

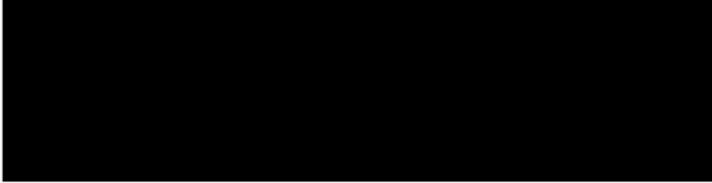
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U.S. Department of Homeland Security
I.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529



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Services

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FILE: WAC 07 149 52522 OFFICE: CALIFORNIA SERVICE CENTER DATE: JUL 31 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:



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 is engaged in providing IT solutions and consulting.¹ It seeks to employ the beneficiary as a systems analyst from October 1, 2007 to September 30, 2010. Accordingly, the petitioner 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 November 16, 2007, the director denied the petition, determining that the petitioner failed to establish that: (1) it has a *bona fide* position for the beneficiary; (2) the duties of the position are those of a specialty occupation; and (3) it is in compliance with the terms and conditions of employment.²

On appeal, counsel submits a brief and additional evidence, and contends that the director's decision is erroneous on several of the issues discussed.

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, the petitioner's brief, and 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 systems analyst, with an offered annual salary of \$60,000. The initial record also included a Form ETA 9035E, Labor condition Application, certified by the Department of Labor on March 31, 2007 for a systems analyst position in San Jose, California.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on July 27, 2007. In the request, among other things, the director: asked the petitioner to clarify the petitioner's employer-employee relationship with the beneficiary and to submit evidence such as contractual agreements or work orders from the actual end-client firm where the beneficiary would work; asked the petitioner to submit documentation such as an itinerary of services that specifies the dates of each service, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed for the period of time requested; asked the petitioner to submit

¹ At the time the I-129 Petition was filed in April 2007, the petitioner was a company called Valley U.S., Inc. In July 2007, Valley U.S., Inc. restated its Articles of Incorporation and changed its name to Quintegra U.S., Inc. In January 2008, Quintegra U.S., Inc. merged with Quintegra Solutions Limited and the separate entity Quintegra U.S., Inc. ceased to exist. All companies have been engaged in the same business – providing IT solutions and consulting.

² The AAO notes that the director initially mailed the denial letter to an incorrect address, which resulted in the letter being returned to the director. Although the director mailed the letter to the correct address after it was returned, she did not update the date on the denial letter to reflect that it was being mailed in December 2007 instead of November 2007. The petitioner's appeal is timely because it was filed within 33 days of the December 2007 mailing date.

copies of its federal income tax returns for 2005 and 2006; and requested copies of the petitioner's federal and state quarterly wage reports.

In a response dated October 15, 2007, counsel addressed the director's queries. Counsel contended that the petitioner was the beneficiary's actual employer, and not an agent, because it would hire, pay, fire, supervise and control the work of the beneficiary. While counsel acknowledged that "[the beneficiary] shall not be associated with any one Project or Client," counsel stated that the beneficiary would be working at the petitioner's office and that, should the beneficiary be assigned to work at client sites, the petitioner would "comply with all LCA and H-1 requirements." The petitioner submitted documentation in the form of corporate tax returns, quarterly wage reports, and a list of other H-1B employees in response to the RFE.

On November 16, 2007, the director denied the petition. The director determined that the petitioner did not have a *bona fide* position for the beneficiary, that the beneficiary's proposed duties were not those of a specialty occupation, and that the petitioner was not compliant with the terms and conditions of employment. Before discussing the position that the petitioner is offering to the beneficiary, the AAO shall first address the director's comments regarding the petitioner's noncompliance with the terms and conditions of employment.

The director noted in the denial letter that the petitioner has submitted approximately 230 H-1B petitions since fiscal year 2000. The director further cited the earnings information of several employees whose wage information, as listed on the petitioner's quarterly wage reports, did not match the proffered salary that was listed on each employee's H-1B petition. In addition, the director provided detailed information about the petitioner's claimed lease and organizational structure, and concluded that the petitioner did not have the requisite space to accommodate all of the listed employees, including those 230 beneficiaries for whom the petitioner submitted H-1B petitions. The director concluded that the petitioner was violating the terms and conditions of employment because it was not paying prevailing wages to its employees. The director further stated that the petitioner did not have sufficient work for its employees and was "benching" them.

As a preliminary matter, the AAO will withdraw the director's comments regarding the petitioner's lease and organizational structure. As counsel notes in the brief, the petitioner was never asked to submit and never submitted a copy of its lease or an organizational chart. The information that the director listed seems to pertain to a company that is not the petitioner. Therefore, as the director did not have any information regarding the petitioner's physical premises, it could not have reached the conclusion that the petitioner did not have sufficient space to accommodate its staff.³

Regarding the director's comments that the petitioner failed to compensate its other H-1B employees as claimed, the AAO notes that voluminous documentation pertaining to the petitioner's federal and quarterly wage reports was submitted into the record. 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

³ On appeal, counsel provides the petitioner's lease, which shows that, when it filed the petition, the petitioner had leased 2,288 square feet of office space as of September 2006. Although counsel submits evidence to show that the petitioner leased an additional 1,458 square feet of space, this lease did not commence until June 1, 2007, which was after the filing of the petition and it, therefore, cannot be considered. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

the compensation paid to certain beneficiaries and the compensation listed on the LCA submitted in support of the H-1B petitions for those beneficiaries. On appeal, counsel explains that the petitioner cannot locate supporting documentation to clear up the discrepancies because of the change in corporate structure.

Absent full details regarding the circumstances surrounding the employment of each H-1B employee that the director named in the RFE 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 under its previous name raises concerns regarding the legitimacy of the H-1B petitions. Although the record in this matter is insufficient to determine that the petitioner failed to comply with the terms and conditions of employment of other beneficiaries in other petitions, the AAO observes that the director's findings are justified; thus, the AAO will not disturb the director's decision with regard to this issue.⁴

The AAO now turns to the director's determination that the petition could not be approved because no *bona fide* position exists and the duties of the proffered position are not those of a specialty occupation. The director determined that, because the petitioner is a consulting company, it was impossible to conclude that the beneficiary would be employed in a specialty occupation based on the lack of contracts detailing the beneficiary's ultimate duties. As shall be discussed the AAO agrees with the director on these two issues.

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 greater 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:

⁴ 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 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.

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 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.

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.

On the Form I-129, the petitioner stated that the proffered position is that of a systems analyst. In the petitioner’s March 31, 2007 letter appended to the petition, the petitioner indicated that the beneficiary’s responsibilities as a systems analyst would include being “a part of a team of software programmers who are engaged in designing, developing and implementing functional specifications of computer software systems using standardized methods and procedures.” The petitioner further provided a breakdown of the percentage of time that the beneficiary would spend on different duties and also stated that the beneficiary would be working at its office, although “[the petitioner’s] employees are not limited to a single project or single customer.”

Because no independent documentation to further explain the nature and scope of the intended duties was submitted, and 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 in the RFE documentation such as contracts and work orders to establish for whom the beneficiary would render his services and what his duties would include at each worksite.

In response, the petitioner submitted two contracts. One is a Temporary Staffing Services Agreement with Google for an individual who is not the beneficiary. The other is a Subcontract Supplier Agreement with Ensemble-Chimes that does not list the beneficiary’s name.⁵ Counsel stated in the October 15, 2007 RFE

⁵ The *Ensemble-Chimes* contract is dated July 26, 2007, which is three months after the filing of the petition.

response letter to the director that the beneficiary “will be helping the Quintegra US with the ongoing and new projects for various clients.” On page 3 of its October 15, 2007 letter, counsel stated that the beneficiary will be working as a systems analyst, while on page 4, counsel stated that the petitioner seeks to employ the beneficiary as a software engineer. The Employment Agreement between the petitioner and the beneficiary listed the beneficiary’s job title as software engineer; however, it did not provide a description of his duties.

The petitioner has not established that the proffered position is a specialty occupation. The AAO finds the petitioner’s evidence problematic regarding the beneficiary’s job title and, therefore, his job duties. Initially, the petitioner stated in the petition and its letter of support that the beneficiary would be working as a systems analyst; however, other documentation in the file, including counsel’s letter in response to the RFE and the beneficiary’s employment contract lists his title as software engineer. Further confusing the issue is the Employment Agreement which not only lists the beneficiary’s title as software engineer instead of systems analyst, but also states: “The employee will serve the Company as Software Engineer or in such other position(s) as the Company’s Management . . . may determine with the agreement of the Employee from time to time.”

The AAO does not concede that the job titles of systems analyst and software engineer are interchangeable or that, based upon the either job title alone, the position could be classified as a specialty occupation. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Here, there is no clarifying evidence regarding the beneficiary’s job title.

Furthermore, even without looking at the job title, the record contains scant information regarding the duties that the beneficiary would perform. The petitioner provided a very generic job description for the beneficiary. The Employment Agreement does not contain any information that could shed light on the duties that the beneficiary would be required to perform, and the language within it only highlights the fact that there are no certain or credible job duties because the beneficiary’s position may change over time. Additionally, The *Google* contract that the petitioner submitted lists another beneficiary’s name, and the *Ensemble-Chimes* contract is not relevant because it came into existence after the filing of the petition. *Matter of Michelin Tire Corp.*, *supra*. 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 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.

Although the petitioner claimed that the beneficiary would be working at its office only in San Jose, California, the petitioner has provided no evidence of in-house projects to which the beneficiary would be assigned. The petitioner’s failure to provide a consistent job title and details regarding the beneficiary’s duties renders the AAO unable to assess whether the beneficiary’s duties 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)(A)(iii) 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).

Beyond the director's decision, the AAO does not find that 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 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.”⁶ 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)).⁷

⁶ 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.

⁷ 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),

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

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 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).

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 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 that contracts work with clients for IT consulting.⁸ Counsel’s statement in the October 15, 2007 response to the director’s RFE that, “due to the nature of the work to be done[,] we cannot at this time determine the future locations of work” and the petitioner’s issuance of IRS Forms W-2, Wage and Tax Statement, to employees with addresses outside of the State of California accentuate the fact that the petitioner operates as a contracting company that places H-1B beneficiaries in various locations.

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. While the Employment Agreement, dated January 2, 2007, indicates the petitioner’s engagement of the beneficiary to work in the United States, this contract merely outlines the beneficiary’s salary and benefits but provides no details regarding the nature of the job offered or its location. The petitioner did not submit an employment contract or any other document signed by the beneficiary describing the beneficiary’s claimed employment relationship with the petitioner. Therefore, the petitioner has failed to establish that an employer-employee relationship exists. The evidence 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. 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.” In the October 15, 2007 response to the director’s RFE, counsel claimed that the petitioner was

⁸ The AAO observes that, in its response to the director’s RFE, the petitioner stated that it “employs about 60 employees in the United States.” On appeal, counsel states that the petitioner employs only 17 persons, whose titles are: President; Finance Manager; Accountant; HR Manager; HR Executive; Sales (6 persons); Recruiter (2 persons); Administration; and Programmer Analyst (3 persons). There is no independent evidence to clarify these inconsistencies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

not an agent and the petitioner has not submitted any evidence to the contrary on appeal. Thus, as the petitioner is neither a U.S. employer nor an agent, the petition may not be approved for this additional reason.

Finally, beyond the director's decision, the AAO does not find that the LCA that the petitioner submitted is valid for all work locations, as required by 8 C.F.R. § 214.2(h)(2)(i)(B). The LCA that the petitioner submitted with the initial H-1B petition filing listed the beneficiary's work location as San Jose, California. However, based upon statements made in counsel's October 15, 2007 RFE response letter, a review of the petitioner's IRS Forms W-2, Wage and Tax Statement, and the absence of evidence of any in-house projects, the petitioner has not established that the LCA submitted is valid. For this additional reason, the petition may not be approved.

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).

For the reasons set forth above, the petitioner has failed to supplement the record with sufficient evidence to establish that it qualifies as a U.S. employer or agent and that it will comply with the terms of the LCA. 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.