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U.S. Citizenship and Immigration Services

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[Redacted]

FILE: WAC 07 144 53711 Office: CALIFORNIA SERVICE CENTER Date: **AUG 04 2009**

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

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

ON BEHALF OF PETITIONER:

[Redacted]

INSTRUCTIONS:

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

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

John F. Grissom,
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director of the California Service Center 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 programmer 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 software consulting and development firm and indicates that it currently employs 24 persons.

The director denied the petition because the petitioner failed to establish that: (1) it meets the regulatory definition of an intending United States employer as defined at 8 C.F.R. § 214.2(h)(4)(ii); (2) it meets the definition of “agent” at 8 C.F.R. § 214.2(h)(2)(i)(F); (3) it submitted a valid labor condition application (LCA) for all locations; (4) the proffered position is a specialty occupation; or (5) it complied with the terms and conditions of employment.

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.

When filing the I-129 petition, the petitioner submitted a letter of support dated April 1, 2007 in which it claimed that since its inception, it has provided “expert software development, consulting, and programming services, [particularly] in scientific engineering applications, e-commerce, web development and related projects.” It further stated that the beneficiary’s services are needed to design, develop and implement comprehensive computer systems and advanced software applications to meet the needs of the petitioner’s clients. Regarding the beneficiary’s duties, the petitioner indicated that he would provide services at client locations.

The petitioner also submitted a document entitled “Itinerary of Definite Employment” dated April 1, 2007, which indicated that due to recent contractual agreements with Logitech, Inc. (Logitech) and Cisco, Inc. (Cisco), the beneficiary’s services were immediately required to develop and implement software programs in accordance with the requirements of Cisco and Logitech. Finally, the petitioner submitted an Offer of Employment, dated March 21, 2007, outlining the beneficiary’s proposed salary and related employee benefits.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued a request for evidence (RFE) on May 23, 2007. In the request, the director asked the petitioner to submit 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 14, 2007, the petitioner addressed the director’s queries. The petitioner submitted new documentary evidence, including an updated “Itinerary of Definite Employment,” which indicated that the beneficiary would be employed full-time as a programmer analyst and would provide software

development and implementation services to pending and ongoing in-house projects. Additionally, the petitioner claimed that the beneficiary would be deployed to several client companies to complete their specific projects. Again, the petitioner referred to recent agreements entered into with Logitech and Cisco, and submitted as evidence what it referred to as "representative contracts" between the petitioner and Cisco, Logitech, Stubhub, Inc. (Stubhub), and Redback Networks, Inc. (Redback). It is noted that none of these agreements made reference to the beneficiary.

On December 4, 2007, the director denied the petition. The director found that the petitioner is a contractor that subcontracts workers with a variety of computer skills to other companies who need computer programming services. The director concluded that, because the petitioner was a contractor, it was required to submit the requested end contracts and itinerary and, without this documentation, the petitioner could not establish that it met the definition of United States employer or agent.

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 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 U.S. Citizenship and Immigration Services (USCIS) has defined the terms "employee," "employed," "employment," or "employer-employee relationship" by regulation for purposes of the H-1B visa classification, even though the law describes H-1B beneficiaries as being "employees" who must have an "employer-employee relationship" with a "United States employer."¹ Therefore, for purposes of the H-1B visa classification, these terms are undefined.

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

In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill

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

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

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 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).

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" with the beneficiary as an H-1B temporary "employee."

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

On appeal, the petitioner asserts that it is in fact the employer of the beneficiary and asserts that the director's conclusion to the contrary was erroneous.

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 documents contained in the record indicate that the petitioner has an Internal Revenue Service Tax Identification Number. While the petitioner's letter of support and its response to the request for evidence indicate its engagement of the beneficiary to work in the United States, this documentation alone provides insufficient details regarding the nature of the job offered or 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 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. Specifically, noting the petitioner's claim that the beneficiary would provide services to clients as needed, the director noted that evidence in the form of an agreement or work order between the petitioner and these clients identifying the duties of the beneficiary was not submitted, thereby raising questions regarding the validity of the petitioner's claims.

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).

The record reflects that the petitioner submitted several documents in support of its claim that it was an employer for purposes of the definition above. Specifically, the petitioner relies on the Offer of Employment as well as representative contracts with clients as evidence of its need for the beneficiary's services. Although the petitioner relies on these documents as evidence that it will serve as the beneficiary's employer, the petitioner overlooks the fact that the claimed employment offer is not executed by the beneficiary. (It is noted that the March 21, 2007 letter asks the beneficiary to sign and return the duplicate enclosed copy; no such document is submitted into the record). Moreover, the representative contracts relied upon by the petitioner do not identify the beneficiary as a subcontractor nor do they outline the terms and conditions of his proposed employment.

The petitioner submitted several documents in support of its claim that it will be the beneficiary's employer for purposes of the definition above. Specifically, the contracts with Cisco, Logitech, Stubhub and Redback are submitted to support the petitioner's contention that the beneficiary will be employed by the petitioner as a programmer analyst, providing services to these clients. However, none of these agreements outline the scope of the beneficiary's employment nor do they refer to the beneficiary specifically; in fact, the Logitech agreement identifies another employee as the contractor. There is no reason to believe that these agreements, as contended by the petitioner, constitute the terms of employment under which the beneficiary would work.

The subcontractor agreements, in addition to not pertaining to the beneficiary, are not current.

The minimal information contained in the letter of support and the incomplete information reflected in the agreements with Cisco, Logitech, Stubhub and Redback are insufficient to show that a valid employment agreement or credible offer of employment existed between the petitioner and the beneficiary at the time the petition was filed. Absent evidence pertaining specifically to the requested validity period of this petition, the AAO is prohibited from concluding that the petitioner would be the beneficiary's employer. 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)).

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).

The petitioner claims to simultaneously be the beneficiary's agent, which is contradictory in and of itself in that for purposes of this analysis, the petitioner is either an employer *or* an agent. 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. For the reasons set forth above, the petition may not be approved.

The next issue is whether the petitioner submitted a valid LCA for all locations.

Upon review, the petitioner did not submit a valid LCA for all work locations, as required by 8 C.F.R. § 214.2(h)(2)(i)(B). The LCA submitted listed the beneficiary's work locations as Fremont and San Jose, California. However, the petitioner contends that the beneficiary will work at various client sites as necessary. Upon review of the representative agreements submitted to the record, it appears that not all of the petitioner's clients are located within the areas identified on the LCA. For example, Stubhub is located in San Francisco, an area not included on the LCA. It is likely, therefore, that many of the petitioner's other clients are likewise located in areas outside of those identified on the LCA. Therefore, the petitioner's claim that the beneficiary will be employed only in Fremont and San Jose for the duration of the validity period is not persuasive. Absent end-agreements with clients, the duration and location of work sites to which the beneficiary will be sent during the course of his employment cannot be determined. The AAO, therefore, cannot conclude that the LCA submitted is valid for the beneficiary's intended work locations for the entire validity period. For this additional reason, the petition may not be approved.

The next issue is whether the beneficiary will be employed in a specialty occupation.

It should be noted that for purposes of the H-1B adjudication, the issue of bona fide employment is viewed within the context of whether the petitioner has offered the beneficiary a position that is viewed as a specialty occupation. Of greater importance to this proceeding, therefore, is whether the petitioner has provided

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

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 software consultant.

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)(I) 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.

The petitioner’s letter of support dated April 1, 2007 provided an overview of the beneficiary’s proposed duties. Specifically, the petitioner provided the following breakdown of duties to which the beneficiary would devote his time:

- Plan, develop, test and document computer programs, applying knowledge of programming techniques in, C,C++, Java, Windows 2000, Unix, Oracle 8, SQL, and MS Office.
- Design and development, testing and implementation of Vendor Management applications such as C,C++, Java, Windows 2000, Unix, Oracle 8, SQL, and MS Office.
- Evaluate user request for new or modified program, such as for financial or human resource management system, to determine feasibility, cost and time required, compatibility with current system, and computer capabilities.
- Consult with user to identify current operating procedures and clarify program objectives.
- Read manuals, periodicals, and technical reports to learn ways to develop programs that meet user requirements.

- Formulate plans outlining steps required to develop program, using structured analysis and design.
- Submit plans to user for approval.
- Prepare flowcharts and diagrams to illustrate sequence of steps program must follow and to describe logical operations involved.
- Design computer terminal screen displays to accomplish goals of user request.
- Convert project specifications, using flowcharts and diagrams, into sequence of detailed instructions and logical steps for coding into language processable by computer, applying knowledge of computer programming techniques and computer languages.
- Enter program codes into computer system.
- Enter commands into computer to generate reports for end-users.
- Read computer printouts or observe display screen to detect syntax or logic errors during program test, or use diagnostic software to detect errors using Rational Rose and Erwin.
- Replace, delete, or modify codes to correct errors.
- Analyze, review, and alter program to increase operating efficiency or adapt to new requirements.
- Write documentation to describe program development, logic, coding, and corrections[.]
- Write manual for users to describe installation and operating procedures.
- Assist users to solve operating problems.
- Recreate steps taken by user to locate source of problem and rewrite program to correct errors.
- Use computer-aided software tools, such as flowchart design and code generation, in each stage of system development.
- Train users to use software programs.
- Oversee installation of hardware and software.
- Provide technical assistance to program users.
- Install and test program at user site.
- Monitor performance of program after implementation.
- Develop programs for business or technical applications.

However, no independent documentation to further explain the nature and scope of these duties was submitted. Noting that the petitioner was engaged in an industry that typically outsourced its personnel to client sites to work on particular projects, the director requested documentation such as contracts and work orders, documentation 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. 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).

Upon review of the evidence, the AAO concurs with the director's findings. As discussed above, the petitioner has submitted "representative" agreements with four companies, none of which refer to the beneficiary. The petitioner's support letter provides a generic overview of computer-related tasks which are

not specific to a project or client. Moreover, the letter acknowledges that the petitioner contracts out computer personnel to clients on an as-needed basis, thereby confirming that the beneficiary's duties will vary based on specific client needs. Once again, the fact that the petitioner outsources personnel to various client sites 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.

As discussed above, the record contains simply the letter of support and itinerary, offer of employment, and the deficient agreements between the petitioner and four clients which provide no information regarding the end-clients and/or the companies' requirements for the beneficiary. 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. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

In support of this analysis, USCIS routinely cites *Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000), 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.*

In this matter, it is unclear whether the petitioner will be an employer or 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 working on client projects and 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 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. Moreover, the petitioner's failure to provide evidence of work orders or employment contracts between the petitioner and its clients which identify the beneficiary as a contractor render 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. 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)(I).

For the reasons set forth above, even if the other stated grounds of ineligibility were overcome on appeal, the petitioner has failed to supplement the record with sufficient evidence to establish that the beneficiary would be performing the duties of a specialty occupation, and the petition cannot be approved for this reason.

The final issue is whether the petitioner is in compliance with the terms and conditions of employment. Specifically, the director found that the petitioner made inconsistent and contradictory claims regarding its employment of and wages paid to its H-1B employees.

The director notes that the petitioner has failed to compensate its other H-1B employees as claimed. The director found discrepancies between the petitioner's payroll records and the actual wages paid and hours worked by these employees. As explained by the petitioner on appeal, however, one of these employees was on a voluntary leave of absence. Upon review, the provided explanation regarding this sample employee is insufficient. First, the dates of absence provided for the second and fourth quarters does not explain the difference in wages between what was proffered and what was actually paid. Second, "personnel commitments" in the U.S. is not a sufficient basis to justify the particular employee's leave of absence and her claimed maintenance of H-1B status in the United States. Absent a more in-depth explanation and corroborating evidence, e.g., medical records, the AAO is left to conclude that this employee either violated her status of her own volition or was forced to violate her status by being benched by the petitioner. Either way, the director's concerns regarding the petitioner's compliance with the terms and conditions of its alien workforce are justified and, as such, shall not be disturbed.

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

ORDER: The director's decision is affirmed. The petition is denied.