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U.S. Citizenship and Immigration Services
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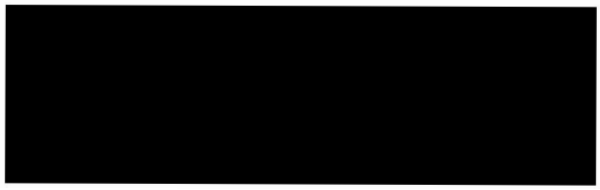
U.S. Citizenship and Immigration Services



FILE: WAC 07 146 54525 Office: CALIFORNIA SERVICE CENTER Date: NOV 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 of the 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 filed this nonimmigrant petition seeking to employ the beneficiary in the position of systems analyst 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). The petitioner describes itself as a global consulting organization and provider of Information Technology (IT) services and business solutions, with a focus on delivering infrastructure technology solutions to its clients, which, the petitioner asserts, include Fortune 500 firms as well as companies involved in architecture, business value analysis, asset management, product evaluation and selection, and data privacy.

The director denied the petition on two independent grounds, namely, his findings that the petitioner failed to establish (1) that it 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); and (2) that documentary evidence in the record contains unresolved discrepancies that undermine the credibility of the petition. The director's decision describes these discrepancies as follows:

> A review of Part 5 of the petition, Form I-129, indicates that the petitioner certified that the company's gross annual income is $150,000. A copy of the petitioner's Federal tax return for the year 2006 reflects that the income was actually only $117,333.
>
> Also, copies of the petitioner's Quarterly Wage reports for all of the employees for the last two quarters of the year 2007 show that the average wages, tips, and compensation was only $35,456.
>
> These figures, divided by the total number of current employees, and the number of employees the petitioner intends to hire, would be insufficient to pay the beneficiary the claimed wage on the I-129 Petition as well as on the Labor Condition Application (LCA).
>
> Furthermore, the high number of Fiscal Year 2008 I-129 petitions filed by the petitioner will increase the company size by 50%. However, there is insufficient information to support the increase and the need for the beneficiary's [sic] work.

The AAO's first adjudicative determination is to withdraw the second ground of the director's denial. Upon review of the record as supplemented by the appeal and counsel's responses to the discrepancies asserted by the director, the AAO finds that counsel has adequately explained or effectively rebutted each aspect of the record that the director cites as a discrepancy that undermines the credibility of the petition.

On appeal, counsel acknowledges that the $150,000 figure exceeds the $117,000 gross income that it reported in the tax return that it submitted into the record. However, counsel's explanation, quoted below, appears to assert that the $150,000 figure comported with the petitioner's gross income for the twelve-month period backdated from the time of the petition's filing:

> The second reason cited by the [service center] in support of the denial is the alleged inconsistency in the petition. The petitioner stated that its gross revenues were $150K on the petition and the gross revenues reported on the tax returns were $117[K] approximately. It is pertinent to note that this is a newly incorporated company, namely, incorporated in 2006. The company never filed tax returns prior to 2006. The company officials, therefore, merely stated its gross revenues until April 2007. The company officials were later advised at the time of filing their 2006 returns to report revenues received until December 2006. Hence the minor discrepancy in the information provided by the Petitioner, which is now explained and competent objective evidence, in the form of tax returns, is available to show the true and correct gross revenue of the company.

The AAO finds counsel's explanation plausible, especially in light of the fact that the petitioner's letter of support filed with the Form I-129 appears to cite the $150,000 figure as the petitioner's total gross revenues since its founding in 2006: "The company was founded in 2006, and our gross revenues are 150K." Therefore, the AAO rejects the $150,000 figure on the Form I-129 as evidence of an intent by the petitioner to mislead the United States Citizenship and Immigration Services (USCIS). Accordingly, the AAO discounts and withdraws this aspect of the director's decision as bearing on the credibility of the petition.

The AAO also finds that the following comments by counsel on appeal effectively refute the other discrepancies claimed by the director, by indicating that they are incorrectly derived from the information in the record:

> The officer adjudicating the petition stated that the copies of the Petitioner's Quarterly Wage Reports for all of the employees for the last two quarters of the year 2007 show that the average wages, tips, and compensation was only $35,456. This is a clear error and misapplication of the reasoning on the officer's part. The wage report not only shows the company's engineers but also its administrative staff's salaries. The administrative staff is paid a much lower wage than the engineer. To add all wages and then provide the average wage is reaching a ridiculous conclusion.
>
> The [service center] also mentioned that the funds were insufficient to pay the employees. The [service center] officer erred in using the company's 2006 revenues to support his/her conclusion that the company does not have financial ability to pay its employees. This newly incorporated company has sufficient contracts with its clients for the year 2007 to support the wages of its workers. Copies of the current contracts as evidence of business of the company was [sic] provided to the [service center]. See Exhibit G, Annexure C.

First, the AAO is persuaded by counsel's argument that the director miscalculated the average wage. The AAO recognizes that counsel does not submit additional documentation to supplement the quarterly reports cited by the director. However, the director cited no other record as the basis for her adverse conclusion and failed to provide any factual basis for her assumption that all of the petitioner's employees were being paid substantially equal wages. Next, the record of proceedings does not establish the amount of revenue available to the petitioner for hiring in 2008. Therefore, the director based her determination about hiring revenue on an incomplete record, that is, one that did not include revenue available to the petitioner in 2008. Although the burden to establish eligibility remains entirely on the petitioner, the record as currently constituted sufficiently supports the petitioner's claims regarding this issue. As such, the director's adverse determination regarding the petitioner's hiring revenue is hereby withdrawn.

In light of its findings above, the AAO is left with one determination to make on the director's decision, namely, whether the director erred in denying the petition on the basis that the petitioner failed to establish that it is either (1) a U.S. employer as defined at 8 C.F.R. § 214.2(h)(4)(ii), or (2) a U.S. agent, in accordance with the regulation at 8 C.F.R. § 214.2(h)(2)(i)(F).

On appeal, counsel for the petitioner submits a brief and additional evidence, and contends that the director erroneously found that the petitioner would not be the beneficiary's employer.

Counsel not only does not contest the director's finding that the petitioner is not a U.S. agent, but he also expressly asserts that the petitioner is not an agent. Therefore, the AAO need not address the agency issue, as it is conceded by counsel.

The issue at hand, then, 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 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*).

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.

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

The record reflects that the petitioner's business is generated by contracts between it and business entities seeking temporary assignment of consultants to provide a variety of computer and IT services for themselves or their clients. Accordingly, any Systems Analyst work to be assigned to the beneficiary is dependent upon contractual commitments by clients of the petitioner for such work.

The record contains many contract and contract-related documents each of which reflect actual or potential contractual commitments between the petitioner and one or more business entities. These include: (1) a Subcontractor Services Agreement between Comsys and the petitioner which allows the petitioner to introduce its personnel to Comsys as candidates for Comsys's proposed use in its contracts with Comsys clients; (2) a Supplier Purchase Order issued by Comsys to the petitioner for a certain person (not the beneficiary) to serve as a programmer from August 15, 2006 to August 14, 2007; (3) a Supplier Purchase Order issued by Comsys to the petitioner for a certain person (not the beneficiary) to serve in an unspecified ("Exempt") capacity from November 20, 2006 until an anticipated end date of November 20, 2007; (4) a Supplier Purchase Order issued by Comsys to the petitioner for a certain person (not the beneficiary) to serve as a Java/J2EE Programmer from February 5, 2007 until an anticipated end date of May 5, 2007; (5) a Supplier Purchase Order issued by Comsys to the petitioner for a certain person (not the beneficiary) to serve as a Programmer Analyst from April 16, 2007 until an anticipated end date of October 16, 2007; (6) an Independent Contractor Agreement, with attached work orders, between [redacted] and the petitioner, obligating the petitioner to provide: (a) a certain person (not the beneficiary) to a specified [redacted] client for ".Net Development expertise and assistance as assigned by Client," from January 17, 2007 to June 30, 2007; and (b) a certain person (not the beneficiary) to a specified [redacted] client for "PL/SOL and UNIX expertise and assistance as assigned by Client," from February 7, 2007 to June 30 , 2007; (7) a Subvendor Agreement, with Work Order, between the Judge Technical Staffing and the petitioner, whereby the petitioner is to provide an unnamed person to serve as a Document Administrator for a certain Judge Technical Staffing client, from June 15, 2007 to at least December 31, 2007; (8) an Independent Sub-Contractor Agreement between Longtop International and the petitioner, by which the petitioner is to

provide a certain person (not the beneficiary) as a consultant to Longtop International with regard to a Content Management/Documentation project for a particular Longtop International client; (9) an agreement entitled "General Terms and Conditions for the Hire of Sub Contractor," wherein Takeessence, Inc. and the petitioner agree to terms and conditions that would govern whenever Takeessence may engage the petitioner as a subcontractor, with a Purchase Order for the petitioner to provide a certain person (not the beneficiary) for a "QA project" with a "Project Duration/Start Date" of December 11, 2006; (10) a Contractor Agreement between Eliassen Group, Inc. and the petitioner, with a Purchase Order for the petitioner to provide a maximum of 1,540 hours of work on a Eliassen Group client's project identified only as '[redacted] – Sr. Java/J2EE Developer, Tech Lead, Backend devt, SOA," from April 11, 2007 to at least December 31, 2007; and (11) an Independent Contractor Agreement Purchase Order by which the petitioner agrees to provide a certain person (not the beneficiary) to Galattietech Inc for at least six months, commencing March 19, 2007, to perform such projects as Galattietech Inc or any of its clients may designate.

None of the record's copies of contract documents executed by the petitioner and other business entities include any terms or conditions regarding the beneficiary. Further, none of these documents specify Systems Analyst work, which is the type of work that the Form I-129 asserts that the beneficiary will perform if the petition is approved.

The request for additional evidence (RFE) issued with regard to this petition provided more than ample notice to the petitioner of the critical importance of its providing documentary evidence of whatever contracts existed at the time that the petition was filed that would generate systems analyst work for the beneficiary during the employment period sought in the petition. The petitioner provided no such evidence in response.

The AAO finds no evidentiary weight in counsel's assertion on appeal that the contract documents submitted into the record reflect that the petitioner "has numerous projects which it is outsourcing at this time as it cannot meet the demand for such technology services." The AAO notes, first and foremost, that none of the contracts in the record are for a systems analyst, which is the position that is the subject of this petition. Further, contrary to counsel's statements, the record's contracts do not involve the petitoner's "outsourcing" work to other firms. 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)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The AAO accords no weight to counsel's assertions on appeal that the petitioner "has numerous in-house projects to provide software solutions and web management services" and that the record's copies of the petitioner's Business Plan for the year 2007 reflects this fact. The Executive Summary for the Business Plan (August 2006) indicates that this Business Plan was being written while the petitioner was "in the process of being formed as an LLC"; and the Business Plan describes itself as

"a guide for starting and managing this new business and will also serve as the basis of a separate, detailed marketing plan." As such the Business Plan is prospective only. It consists of forecasts that are not accompanied by any documentation of any in-house projects of any kind that would exist during the period of employment sought by this petition. There is a second Business Plan in the record, Business Plan: Application Development (August 2007). This document also contains no evidence of the existence of any systems analyst work for the beneficiary to perform in the employment period sought in the petition. This particular Business Plan merely discusses the petitioner's approach when involved in an application development project. It provides no evidence of the existence of any such project during the employment period specified in the petition. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N at 165. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N at 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N at 506. Further, the existence of in-house projects would be relevant to this petition only if the record established that they required systems analysts. There is no such evidence in the record.

The AAO further notes that, besides the absence of documentary evidence substantiating systems analyst work, which is in itself decisive, the AAO finds the petitioner's claims about such work materially inconsistent and therefore doubtful on their face. On appeal, counsel claims that the beneficiary will be employed on in-house use projects, but the petitioner's letter of response to the RFE stated, also without substantiating documentation, that the beneficiary "will be replacing one of the subcontractors on one of the company's on going projects with vendors." On appeal, 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 the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

The only documentary evidence of the petitioner's communications with the beneficiary consists of an undated "Terms of Employment" letter from the petitioner's president to the beneficiary. The letter describes itself as the terms of an offer of employment to the beneficiary which will govern his employment if he accepts them. The letter states that the beneficiary's "position will be Systems Analyst, reporting to various clients and partners of the company," and that his "duties and responsibilities will be designated by the company." The letter further states:

> Our employment relationship is terminable at will, which means that either you or the Company may terminate your employment at any time, and for any reason or no reason.

The letter specifies that "the employment term will begin on 10/01/2007," and it describes compensation as including "$55,000 a year, paid semi-monthly consistent with the Company's payroll practices" and three weeks paid vacation "for every 15 months of full employment."

The AAO first notes, however, that the record of proceeding contains no documentary evidence of either the beneficiary's receipt of the letter or acceptance of its terms. Therefore, the letter is not persuasive evidence of terms reached by the beneficiary and the petitioner. The evidentiary value of the letter is further diminished by the fact that it contains no representations as to specific projects reserved for the beneficiary's performance during the employment period specified in the petition, that it is not signed by any business entity that would be providing systems analyst work for the beneficiary, and that it is not supplemented in the record by documentary evidence from any business entity confirming that it is providing systems analyst work to the petitioner for performance by the beneficiary.

On review of all of the evidence noted above, the AAO finds that the record of proceeding fails to establish (1) the existence of any systems analyst work for the beneficiary during the employment period specified in the petition, and, consequently, (2) the actual lines of relative authority and control over the beneficiary and his work. Accordingly, 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*).

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.

Upon review, the AAO concurs with the director's decision. The record is not persuasive in establishing that the petitioner or any of 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 USCIS has defined the terms "employee," "employed," "employment," or "employer-employee relationship" by regulation for purposes of the H-1B visa classification, even though the law describes H-1B beneficiaries as being "employees" who must have an "employer-employee relationship" with a "United States employer."[1] Therefore, for purposes of the H-1B visa classification, these terms are undefined.

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."

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[1] 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.

Nationwide Mutual Ins. Co. v. Darden, 503 U.S. 318, 322-323 (1992) (hereinafter "*Darden*") (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). That definition is as follows:

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

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

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

The regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to employ persons in the United States, *and* to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements, thus indicating that the regulations do not indicate an intent to extend the definition beyond "the traditional common law definition." Therefore, in the absence of an intent to impose broader definitions by either Congress or USCIS, the "conventional

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

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

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

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

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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).

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 the petitioner's tax returns contained in the record indicate that the petitioner has an Internal Revenue Service Tax Identification Number, thereby satisfying the third criterion at 8 C.F.R. § 214.2(h)(4)(ii). However, the record of proceeding fails to satisfy either of the remaining two criteria.

The letter of support generally describes the type of work to which the petitioner claims the beneficiary would be assigned; but neither the letter nor any other evidence of record describes particular assignments to specific clients, so as to establish actual work for the beneficiary for the period specified in the petition. Just simply stating in a letter of support that it will employ the beneficiary is generally insufficient to show that the petitioner will engage the beneficiary to work or that it has made a bona fide offer of employment to the beneficiary given the facts in this matter. Namely, as there is insufficient evidence of where the beneficiary will be placed or what he will be doing, it cannot be found that the petitioner has more likely than not made a bona fide offer of employment to the beneficiary such that it meets the first part of the definition of United States employer. In other words, there is a difference between an intent to engage the beneficiary to work and the likelihood that it will actually engage the beneficiary to work. While the filing of the petition itself demonstrates the intent, the petition and letter of support by themselves are insufficient in this case to demonstrate the necessary likelihood that the petitioner will actually provide work for the beneficiary. 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)). Accordingly, the petitioner has not satisfied the first criterion of 8 C.F.R. § 214.2(h)(4)(ii).

The petitioner has also failed to satisfy the second criterion of 8 C.F.R. § 214.2(h)(4)(ii). The documentation in the record does not establish the substantive nature of the work that the beneficiary would perform if the petition were approved, particular clients whose contracts and specifications would determine the substantive nature of the beneficiary's work, and the relative amounts of control over the beneficiary and his work that would actually be exercised during particular projects by the petitioner, the petitioner's clients contracting for the work, and, in some cases, the petitioner's clients' clients. Therefore, as the petitioner has failed to establish the extent that it and its clients would control the beneficiary and his work, the record does not establish that an employer-employee relationship exists or will exist.

Despite the director's specific request in the RFE that the petitioner provide contracts between the petitioner and the beneficiary, or between the petitioner and its end clients, the petitioner did not fully respond to the director's request. 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, 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).

Beyond the decision of the director, the AAO also finds that the petition must be denied for the additional reason that the evidence of record fails to establish that, when filed, the petition was supported by actual specialty occupation work to be performed by the beneficiary in the period of employment specified by the petition.

Section 214(i)(l) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(l), 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.

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 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as 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 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."

At the outset, the AAO notes that there is no credible evidence that, at the time the petition was filed, either "in-house" projects or contractual commitments existed for the beneficiary's performance as a systems analyst in the period of employment specified in the petition. In this regard the AAO here adopts and incorporates its discussions earlier in this decision about the lack of documentary evidence of actual work to be performed by the beneficiary.

Qualification of a position as a specialty occupation is not determined by its title or how closely a petitioner's descriptions of the position approximate a published narrative about an occupational category. Rather, specialty occupation status must be substantiated by evidence of record about the actual performance requirements of the position in the context of the petitioner's particular business. To determine whether a particular job qualifies as a specialty occupation, USCIS focuses on the evidence of the specific duties of the proffered position as performed within the context of the petitioner's business operations. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the evidence of record establishes that the actual performance of the position requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act. In consonance with section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l), and the H-1B implementing regulations at 8 C.F.R. § 214.2, the evidence of record must establish that the actual performance of the proffered position requires the theoretical application of a body of highly specialized computer-related knowledge and the attainment of at least a bachelor's degree in a specific specialty that signifies the attainment of such knowledge. In the context of the present petition, where the nature and extent of the beneficiary's work will depend upon contractual requirements generated by customers, it is essential that the petitioner provide documentary evidence of whatever contractual or similar documents existing at the time the petition was filed called for the beneficiary's work as a systems analyst for client's or customers of the petitioner. This the petitioner has not done.

Without evidence of contracts, work orders, or statements of work describing the duties the beneficiary would perform and for whom, the petitioner fails to establish that the duties that the

beneficiary would perform are those of a specialty occupation. Providing a generic job description that speculates what the beneficiary may or may not do at each worksite is insufficient. 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 at 165. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N at 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N at 506. 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). 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).

Also, as the petition indicates that the beneficiary's work would include projects whose specifications and work requirements would be determined by clients of the petitioner, or clients of such clients, for support of this analysis, the AAO again cites to *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 that evidence of the client companies' job requirements is critical if the work is to be performed for entities other than the petitioner. *Id.* As evidence of work to be performed by the beneficiary at each worksite has not been provided, it cannot be found that the beneficiary will be employed in a specialty occupation. For this additional reason, the petition must be denied.

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

Counsel asserts that USCIS has approved other, similar petitions in the past. The present record of proceeding does not, however, contain all of the supporting evidence submitted to the service center

in the prior case. In the absence of all of the corroborating evidence contained in that record of proceeding, the AAO is not able to determine whether the position offered in the prior case was similar to the position in the instant petition. Each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, USCIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether the prior cases were similar to the proffered position or were approved in error, no such determination may be made without review of the original record in its entirety. If the prior petition was approved based on evidence that was substantially similar to the evidence contained in this record of proceeding, however, the approval of the prior petition would have been erroneous. USCIS is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Neither USCIS nor any other agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), *cert denied,* 485 U.S. 1008 (1988).

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.