

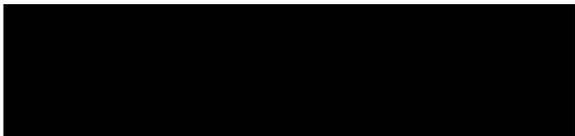
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U.S. Department of Homeland Security
I.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529

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U.S. Citizenship
and Immigration
Services



Dr

FILE: WAC 08 144 53288 OFFICE: CALIFORNIA SERVICE CENTER DATE:

AUG 21 2009

IN RE: Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

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

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

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner avers that it designs and develops software solutions for a wide range of commercial and scientific applications. It seeks to employ the beneficiary as a programmer analyst and, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

On August 26, 2008, the director denied the petition because the petitioner failed to establish that it has a *bona fide* position for the beneficiary. Specifically, the director stated that the petitioner was not complying with the terms and conditions on the Labor Condition Applications (LCA) and I-129H Petitions that it was filing with U.S. Citizenship and Immigration Services (USCIS). On appeal, the petitioner submits a letter and copies of documents already included in the record.

The record includes: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the director's RFE; (4) the director's denial decision; and, (5) the Form I-290B, along with documentation submitted in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

When filing the Form I-129 petition, the petitioner averred in both the petition and the letter of support that it would employ the beneficiary as a programmer analyst, with an offered annual salary of \$52,000. The initial record also included a Form ETA 9035E, Labor condition Application, certified by the Department of Labor on March 31, 2008 for a programmer analyst position in Golden Valley, Minnesota, with no alternate work location listed on the LCA.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on June 10, 2008. In the request, among other things, the director: asked the petitioner to submit evidence of the existence of a specialty occupation such as copies of signed contracts between the petitioner and the beneficiary and contractual agreements with its clients; asked the petitioner to submit its Form 941, Quarterly Tax Return; and asked the petitioner to submit copies of its federal income tax returns, and state quarterly wage reports. The director also asked the petitioner to submit evidence that the beneficiary was qualified to perform programmer analyst duties.

In a response received on July 22, 2008, the petitioner submitted the requested documents and a clarifying letter. The petitioner stated that it was an agent pursuant to 8 C.F.R. § 214.2(h)(2)(i)(F) and that its business model involved both in-house software development as well as providing such services at the clients' places of business. The petitioner submitted an itinerary "for the whole requested period and the contractual agreement for the services of the beneficiary, if requested to perform the services at the client site." The petitioner also submitted a newly-certified LCA because the beneficiary would be working both at the petitioner's office and at a client site in Arlington Heights, Illinois, as well as an "Employment Offer Letter" between the petitioner and the beneficiary and an "itinerary" of the beneficiary's employment.

On August 26, 2008, the director denied the petition. The director implied that the petitioner did not have a *bona fide* position for the beneficiary because, based upon the petitioner's filing practices, it was not

complying with the terms and conditions of the LCA or the I-129H Petitions. In her denial decision, the director provided a chart that listed the names, receipt numbers and quarterly wages of the petitioner's employees and compared those actual wages to the wages that the petitioner claimed it would pay on the LCA and I-129 Petition. The director concluded that, based upon such information, the petitioner did not have a credible offer of employment.

On appeal, the petitioner submits a letter disagreeing with the director's findings and providing its explanation for why the beneficiaries who were listed in the director's denial decision received lesser wages than what was stated on the LCA and I-129 Petition.

Upon review of the record, the AAO concurs with the director and finds, beyond the director's decision, that: (1) the petitioner has not established that it is a United States employer or agent; (2) the petitioner did not have a specialty occupation position to offer the beneficiary at the time it filed the petition; and (3) the beneficiary would not be qualified for the proffered position even if the AAO found such a position to be a specialty occupation.

The issue raised by the director is whether the petitioner has established that it has a *bona fide* offer of employment to the beneficiary. The AAO notes that documentation pertaining to the petitioner's federal and quarterly wage reports was submitted into the record. As already noted, the director found discrepancies between the petitioner's payroll records and the actual start dates of certain of the petitioner's beneficiaries, as well as discrepancies between the compensation paid to certain beneficiaries and the compensation listed on the LCAs submitted in support of the H-1B petitions for those beneficiaries.

Absent full details regarding the circumstances surrounding the employment of each H-1B employee that the director named in the denial letter and the petitioner's complete personnel records regarding each of these beneficiaries, the record does not include sufficient evidence to determine whether the petitioner compensated each beneficiary as shown on the LCA. That being said, the AAO agrees that the number of petitions filed by this petitioner raises concerns regarding the legitimacy of the H-1B petitions and the director's findings are justified. Although the petitioner submitted an explanation for why its actual quarterly wages were different from the proffered wages, it did not submit any independent evidence to substantiate its claims. For example, the petitioner provided the names of three employees who had a serious medical condition that required their absences from work extended periods. The petitioner did not, however, submit any evidence of these emergencies, and such evidence should be readily available through the petitioner's human resources division. Going on record without supporting evidence will not meet the petitioner's burden or proof. *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 AAO will not disturb the director's decision with regard to this issue.¹

¹ While the Department of Labor regulations at 20 C.F.R. § 655.731(c)(7)(ii) may permit the non-payment of wages by an H-1B employer "due to conditions unrelated to employment which take the nonimmigrant away from his/her duties at his/her voluntary request and convenience," this has no bearing on a Department of Homeland Security (DHS) determination regarding an alien's maintenance of status in the United States and a petitioner's compliance with DHS H-1B program requirements. In general, except in situations in which the Family and Medical Leave Act (29 U.S.C. § 2601 et seq.) or the Americans with Disabilities Act (42 U.S.C. § 12101 et seq.) may apply, DHS generally requires that the failure to carry on the specific activities for which

Even if the petitioner had overcome the director's conclusions, the petition would not be approvable because (1) the petitioner has not established that it is a United States employer or agent; (2) the petitioner did not have a specialty occupation position to offer the beneficiary at the time it filed the petition; and (3) the beneficiary would not be qualified for the proffered position even if the AAO found such a position to be a specialty occupation. The AAO shall discuss these issues separately.

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 determined to be a specialty occupation. Therefore, of great importance to this proceeding 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 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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which 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.

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

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation "which [1] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [2] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States."

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

the H-1B status was obtained constitutes a failure to maintain status and renders the alien immediately deportable and the employer in non-compliance with the H-1B program requirements.

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), 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. To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position’s title. The specific duties of the proffered position, combined with the nature of the petitioning entity’s business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, to determine whether the position qualifies as a specialty occupation. *Defensor v. Meissner*, 201 F. 3d 384.

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.*

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

On the Form I-129, the petitioner stated that the proffered position is that of a programmer analyst. In the petitioner’s March 28, 2008 letter appended to the petition, it provided a very generic description of what duties the beneficiary would be expected to perform and provided a breakdown of the percentages of time that the beneficiary would devote to certain generic duties. The petitioner did not specify where the beneficiary would be working – either at the petitioner’s office or at a client site. The petitioner did not provide any further clarifying details about the proffered position when responding to the RFE; although, it did clarify the work location(s). Based upon the letter of support alone, the AAO cannot conclude that the position of programmer analyst is a specialty occupation. The petitioner has not met its burden of proof in this matter. *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)). The petitioner has not presented any evidence to establish either (1) that 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, that this particular position is so complex or unique that it can be performed only by an individual with a degree; (3) that it 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. Accordingly, the petitioner has not established that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(1)(B)(1).

The AAO now turns to another reason why the petition may not be approved – the petitioner does not meet the regulatory definitions of an intending United States employer or an agent. Specifically, the AAO will 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 an H-1B nonimmigrant as an alien:

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

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

United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
- (3) Has an Internal Revenue Service Tax identification number.

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

“employer-employee relationship” with a “United States employer.”² 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 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)).³

² 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.

³ 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

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

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 person(s) 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 of having a tax identification number and to employ person(s) in the United States. The lack of an express expansion of the definition regarding the terms “employee,” “employed,” “employment” or “employer-employee relationship” indicates that the regulations do not intend to extend these terms beyond “the traditional common law definition.” Thus, 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).

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 will be a “United States employer” having an “employer-employee relationship” with the beneficiary as an H-1B temporary “employee.” The AAO notes that the evidence in the record establishes that the petitioner is an employment contractor and shows that the petitioner places H-1B beneficiaries in various locations to work on client projects.

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 federal tax returns contained in the record indicate that the petitioner has an Internal Revenue Service Tax Identification Number. In response to the RFE, the petitioner submitted an “Employment Letter” that was signed by the petitioner and the beneficiary on March 5, 2008. This letter, however, does not suffice as evidence of an employer-employee relationship. The problem with the letter is that, other than welcoming the beneficiary to its “professional staff,” it fails to state the beneficiary’s job title or provide any details regarding the nature of his duties. Going on record without supporting evidence will not meet the petitioner’s burden or proof. *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)). Based upon the record before the AAO, there is insufficient to establish that the petitioner qualifies as an employer, as defined by 8 C.F.R. § 214.2(h)(4)(ii).

Similarly, the petitioner could not be classified as an agent, despite its claims. The regulation 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 petitioner has not submitted any evidence to establish that it could be considered an agent. While the director’s RFE specifically requested evidence of contracts between the petitioner and its clients to assess whether the petitioner could be considered an agent under the regulations, the petitioner provided only one contract between it and NGTECH, dated June 1, 2008, which is a date after the petition was filed. It, therefore, cannot be used to establish the petitioner’s alleged status as an agent. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Furthermore, the “itinerary” that the petitioner submits for the beneficiary states only that he will work at the client site 75 percent of the time and at the petitioner’s office 25 percent of the time. A sufficient itinerary would be one that shows, in part, the exact dates of a beneficiary’s specific work location during the three-year period in H-1B status. Here, the petitioner has not provided such detail.⁴ As explained, the petitioner is neither a U.S. employer nor an agent, and the petition may not be approved for these reasons.

⁴ The AAO notes that the itinerary indicates that it covers the period from “October 1, 2008 to September 20, 2008.” The September 30, 2008 date is an obvious typographical error; however, it cannot be determined what the actual end date will be.

Finally, had the AAO found the position to be a specialty occupation, the beneficiary would not be qualified to assume such a position.

The petitioner states that the beneficiary is qualified to perform the position of a programmer analyst based upon an evaluation of the beneficiary's education and experience that was done by [REDACTED] of CREDAL, Inc. According to the evaluation, the beneficiary's Bachelor of Laws from an Indian university, as well as his work experience, are equivalent to a Bachelor of Science Degree in Computer Information Systems.

evaluation, however, cannot be used to establish that the beneficiary's educational and employment experiences equate to a bachelor's degree in Computer Information Systems. If a petitioner is claiming that the beneficiary has gained the equivalent of a degree that the specialty occupation requires, the evaluation of such education and experience must be demonstrated by one of the following: (1) an evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience; (2) the results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI); (3) an evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials; (4) evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty; or (5) a determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

Here, the evaluator, [REDACTED] is basing his conclusions on the beneficiary's education and experience; yet, he has not submitted any evidence that he has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience.⁵ The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). For this reason, [REDACTED] evaluation carries no weight.

Although USCIS may determine whether the beneficiary's education and experience are equivalent to the required degree, the petitioner has not submitted any evidence for the AAO to assess. The beneficiary's prior employment letters do not clearly demonstrate that the beneficiary's work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the beneficiary's experience was gained while working with peers, supervisors, or subordinates who have a degree or its

⁵ The AAO notes that CREDEVAL, Inc.'s disclaimer states: "This evaluation prepared by CREDEVAL, Inc. is solely based on the educational documents provided . . ." It is clear from [REDACTED] evaluation, however, that he considered the beneficiary's work experience to reach his conclusions. Despite the disclaimer, the evaluation is not based solely on the beneficiary's educational background.

equivalent in the specialty occupation; or that the beneficiary has recognition of expertise in the specialty. Therefore, even if the AAO had found that the proffered position required a specific degree in a computer science or information technology field, the petitioner has not demonstrated that the beneficiary would be qualified to accept such a position.⁶

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The petitioner has failed to overcome the director's reason for denying the petition and, upon a *de novo* review of the record, the AAO has determined that the offered position is not a specialty occupation, the petitioner does not qualify as a United States employer or agent, and the beneficiary would not be qualified for the proffered position even if it were found to be a specialty occupation. Therefore, the petition is not approvable.

Pursuant to section 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361, the burden of proof is upon the petitioner to establish eligibility for the benefit it is seeking. Here, the petitioner has not met its burden. Accordingly, the AAO affirms the director's decision to deny the petition and dismisses the appeal.

ORDER: The appeal is dismissed. The petition is denied.

⁶ The AAO notes that petitioner initially submitted an evaluation from Multinational Education & Information Systems, Inc. which equated the beneficiary's education and work experience to a bachelor's degree in international law and computer science. This evaluation, however, is also insufficient for the same reasons as the CREDEVAL, Inc. evaluation.