credential Verification Certificate for Physical Therapists in the United States, issued to the beneficiary on June 1, 2006 by the Foreign Credentialing Commission on Physical Therapy (FCCPT).

Pursuant to Ohio Laws and Rules regulating the practice of physical therapy, a person may obtain a license by either examination or endorsement. Ohio Revised Code § 4755-23-03, entitled "License by Examination," provides:

(A) To be licensed by examination as a physical therapist an applicant must pass the following examinations:

- (1) The national physical therapy examination (NPTE) for physical therapists administered by the federation of state boards of physical therapy; and
- (2) The examination approved by the physical therapy section on the laws and rules governing the practice of physical therapy in the state of Ohio.

Ohio Revised Code § 4755-23-04, entitled "License by Endorsement," provides, in relevant part:

(A) The physical therapy section may issue a license by endorsement to an applicant who is currently licensed as a physical therapist or physical therapist assistant under the laws of another state, provided the requirements for registration or licensure under the appropriate category in that state, including minimal education and passing score on the national physical therapy examination (NPTE) were reasonably equal to the requirements in force in this state on the date of the applicant's initial licensure in the other state.

Moreover, Ohio Revised Code § 4755-23-12 provides that all foreign-educated applicants must submit an evaluation of education credentials prepared by a professional education evaluating service to show an educational background deemed by the physical therapy section to be reasonably equivalent to the requirements established in the code. In addition, applicants must submit evidence of a working knowledge of English.

As previously noted, the record contains an evaluation of education credentials prepared by the FCCPT, an approved professional education evaluating service, verifying that the beneficiary's foreign degree is equivalent to a physical therapy degree conferred by a regionally accredited college or university in the United States. The record also contains evidence that the beneficiary possesses a working knowledge of the English language.

The director denied the petition on the basis that the petitioner had failed to submit evidence that the beneficiary had taken and passed the NPTE and the Ohio Jurisprudence exam, as required by Ohio Revised Code § 4755-23-03.

On appeal, counsel states that the beneficiary has applied for a physical therapist's license in the State of Ohio and has passed the NPTE as required, and counsel submits a letter dated September 17, 2007 from the Ohio Occupational Therapy, Physical Therapy and Athletic Trainers Board confirming this claim. Counsel contends that the beneficiary's only obstacles to obtaining state licensure are: (1) the beneficiary has not yet received a social security card from the Social Security Administration (SSA); and (2) the beneficiary has not yet taken and passed the Ohio Jurisprudence exam, which is only offered in the United States.

Upon review of the evidence of record, the AAO concurs with the director's findings. First, while the record contains documentation that the beneficiary in fact passed the NPTE, the first examination requirement for licensure, it appears that he did not pass this exam until September 17, 2007, almost five months after the petition was filed. 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) and 103.2(b)(12). 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).

Moreover, counsel for the beneficiary acknowledges that the beneficiary has not yet taken the Ohio Jurisprudence test, the second required examination under the statute. Counsel claims that the beneficiary is unable to sit for this examination until a valid social security number is issued. Counsel claims that the exam is only issued in the United States and therefore the beneficiary is precluded from taking the examination until a social security number is issued.

A November 20, 2001 guidance memorandum from [REDACTED] addresses H-1B petitions where the beneficiary is unable to obtain a state license because he or she is not in the United States. Specifically, the memorandum instructs adjudicators to approve such petitions for a period of one year when the petition contains evidence from the state licensing board clearly stating that the *only* obstacle to the issuance of state licensure is the lack of a social security card. In addition, the petitioner must establish that all other regulatory and statutory

requirements for the occupation have been met. See Memo. from [REDACTED], Office of Adjudications, Immigration and Naturalization Serv., to All Dist. Dir. et al., *Social Security Cards and the Adjudication of H-1B Petitions*, 1-2 (November 20, 2001) (copy on file with *Am. Immig. Law Assn.*) (emphasis added).

In this matter, the September 17, 2007 letter from the Ohio Occupational Therapy, Physical Therapy and Athletic Trainers Board indicates that once the beneficiary obtains a social security number and takes and passes the Ohio Jurisprudence exam, he will be issued the coveted license. Since there are clearly two obstacles for the beneficiary to overcome in obtaining his license, the instructions set forth in the Cook memorandum are not applicable. Specifically, there is no guarantee that the beneficiary would pass the jurisprudence exam, thereby rendering it impossible to conclude that, at the time of the petition's approval, the beneficiary would be qualified to immediately engage in employment in the occupation. Moreover, while counsel states that the jurisprudence examination can only be taken in the United States, she provides no evidence to support this claim. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In view of the foregoing, the petitioner has also failed to establish that the beneficiary would be qualified to perform the duties of the proffered position if the position had been determined to be a specialty occupation. For this additional reason, the petition may not be approved.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she 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 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

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