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FILE: WAC 07 074 51732 Office: CALIFORNIA SERVICE CENTER Date: OCT 05 2009

IN RE: Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

Perry Rhew
Chief, Administrative Appeals Office

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

To employ the beneficiary in what it designates a systems analyst position, the petitioner filed this nonimmigrant petition seeking to classify the beneficiary 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). On the Form I-129, the petitioner describes its type of business as computer consulting and training.

The director denied the petition on two independent grounds, namely, her findings that the petitioner failed to: (1) establish that it is qualified to file an H-1B petition, that is, as either (a) a U.S. employer as defined at 8 C.F.R. § 214.2(h)(4)(ii), or (b) a U.S. agent, in accordance with the regulation at 8 C.F.R. § 214.2(h)(2)(i)(F); and (2) establish that Labor Condition Application (LCA) filed with the petition was valid for the type and location of work to be performed by the beneficiary.

Along with the Form I-290B, counsel submits on appeal: (1) a brief, on the petitioner's letterhead and signed by the petitioner; and (2) a November 28, 2006 letter from [REDACTED] Member of Technical Staff, Business Data Product Realization, Cingular Wireless (hereinafter referred to as the Cingular Wireless letter). The letter is addressed to the attention of [REDACTED] Tek Systems."

As will be discussed below, the AAO finds that the director was correct in denying the petition on each of the grounds that she cited. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied. The AAO reaches this conclusion on the basis of its review of the entire record of proceeding, as supplemented by the submissions on appeal.

Some general orienting comments about the petition are appropriate at this point.

The petition was filed on January 18, 2007. It seeks to classify the beneficiary as an H-1B employee for the employment period from December 11, 2006 to December 10, 2009. The related LCA was filed on May 16, 2006, for the period May 16, 2006 to May 15, 2009.¹

According to item 5, Part 5 of the Form I-129, the beneficiary will work at the petitioner's address in Atlanta, Georgia. Likewise, part E of the LCA states that the beneficiary's work location will be Atlanta, Georgia.

Both the Form I-129 and the LCA identify the beneficiary's job title as Computer Systems Analyst; and both forms indicate that the beneficiary will be paid \$52,395 per year.

¹ The AAO observes that the certification period stated in the LCA precludes approval of the petition beyond May 15, 2009. Accordingly, the petition is invalid to the extent that it seeks H-1B classification for the period May 16, 2009 to December 10, 2009.

The Form I-129 and the petitioner's December 8, 2006 letter filed with it present the petitioner as a computer consulting and training firm that "assists mid-sized and large businesses in implementing and using information technology" by providing services that include desktop application support, network installation and support, custom application programming, and general systems strategy.

Under the heading "Description of the Position Offered," the petitioner's December 8, 2006 letter states:

At the present time, we are in need of a Systems Analyst to participate in several of the application development projects we are performing or being asked to perform. These projects include the use of generally accepted application development practices in the design, documentation and implementation areas of this service. In addition, our firm prides itself at understanding the business needs and implications of utilizing information technology, so knowledge or experience of business issues plays a vital role in our success.

In the performance of our consulting services, our employees make use of the following tools and systems, depending on the particular client or project: Visual Basic; Sybase, SQL server, Oracle, Visual C++, Borland C++, Java, E-Com applications, Win 2000 and UNIX. These signify the current major components, but we also support clients in other areas such as IBM AS/400, 3270 communication support and IBM RS/6000.

The service center issued two requests for additional information (RFEs). The first was issued in March 2007, and the second in July 2007. The Consultants and Staffing Agency subsection of the Employer Information section of the first RFE requests material evidence that the petitioner did not include in its response to the RFE. The subsection reads:

- **Consultants and Staffing Agencies:** If the petitioner is, in any way, engaged in the business of consulting, employment staffing, or job placement that contracts short-term employment for workers who are traditionally self-employed, submit evidence that a specialty occupation exists for the beneficiary.

No matter whether [the beneficiary] will be working within the employment contractor's operation on projects for the client or whether [the beneficiary] will work at the end-client's place of business – USCIS must examine the ultimate employment of the alien, and determine the whether the position qualifies as a specialty occupation. Please clarify the petitioner's employer-employee relationship with [the beneficiary] and, if not already provided, submit the following evidence:

- provide contractual agreements, statements of work, work orders, service agreements, or letters from authorized officials of the ultimate end-client companies where the work will

actually be performed, that lists [the beneficiary], a detailed description of the duties that the alien will perform, the qualifications that are required to perform the job duties, salaries or wages paid, hours worked, benefits, a brief description of who will supervise the beneficiary and their duties, or any other related evidence.

NOTE: Providing evidence of work to be performed for other consultants or employment agencies that provide consulting or employment services to other companies may not be sufficient. The evidence must show specialty occupation work with the actual client-company where the work will ultimately be performed.

In response to the above noted RFE section, the petitioner submitted copies of the following documents executed by the petitioner and TEKsystems, Inc.: (a) a Secondary Supplier Service Agreement (SSSA), dated December 5, 2006; (2) a Non-Disclosure Agreement, dated December 1, 2006; and (3) an Addendum to Sub-Vendor Agreement (“for IT work provided to Cingular”), dated December 5, 2006. The section of the petitioner’s letter of response to the RFE introduced these documents as follows:

Consultants and Staffing Agencies: [The petitioner] is in a contractual agreement with TEKsystems Inc. to offer consulting services in the area of Quality Assurance.

Please find attached a copy of the contractual agreement with TEKsystems Inc. which details the terms and conditions.

Noteworthy is the fact that the TEKsystems documents submitted in response to the first RFE indicate that this firm’s principal place of business is in Hanover, Maryland, a location different than the Georgia work locations specified for the beneficiary in the Form I-129 and the LCA. In response to the first RFE’s section requesting clarification of the beneficiary’s workplace, the petitioner’s letter of response states:

Workplace Clarification: The beneficiary will work at the Office of Cingular. The Address is 5565 Glenridge Connector, Atlanta, GA – 30342.

The employee will work 40 hours a week from 9am to 5pm. [The petitioner] is in a contractual agreement with TEKsystems, Inc. to offer consulting services in the areas of Quality Assurance.

Preliminary Findings

Based upon its review of the entire record of proceedings, the AAO will now enter several evidentiary findings that impact upon both issues on appeal.

With regard to the Cingular Wireless letter, which was not submitted prior to the appeal, the AAO finds: (1) that U.S. Citizenship and Immigration Services (USCIS) regulations preclude

consideration of this letter as evidence in support of the petition, because it is within the scope of evidence requested by the first RFE but was not included in the response to that RFE; and (2) that the letter would have no probative weight, even if it had been submitted as part of the petitioner's response to the RFE.

The Cingular Wireless letter falls within the scope of evidence sought by the first RFE's Consultants and Staffing Agencies section quoted earlier in this decision.² Because it was not provided in the petitioner's response to that RFE, it will not now be considered. The regulation at 8 C.F.R. § 214.2(h)(9) states that the director shall consider "all the evidence submitted and such other evidence as he or she independently require to assist his or her adjudication." 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)(1), (8) and (12). The 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).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.*

The Cingular Wireless letter would have no probative value even if it were a proper matter for consideration on appeal. The document is at most a request from Cingular Wireless for the beneficiary's services. It is not supported by any documentation showing that the letter actually resulted in the assignment of the beneficiary for any part of the employment period specified in the petition. In this regard, the AAO finds that the evidence does not establish that the Cingular Wireless letter is related to the petitioner/TEKsystems SSSA which the petitioner asserts as proof of

² The pertinent part of this RFE section is:

- provide contractual agreements, statements of work, work orders, service agreements, or letters from authorized officials of the ultimate end-client companies where the work will actually be performed, that lists [the beneficiary], a detailed description of the duties that the alien will perform, the qualifications that are required to perform the job duties, salaries or wages paid, hours worked, benefits, a brief description of who will supervise the beneficiary and their duties, and any other related evidence.

NOTE: Providing evidence of work to be performed for other consultants or employment agencies that provide consulting or employment services to other companies may not be sufficient. The evidence must show specialty occupation work with the actual client-company where the work will ultimately be performed.

the beneficiary's assignment to the petitioner. The AAO bases this conclusion on the fact that, while the petitioner submitted Exhibit B of the SSSA (which names the beneficiary and specifies the billing rate for his work), the petitioner failed to submit Exhibit A, which, by the terms at Clause 1 and 2 of the Agreement, defines the work to which the petitioner agrees to assign people. Absent this part of the Agreement, the AAO cannot determine that the work to which it refers is the same as described in the Cingular Wireless letter.

Next, the copy of the SSSA submitted into has no probative value. Without Exhibit A's description of the work to be performed under the SSSA, the AAO has no reasonable basis to accept that the work that is the subject of the SSSA relates to the position proffered in this petition.

The AAO further finds that the record fails to establish a specific period for the performance of the Cingular Wireless project. None of the contractual documents submitted into the record specifies a period certain for the beneficiary's services. The petitioner submits the SSSA as the document establishing that the beneficiary will be assigned to specialty occupation work. However, the SSSA nowhere specifies the duration of any assignment to be made pursuant to it. The AAO reiterates that the Cingular Wireless letter is not properly before the AAO and, therefore, will not be considered as evidence towards satisfying any requirement for approval of this petition. However, the AAO notes that it, too, cites no period certain for the beneficiary's services: it only states that Cingular Wireless needs the beneficiary "beginning 12/11/2006."

The AAO will now address the grounds of the director's decision in the order in which she discussed them.

THE ISSUE OF THE PETITIONER'S QUALIFICATION TO FILE AN H-1B PETITION

The director found that the petitioner is not a computer programming or software company, but rather a contractor that subcontracts workers to other companies that need computer programming services. The director observed that the petitioner claims that the beneficiary would be assigned as a subcontractor to Cingular Wireless, pursuant to a TEKsystems contract with the petitioner. The director determined that, by failing to submit a copy of the TEKsystems contract with Cingular Wireless, the petitioner failed to show "who has actual control over the beneficiary's work or duties." The director therefore concluded that the petitioner did not establish that it met the definition of U.S. employer or agent.

On application of the analytical framework discussed below, the AAO finds that the director was correct in denying the petition for failure to establish that the petitioner qualifies as an intending U.S. employer or agent in accordance with section 101(a)(15)(H)(i)(b) of the Act and the implementing regulation at 8C.F.R. § 214.2(h)(4)(ii). The AAO reaches this conclusion because the record does not establish the petitioner as the party controlling the manner and means of whatever work the beneficiary would perform.

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 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."³ 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)).⁴

³ 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.

⁴ 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

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.*

'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).

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."

On appeal, the petitioner asserts that it has the power to hire, fire, pay, and discipline the beneficiary. The petitioner also asserts that it controls the beneficiary's work by reviewing it the client site, reporting on the completion of his daily task, discussing project issues and defects, planning his assignments day-by-day, reviewing the client's requirements, and discussing the progress of the project with the beneficiary with him and the client. The AAO accords no weight to this contention, in that it is not supported by documentation in the record. 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)).

The AAO finds that it is not possible to determine from the record the true extent of the petitioner's control over the work of the beneficiary. The AAO draws this conclusion based upon: (1) the absence of a critical document referenced in the SSSA, namely the Primary Supplier's Agreement with Customer (PSAC) between TEKsystems and Cingular Wireless; and (2) the content of the SSSA itself.

The PSAC precedes, and generated the need for, the SSSA by which TEXsystems could secure workers for Cingular Wireless. Clause 17 of the SSSA incorporates into the SSSA "terms,

conditions, rules and procedures” of the PSAC. However, the petitioner did not provide a copy of the PSAC.

The record’s only documentary evidence regarding any contractual relationship between the petitioner and the claimed end-client, Cingular Wireless, is the aforementioned SSSA. It identifies Cingular Wireless as the TEKsystems client for whom the petitioner agrees to assign the beneficiary. As noted earlier in this decision, the petitioner failed to submit the SSSA’s Exhibit A, which defines the particular work to be performed. In the absence of that part of the SSSA, the AAO cannot ascertain that this contract is relevant to the petition at hand.

Further, even if the petitioner had established that the SSSA relates to the particular position proffered in this petition, the record contains no documentary evidence to support its assertion that it would exert control over the beneficiary’s work for Cingular Wireless. There are no contracts or other documents properly before the AAO that support the petitioner’s assertions about the nature of its involvement in work that the beneficiary would perform for Cingular Wireless.

The AAO notes that clause 2 (Services) of the SSSA states the following obligations of the petitioner towards persons it assigns to Cingular Wireless: maintaining personnel and pay records; computing wages and withholding appropriate taxes; remitting tax withholdings; making employer contributions and payments legally required of employers for their employees; providing legally required insurance coverage; and ensuring that they are properly authorized to work in the United States. However, these terms just indicate the petitioner’s assumption of administrative accountability to governmental agencies for proper pay and employment practices. They do not indicate the degree of control, if any, that the petitioner would have over the beneficiary’s performance of specific work for the end-client. Clause 2 states that the petitioner will “recruit, interview, select, and hire” persons for assignment to Cingular Wireless and that petitioner retains the right “to hire, reassign, and/or terminate its own employees.” However, neither these nor any other terms of the SSSA indicate that the petitioner is to determine the scope of assigned personnel’s work at Cingular Wireless, directly supervise them during their assignment, or otherwise intervene to the extent claimed by the petitioner. Further, there is no basis in the record to determine the terms and conditions which the PSAC imposes upon the petitioner. 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.

To qualify as a United States employer, all three criteria at 8 C.F.R. § 214.2(h)(4)(ii) must be met. While the petitioner’s letter of support indicates its engagement of the beneficiary to work in the United States, the petitioner does not establish the nature and relative degrees of control that would be exercised by various parties responsible for providing the work that the beneficiary would perform.

The AAO further notes that neither counsel nor the petitioner addresses the director’s determination that the evidence of record does not establish the petitioner as filing as an agent. As the director’s determination on the agency issue is not contested on appeal, the petitioner concedes the correctness

of the director's decision that the petitioner does not qualify as an agent under 8 C.F.R. § 214.2(h)(2). Therefore, there is no basis for the AAO to disturb the director's determination that the petitioner has not established that it qualified to file the petition because it did so as an agent. Accordingly, this issue will not be further discussed.

THE LCA ISSUE

The AAO finds that the director was correct to deny the petition for failure to provide an LCA for the intended area of employment.

The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) stipulates the following:

Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(1) states that, when filing an H-1B petition, the petitioner must submit with the petition “[a] certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary.” Thus, in order for a petition to be approvable, the LCA must have been certified before the H-1B petition was filed. The submission of a certified LCA certified subsequent to the filing of the petition satisfies neither 8 C.F.R. § 214.2(h)(4)(i)(B)(1) nor 8 C.F.R. § 214.2(h)(4)(iii)(B)(1). USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1).

While the Department of Labor (DOL) is the agency that certifies LCA applications before they are submitted to USCIS, the DOL regulations note that it is within the discretion of the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) to determine whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part:

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification. . . .*

(Italics added.)

The LCA submitted with this petition is for one work location only, namely, Atlanta, Georgia. In this particular case, the AAO finds that the record of proceeding fails to establish any systems

analyst work in Atlanta, Georgia for the beneficiary for any time during the period of employment specified in the petition. As discussed earlier in this decision, because the record's copy of the SSSA lacks the portion that describes the work to be performed pursuant to the SSSA, the SSSA's relevance to this petition has not been established. Thus, the SSSA has no value towards establishing the validity of the LCA for this petition. Further, there is no other documentation of record establishing where, if anywhere, and when, if ever, there would be systems analyst work for the beneficiary during the period certified in the LCA. Accordingly, it has not been established that the LCA filed with this petition relates to any real period of definite employment of the type for which the LCA was certified, or to the place for which such employment was certified. *Matter of Soffici*, 22 I&N Dec. at 165. As the record does not document that the LCA submitted with the petition is valid for locations where the beneficiary would perform his services, the director's decision to deny the petition on the LCA issue was correct and shall not be disturbed.

ADDITIONAL GROUNDS FOR DENYING THE PETITION

Beyond the decision of the director, the AAO finds two additional, independent grounds for denying the petition, namely, the petitioner's failures to establish: (1) that the proffered position is a specialty occupation; and (2) that the beneficiary is qualified to serve in the type of specialty occupation position asserted in the petition, namely, a systems analyst position requiring a bachelor's degree, or the equivalent, in a specific specialty closely related to that position. For these reasons also, the petition must be denied.

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

The petitioner states that it requires the beneficiary to work as a Systems Analyst to participate in several application development projects that use generally accepted application development practices. The petitioner states that its employees make use of the following tools and systems depending on the client or project: Visual Basic, Sybase, SQL Server, Oracle, Visual C++, Borland

C++, Java, E-Com applications, Win 2000, and UNIX. In the documents that we are able to consider from the record, the petitioner does not define the duties the beneficiary will perform as a Systems Analyst in the projects to which it intends to assign him. However, according to the U.S. Department of Labor's *Occupational Outlook Handbook*, employers usually prefer a bachelor's degree, but it is not a requirement. Therefore, without evidence to the contrary that the AAO can consider on the record, the petitioner has not demonstrated that the position of Systems Analyst offered to the beneficiary qualifies as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A).

In implementing 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C) states that an alien must meet one of the following criteria in order to qualify to perform services in a specialty occupation:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The record contains no evidence of the degree or licensure factors specified in the first three criteria of 8 C.F.R. § 214.2(h)(4)(iii)(C), above. Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), equating the beneficiary's credentials to a United States baccalaureate or higher degree under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) would require one or more 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;⁵
- (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;
- (5) A determination by the Service that [a] 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 [b] that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience. . .

The petitioner has submitted no evidence regarding the first second, and fourth criteria of 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), above.

The petitioner relies upon an evaluation of education and experience, submitted by Worldwide Education Evaluators, Incorporated (WEEI). The WEEI evaluation partly falls under the third criterion, that is, to the extent that it opines on the beneficiary's foreign education, in its capacity as a credentials evaluation service specializing in foreign-educational-credentials evaluations. Accordingly, the AAO accepts the WEEI opinion that the beneficiary's foreign education is equivalent to two years of study in Computer Science at a U.S. technical college.

However, the AAO accords no weight to the WEEI evaluator's opinion about the educational equivalency of the beneficiary's training and work experience. As evident at 8 C.F.R. § 214.2(h)(4)(iii)(D)(3), USCIS recognizes educational evaluation services, such as WEEI, as competent to testify only in the area of the U.S. educational equivalency of a beneficiary's foreign formal education, and not on the educational equivalency of training and/or work experience. Therefore, the WEEI opinion about the educational equivalency of the beneficiary's training and experience carries no weight in these proceedings. USCIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988). Consequently, the WEEI Evaluation Summary establishes no more than that the beneficiary holds the equivalent of two years of study in Computer Science at a U.S. technical college.

Next, according to its express terms, to satisfy the beneficiary qualification criterion at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), a petitioner must demonstrate three years of specialized training and/or work experience for each year of college-level training the alien lacks. This provision allows

⁵ The petitioner should note that, in accordance with this provision, USCIS accepts a credentials evaluation service's evaluation of *education only*, not experience.

crediting only training and/or work experience that the petitioner establishes as “specialized” according to the following standards:

[I]t must be clearly demonstrated [1] that the alien’s training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; [2] that the alien’s experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and [3] that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation⁶;
- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

The evidence of record regarding the beneficiary’s training and work experience does not meet the above standards and, therefore, has no relevance to a USCIS determination on this beneficiary’s qualification to serve in a specialty occupation.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff’d*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

⁶ *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority’s opinion must state: (1) the writer’s qualifications as an expert; (2) the writer’s experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. 8 C.F.R. § 214.2(h)(4)(ii).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed, and the petition is denied.