

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

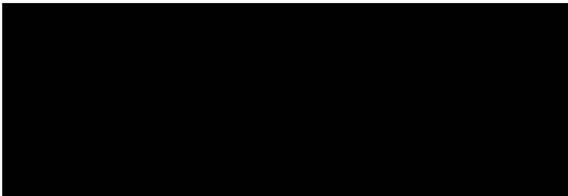
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529



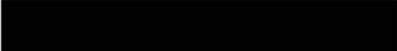
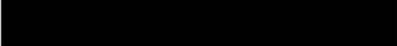
**U.S. Citizenship
and Immigration
Services**

PUBLIC COPY

D2



FILE: WAC 08 096 51220 Office: CALIFORNIA SERVICE CENTER Date: **SEP 15 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)

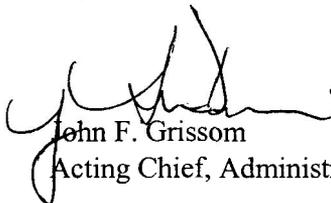
ON BEHALF OF PETITIONER:

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.

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner states that it engages in software consulting, training, and development, that it was established in 1998, employs 180 persons, has a gross annual income of \$28,000,000, and has a net annual income of \$2,500,000. It seeks to extend the employment of the beneficiary as a programmer analyst from May 26, 2008 to May 25, 2011. 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 October 30, 2008, the director denied the petition, determining that the petitioner failed to establish that: (1) it is in compliance with the terms and conditions of employment; (2) it meets the regulatory definition of an intending United States employer at 8 C.F.R. § 214.2(h)(4)(ii); (3) it meets the definition of “agent” at 8 C.F.R. § 214.2(h)(2)(i)(F); (4) it submitted a valid labor condition application (LCA) for all locations; or (5) the proffered position is a specialty occupation.

On appeal, the petitioner submits a statement in support of the Form-I-290B, and contends that the director’s decision is erroneous on each of the issues discussed.

The record includes: (1) the Form I-129 and supporting documentation filed with United States Citizenship and Immigration Services (USCIS) on February 15, 2008; (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 and the petitioner’s brief 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 its January 31, 2008 letter in support of the petition that it is in the business of “designing and developing software solutions for a wide range of commercial and scientific applications.” It further stated that its mission was “to help our clients succeed in the global market place by exceeding their expectations and delivering value in everything we do.” Regarding the beneficiary, the petitioner stated that he would be employed as a programmer analyst with an annual salary of \$75,000. The petitioner submitted an offer of employment dated January 31, 2008 offering the beneficiary the position of programmer analyst with an annual salary of \$75,000, health insurance, and legal fees to obtain H-1B classification. The initial record also included the petitioner’s approval notice for the beneficiary’s H-1B classification valid from November 14, 2005 to May 25, 2008. The initial record further included a Form ETA 9035E, Labor Condition Application, certified by the Department of Labor on January 30, 2008 for a programmer analyst position in Arlington Heights, Illinois with a prevailing annual wage of \$43,368 and in Hauppauge, New York with a prevailing annual wage of \$45,698 and the annual rate of pay for the intended beneficiary at \$48,000.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on April 25, 2008. In the request, among other things, the director: asked the

petitioner to clarify the petitioner's employer-employee relationship with the beneficiary; requested evidence that a specialty occupation exists for the beneficiary; requested copies of signed contracts between the petitioner and the beneficiary; requested a complete itinerary of services or engagements that specifies the dates of each service or engagement, 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; requested copies of signed contractual agreements, statements of work, work orders, service agreements, and letters between the petitioner and the authorized officials of the ultimate end-client companies where the work will actually be performed that specifically lists the beneficiary by name on the contracts and provides a detailed description of the duties the beneficiary will perform; and requested copies of its federal tax returns and its state and federal quarterly wage reports.

In a response dated July 10, 2008 the petitioner addressed the director's queries. The petitioner noted that its services could be "broadly classified into two segments: One, development of software for clients' applications at petitioner's main office at [REDACTED] IL 60005; and second, if requested by the client, providing services to clients' worksites." The petitioner emphasized: "that the petitioner is an agent performing the function of the employer and it is the actual employer and controls the beneficiary's work/services." The petitioner stated that the beneficiary was initially engaged in in-house software development at the petitioner's main office in Arlington Heights, Illinois, but that due to a change in the business scenario¹ and needs of the client it was determined that the beneficiary would work from the client-site, Motorola, Inc., (Motorola) through the petitioner's subcontractor, Smart Solutions, Inc., (Smart Solutions).

In support of its assertion that it is an agent performing the function of the employer and has the absolute right to control the beneficiary's work/services, the petitioner provided a copy of an employment agreement between the petitioner and the beneficiary dated January 31, 2008 which provided an overview of the beneficiary's duties as a programmer analyst and listed the beneficiary's salary. The petitioner also submitted a July 16, 2008 letter reiterating that it would retain all control over the beneficiary and that it is the intent of the petitioner and the beneficiary that the employment would be at will employment for three years.

The petitioner also submitted a copy of a December 31, 2007 contract with Smart Solutions. The Smart Solutions agreement includes the following clauses: that Smart Solutions may at any time with no prior notice terminate the assignment of any assigned employee; that it may request revisions to any work order which the petitioner may accept or reject; and that each assigned employee is considered an independent contractor and not an employee of Smart Solutions. A

¹ The petitioner uses the same premise - that a change in business scenario requires the petitioner to relocate other beneficiaries- in other petitions for H-1B employment. For example, receipt numbers WAC 08 072 50323, WAC 08 096 51260, WAC 08 079 50553, and WAC 08 090 50923. Rather than a change in business scenario, it appears the petitioner's standard practice is to seek to hire H-1B individuals whether specific work exists or not and then when a contract is executed requiring the beneficiaries' services, move the beneficiary to the location of the contracted duties to perform duties for a third party company.

statement of work is attached to the Smart Solutions agreement identifying the beneficiary as the contractor name, indicating the location/customer would be Motorola in Holtsville, New York, the start date would be January 1, 2008 for a period of "612 months with Option to Extend," and the scope/description of work is "SAP FI/CO Consultant." The record also contains a May 6, 2008 letter on the letterhead of Motorola, wherein the letter-writer indicates that the beneficiary is currently working as a programmer/analyst with Motorola and the proposed job duties include:

- Planning, Developing, Testing, Documenting and Supporting Business and Technical applications.
- Prioritize Maintenance, Break-Fixes and Enhancement tasks with business and coordinate with team to deliver the same.
- Evaluating user requests for new and modified programs.
- Consulting with users to identify business process and clarify customized program objectives to perform enhancement, diagnosis and bug fixing.
- Analyzing, Reviewing and Performing System configuration to incorporate business requirements/scenarios.

The petitioner also submitted a document dated July 16, 2008 titled "itinerary" that showed that the beneficiary would perform duties at the petitioner's Arlington Heights, Illinois location 10 percent of the time and at Motorola in Holtsville, New York, 90 percent of the time from January 1, 2008 to May 25, 2011. The petitioner provided a description of the beneficiary's proposed duties for each of the above locations. The petitioner reiterated in its July 16, 2008 letter that the client has the contractual relationship with the petitioner, not the beneficiary.

The petitioner also submitted documentation in the form of corporate tax returns, quarterly wage reports, W-2 forms, and a list of other H-1B employees in response to the RFE.

On October 30, 2008, the director denied the petition. The director found that the petitioner is a contractor that subcontracts workers with a variety of computer skills to other companies who need computer programming services. The director found that the petitioner filed an extraordinarily high number of petitions in relation to the number of employees it claimed on its petition, that it appeared that few of the employees who were granted H-1B status actually worked for the petitioner pursuant to the originally stated terms of employment, that the quarterly wage reports for 2006 and 2007 showed that many of the petitioner's H-1B employees had not been compensated at the rates of pay which were originally stated in the Form I-129 petitions and the corresponding LCAs. The director noted several inconsistencies and determined that the evidence and the petitioner's unusual pattern of H-1B petition filings and conflicting statements regarding wages paid to beneficiaries raised legitimate concerns regarding the petitioner's compliance with the terms and conditions of employment as shown on the Form I-129.

Preliminarily, the AAO will review the director's comments regarding the petitioner's failure to comply with the terms and conditions of employment shown on the Form I-129. The director noted that the proposed salary for the beneficiary, as claimed on the LCA is \$48,000 annually which contradicts the \$75,000 annual salary listed in the petitioner's January 31, 2008 job offer letter and

the January 31, 2008 employment letter signed by the beneficiary. On appeal, the petitioner acknowledged its mistake in listing the beneficiary's salary on the LCA at \$48,000 rather than the correct salary of \$75,000. The petitioner notes, however, that it is only obligated to pay the salary listed on the LCA and its payment to the beneficiary has exceeded the LCA rate of pay. The AAO notes the inconsistency between the job offer and the LCA but does not find the petitioner's error demonstrates its non-compliance with the terms and conditions of employment. It is not prohibited for a petitioner to increase a beneficiary's rate of pay or proffered salary after the filing date of the LCA or even after the filing of the petition itself. It is the lowering of the proffered salary, especially below that of the approved prevailing wage, which would cause concern and possibly lead to a finding of non-compliance. The AAO does not find the petitioner's error demonstrates its non-compliance with the terms and conditions of employment, but does find that listing a lower rate of pay on the LCA than that offered suggests that an actual position with the beneficiary's requested rate of pay was not in place when the petition was filed and the LCA certified. Nevertheless, the director's comment regarding the perceived inconsistent salary is withdrawn.

Also on appeal, the petitioner explains that it files a high number of H-1B petitions because of the high competition among companies in the IT sector looking for qualified personnel. The petitioner notes that USCIS did not provide examples of the petitioner's H-1B beneficiaries that had not been compensated according to certified LCAs and Form I-129 petitions. The petitioner acknowledges, generally, that some discrepancies in compensation may arise because a beneficiary takes unpaid leave for medical reasons or extended home visits.

The AAO notes that voluminous documentation pertaining to the petitioner's H-1B beneficiaries was submitted into the record and acknowledges that absent full details regarding the circumstances surrounding the employment of each H-1B employee 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 pertinent LCA. That being said, the AAO agrees that the number of petitions filed by this petitioner and its pattern of changing the beneficiaries' location after filing the petition raises concerns regarding the legitimacy of the H-1B petitions it files. The AAO also finds an inherent inconsistency in the petitioner's response to the RFE wherein it indicated that the beneficiary first worked in its office in-house and Motorola's May 6, 2008 letter indicating that the beneficiary was currently working at its location which is supported by the beneficiary's pay stubs beginning in November 2007. It is this inconsistency, as well as the failure to produce other information as noted later in this decision, that casts doubt on the legitimacy of the petitioner's business. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). 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 finds that the director's concerns are reasonably justified; thus, the AAO will not disturb the director's decision with regard to this issue.²

² 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 AAO now turns to the director's determination that the petition could not be approved based on the four other grounds set out in the decision. As noted above, the director found that the petitioner is a contractor that subcontracts workers with a variety of computer skills to other companies who need computer programming services. The director determined that the petitioner had not provided a statement of work between the petitioner and any of the consulting firms that further contract the beneficiary's services, had not provided a complete itinerary, and had not provided information demonstrating that it required the beneficiary's services to complete in-house projects. The director concluded that, without evidence of contracts, the petitioner had not established that it is the beneficiary's employer and that it met the definition of United States employer or agent. Moreover, the director determined that the lack of documentation pertaining to an actual work location where work existed for the beneficiary to perform rendered the LCA invalid. Finally, the director determined that it was impossible to determine that the beneficiary would be employed in a specialty occupation based on the lack of contracts detailing the beneficiary's ultimate duties. The AAO affirms the director's conclusions on these issues and finds that for these reasons the petition in this matter is not approvable.

The AAO first addresses the issue in this matter of whether the petitioner established that it met 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:

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.

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

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

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

Although "United States employer" is defined in the regulations, it is noted that "employee," "employed," "employment," and "employer-employee relationship" are not defined for purposes of the H-1B visa classification even though these terms are used repeatedly in both the Act and the regulations, including within the definition of "United States employer" at 8 C.F.R. § 214.2(h)(4)(ii). Section 101(a)(15)(H)(i)(b) of the Act indicates that an alien coming to the United States to perform services in a specialty occupation will have an "intending employer" who will file a labor condition application with the Secretary of Labor pursuant to section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). The intending employer is described as offering full-time or part-time "employment" to the H-1B "employee." Sections 212(n)(1)(A)(i) and 212(n)(2)(C)(vii) of the Act, 8 U.S.C. §§ 1182(n)(1)(A)(i) and 1182(n)(2)(C)(vii). Further, the regulations indicate that "United States employers" must file Form I-129 in order to classify aliens as H-1B temporary "employees." 8 C.F.R. §§ 214.2(h)(1) and 214.2(h)(2)(i)(A). Finally, the definition of "United States employer" indicates in its second prong that the petitioner must have an "employer-employee relationship" with the "employees under this part," i.e., the H-1B beneficiary, and that this relationship be evidenced by the employer's ability to "hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer"). Accordingly, neither the legacy Immigration and Naturalization Service (INS) nor U.S. Citizenship and Immigration Services (USCIS) has defined the terms "employee," "employed," "employment," or "employer-employee relationship" by regulation for purposes of the H-1B visa classification, even though the law describes H-1B beneficiaries as being "employees" who must have an "employer-employee relationship" with a "United States employer."³ Therefore, for purposes of the H-1B visa classification, these terms are undefined.

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

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

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 ‘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 similar 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*

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,

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 of having a tax identification number and to employ persons 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).

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.”

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 petitioner’s job offer dated January 31, 2008 indicates its engagement of the beneficiary to work in the United States, this employment letter merely outlines the beneficiary’s salary and benefits and provides an overview but no comprehensive details regarding the nature of the specific job offered or its location.

In response to the director’s RFE and again on appeal, the petitioner asserts that it is an agent performing the functions of an employer. The petitioner added a copy of an employment agreement between the petitioner and the beneficiary dated January 31, 2008 which indicates that the beneficiary’s duties as a programmer analyst include: “Programming Designing, Planning, Consulting, Testing, Coding, Analysis, Development and new documents preparation etc.; and “other tasks suitable for Programmer Analyst and to which [the petitioner] may assign to you.” The contract also includes the statement that “[the petitioner] will provide you with task-specific instructions for each task assigned to you.” Although this document was signed by the beneficiary and is dated prior to the date the petition was filed, the petitioner did not initially submit this document. The AAO questions the legitimacy of a material document dated at the time the petition was filed but submitted only in response to the director’s RFE. The AAO observes that a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Even if considering the employment agreement legitimate, the agreement does not establish the employer-employee relationship between the petitioner and the beneficiary.

The petitioner’s itinerary for the beneficiary showed that the beneficiary would perform generally described duties at the petitioner’s Arlington Heights, Illinois location 10 percent of the time and provided a description of the duties the beneficiary would provide for Motorola in Holtsville, New York, 90 percent of the time from January 1, 2008 to May 25, 2011. The petitioner reiterated in its July 16, 2008 letter that the client has the contractual relationship with the petitioner, not the beneficiary. As referenced above, the petitioner provided a copy of its December 31, 2007 contract

with Smart Solutions and a statement of work indicating the scope/description of work is “SAP FI/CO Consultant,” and a May 5, 2008 letter indicating that the beneficiary was currently working as a programmer analyst but did not indicate the length of time the beneficiary would be working at that location.

The AAO finds that the above documentation, even when reviewed in totality, does not provide sufficient details regarding the specifics of the job offered or the location(s) where the services will be performed. Although the petitioner provided more detail regarding the duties the beneficiary would perform at its offices in its response to the director’s RFE, the information is generic; it is not related to any specific project. The AAO is unable to discern from the record, the nature of the beneficiary’s purported duties while ostensibly located at the petitioner’s offices. The record does not include information regarding specific projects, tasks, or other information regarding what the beneficiary will be working on. The record does not include any substantive evidence that the petitioner’s regular business involves “analysis, design, programming and implementation of application systems.” 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 does not find any information in the record that demonstrates that the beneficiary will work in-house for the petitioner for the ten percent of the time listed on the purported “itinerary.”

The petitioner’s December 31, 2007 contract with Smart Solutions, although identifying the beneficiary by name on a statement of work, does not include a description of the beneficiary’s proposed duties, but only indicates that the beneficiary will be working for yet another company, Motorola as a SAP FI/CO consultant. The AAO notes specifically that the Smart Solutions contract includes clauses that indicate it has control over the beneficiary’s assignment in that it may terminate the assignment without notice and that it may also revise the work orders. These clauses as they relate to the beneficiary diminish the amount of claimed control the petitioner exercises over the beneficiary and the beneficiary’s work product. In addition, upon review of the May 6, 2008 letter signed on behalf of Motorola, the AAO finds that it provides a generic description of services to be performed by the beneficiary. The record does not include a contract between Smart Solutions and Motorola and Motorola’s letter does not identify a specific project that requires the beneficiary’s services. Not only does the Motorola letter fail to suffice as a contractual agreement to use the beneficiary’s services, but it also does not describe the beneficiary’s actual duties, and it is dated subsequent to the date the petition was filed on February 15, 2008. Despite the director’s specific requests in the RFE dated April 25, 2008 that the petitioner provide contracts between the petitioner and its end clients, the petitioner did not fully respond to the director’s request. The regulations state that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Merely claiming in its letters in response to the director's RFE and on appeal that the petitioner would be the actual employer of the beneficiary and have the absolute right to control the beneficiary's work/services is insufficient. The AAO again notes that the Smart Solutions agreement with the petitioner allows a third party to terminate the work to which the beneficiary is assigned; effectively requiring the petitioner to bench the beneficiary until it finds other work which may or may not be specialty occupation work. Moreover, the AAO finds that the current record is without evidence of the actual work to be performed or contracts between the petitioner and the ultimate end user. Similarly, failing to provide evidence of end contracts in effect when the petition was filed that substantiate that the beneficiary would be providing specialty occupation services precludes a finding of eligibility in this matter. Despite the director's specific request for evidence such as contracts or agreements, or other details of projects, the petitioner failed to submit such evidence that relates specifically to the beneficiary and fully defines the proposed work. The record does not substantiate that the petitioner had specific in-house projects for which the beneficiary's services were required, had full control over the beneficiary's work product and assignment, or that any work assigned would be work performed by the worker as part of the employer's regular business.

Upon review of the totality of the evidence in the record and the tests outlined above, 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 evidence does not establish that the petitioner qualifies as an employer, as defined by 8 C.F.R. § 214.2(h)(4)(ii).

When discussing whether the petitioner was an agent, the director stated that the definition of agent at 8 C.F.R. § 214.2(h)(2)(i)(F) provides for two types of agents: (1) "an agent performing the function of an employer"; and (2) "a company in the business as an agent involving multiple employers as the representative of both the employers and the beneficiary." The director found that absent documentation such as work orders or contracts between the ultimate end clients and the beneficiary, the petitioner could not alternatively be considered an agent in this matter. The AAO reiterates that an agent functioning as an employer must establish that it has an employer-employee relationship as described above. The petitioner in this matter failed to substantiate that such a relationship existed. As stated above, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. Furthermore, the AAO notes that an agent functioning as an employer must submit an itinerary. Although the petitioner in this matter submitted a document titled "itinerary," the document did not specify the dates the beneficiary would be employed in the different locations, and thus does not disclose when the beneficiary would be moved from one location to another. In addition, the petitioner does not provide evidence that supports its description of the beneficiary's duties for Motorola or any other companies. The petitioner submits no new evidence on appeal to support a finding that the petitioner is an agent. For this additional reason, the director's decision on this issue will not be disturbed.

The next issue is whether the petitioner submitted a valid LCA for all work locations, as required by 8 C.F.R. § 214.2(h)(2)(i)(B). Upon review, the AAO finds that the January 31, 2008 letter appended to the petition indicates that the petitioner has offices throughout the United States and the

petitioner's response to the director's RFE confirms that the petitioner outsources H-1B beneficiaries. Absent end-agreements with the clients for which the services are intended to be performed that are in effect when the petition was filed and an itinerary of definite employment, USCIS is unable to determine the duration and location of work sites to which the beneficiary will be sent during the course of the petitioner's requested employment period. Absent this evidence, the petitioner has not established that the LCA submitted is valid.

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

It should be noted that for purposes of the H-1B adjudication, the issue of *bona fide* employment is viewed within the context of whether the petitioner has offered the beneficiary a position that is 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:

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 at 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)(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 January 31, 2008 letter appended to the petition, the petitioner indicated the beneficiary’s responsibilities would include:

- Developing customer software for enterprise resource planning needs;
- Customizing functional modules on GUI mode like financial accountancy, material management, Human Resources management, sales and distribution and production planning;
- Coding in programming languages that suit the particular front end package;
- Writing algorithms required to develop programs using system analysis and design;
- Preparing flowcharts and entity-relationship models and diagrams to illustrate sequence of steps that program must follow and to describe logical operations;
- Using graphic files and text data from a database and presenting it on web;
- Collecting user requirements and analyzing coding to be done;
- Evaluating an existing system’s software, hardware, business bottlenecks, configuration and networking issues, understanding the client’s requests for enhancements and new business functions;
- Interface programming, debugging and executing of programs;
- Monitoring the database using backup, archive and restoring procedures.

Daily task activity would be as follows:

- | | |
|--|-----|
| • System Analysis | 25% |
| • System Design | 20% |
| • Writing the source code and develop programs | 30% |
| • Unit and System Testing | 15% |
| • Implementation and Documentation | 10% |

The petitioner noted the beneficiary would be employed to work on development of ERP and databases technologies and client/server related web technology projects using particular programs and languages. However, the petitioner did not provide independent documentation to further explain the nature and scope of these duties. Noting that the petitioner, as a software development

company, was engaged in an industry that typically outsourced its personnel to client sites to work on particular projects, the director requested documentation such as end-user contracts that provided a comprehensive description of the beneficiary's proposed duties. Despite the director's specific request for these documents, the petitioner failed to fully comply. The record does not include the scope and nature of work the petitioner's client's client requires from the beneficiary.

As discussed above, the record contains only a copy of a job offer to the beneficiary in letter form, an employment agreement that provides a general statement regarding the beneficiary's proposed duties but no description of the specific project to which the beneficiary would be assigned, and information that the beneficiary would be given task specific instructions at some point for each task assigned. Although the petitioner has provided a letter from Motorola to indicate that the beneficiary will work as a programmer analyst for Motorola, the petitioner has not provided the contractual basis for these duties. Moreover, the duties described by Motorola, as the purported "ultimate end user" of the beneficiary's services, are broadly stated and do not provide a description sufficient to examine for purposes of determining whether it is a specialty occupation. The AAO acknowledges the petitioner's addition of information regarding the beneficiary's duties for Motorola on the submitted itinerary, but the petitioner has not provided evidence that these are the duties the ultimate end user, Motorola, requires. Again, 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 establish that a specific position in the computer field is a specialty occupation, the petitioner must provide evidence of the nature of the employing organization, the particular projects planned, and evidence that the duties described require the theoretical and practical application of a body of highly specialized knowledge attained through a baccalaureate program in a specific discipline. In this matter, the petitioner has failed to provide such evidence. Without evidence of contracts, work orders, in-house projects, or statements of work describing the specific duties the end use company requires the beneficiary to perform, USCIS is unable to discern the nature of the position and whether the position indeed requires the theoretical and practical application of a body of highly specialized knowledge attained through a baccalaureate program. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

In support of this analysis, USCIS routinely cites *Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000), in which an examination of the ultimate employment of the beneficiary was deemed necessary to determine whether the position constitutes a specialty occupation. The petitioner in *Defensor*, Vintage Health Resources (Vintage), was a medical contract service agency that brought foreign nurses into the United States and located jobs for them at hospitals as registered nurses. The court in *Defensor* found that Vintage had "token degree requirements," to "mask the fact that nursing in general is not a specialty occupation." *Id.* at 387.

The court in *Defensor* held that for the purpose of determining whether a proffered position is a specialty occupation, the petitioner acting as an employment contractor is merely a "token employer," while the entity for which the services are to be performed is the "more relevant

employer.” *Id* at 388. The *Defensor* court recognized that evidence of the client companies’ job requirements is critical where the work is to be performed for entities other than the petitioner. The *Defensor* court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary’s services. *Id*.

In this matter, the record demonstrates that the petitioner acts as an employment contractor. The job description provided by the petitioner, as well as various statements from the petitioner both prior to adjudication and on appeal, indicate that the beneficiary will be working on client projects and will be assigned to various clients worksites when contracts are executed. The petitioner has not provided substantive evidence of in-house projects to which the beneficiary would be assigned or the work the beneficiary would perform in-house. The petitioner’s personnel record shows it locates individuals in a number of different states to perform services. The petitioner’s failure to provide evidence of a credible offer of employment and/or work orders or employment contracts between the petitioner and its clients renders it impossible to conclude for whom the beneficiary will ultimately provide services, the duration of those services, and exactly what those services would entail. The AAO, therefore, is unable to analyze whether the beneficiary’s duties at each worksite would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation. Accordingly, the petitioner has not established that the proposed position qualifies as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(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)(1).

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

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