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FILE: WAC 07 146 53080 Office: CALIFORNIA SERVICE CENTER Date: **SEP 16 2009**

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

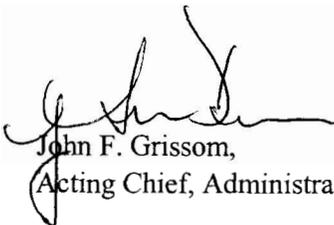
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:  
  
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. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

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 employ the beneficiary as a programmer analyst. 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).

The director denied the petition because 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; (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 and documentation submitted in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

When filing the I-129 petition, the petitioner averred in its March 28, 2007 letter in support of the petition that it was 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, and submitted a letter to the beneficiary dated March 28, 2007 which offered him an annual salary of \$48,000, health benefits and payment of legal fees to obtain H-1B status. The initial record also included a Form ETA 9035E, Labor Condition Application, (LCA) certified by the Department of Labor on March 30, 2007 for a programmer analyst position in Arlington Heights, Illinois with a prevailing wage of \$42,952.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued a request for evidence (RFE) on May 18, 2007 and a second RFE on September 10, 2007. In the requests, the director asked the petitioner to submit evidence demonstrating who the actual employer of the beneficiary would be. The director requested documentation such as contractual agreements or work orders from the actual end-client firm where the beneficiary would work. Additionally, the director noted that if the petitioner was acting as an agent, documentation such as an itinerary and a letter discussing the conditions of the employment from the end-client firms must

be submitted.

In responses dated August 8, 2007 and November 30, 2007, the petitioner addressed the director's queries. The petitioner contended that it was the beneficiary's actual employer, and not an agent, because it would hire, pay, fire, supervise and control the work of the beneficiary. While the petitioner acknowledged that "some assignments to clients' sites would be required," the petitioner noted that the beneficiary would be working at the petitioner's location for the entire validity period. The petitioner submitted its business license, company's brochure, and print-outs from the company's website showing the petitioner's products and services, consultant agreements with major clients, and copies of its federal tax returns for 2004, 2005, and 2006.

On January 11, 2008, the director denied the petition. As a preliminary matter, the AAO will address the director's first basis for denial; namely, that the petitioner is not in compliance with the terms and conditions of employment. Specifically, the director found that the petitioner made inconsistent and contradictory claims regarding wages paid to its H-1B employees and that absent competent objective evidence to establish that United States Citizenship and Immigration Services (USCIS) analysis was incorrect or that the condition of employment by the petitioner had changed, USCIS could not reasonably expect that the petitioner would comply with the terms and conditions of the beneficiary's employment as shown on the Form I-129.

The director noted that the petitioner had filed an extraordinarily high number of petitions in relation to the number of employees it claimed on its petition. The director provided several examples of H-1B beneficiaries and their stated annual wages and the wages actually paid. The director determined that the evidence raised concerns regarding the petitioner's compliance with the terms and conditions as shown on the Form I-129.

Regarding the director's comments concerning the petitioner's failure to comply with the terms and conditions governing H-1B employment, the AAO acknowledges the director's error in referencing the petitioner's "sister" company's, Advansoft Worldwide, Inc., employees when noting the inconsistencies between wages paid to the petitioner's employees and the wages listed in the LCAs and on the Forms I-129 for those employees. The AAO observes that the petitioner in this matter lists its address as [REDACTED], on the Form I-129.<sup>1</sup> Although the director's reference is in error, the AAO notes that the number of petitions filed by this petitioner and by its "sister" company operating out of the same premises makes such an error understandable.

That being said, the AAO also agrees that the number of petitions filed by this petitioner under its various names and another employment identification number raises concerns regarding the legitimacy of the H-1B petitions. Although the record in this matter is insufficient to determine that

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<sup>1</sup> USCIS records reveal that Advansoft Worldwide, Inc. is a petitioner that is located at [REDACTED] in Arlington Heights, Illinois, and that Advansoft Worldwide, Inc.'s lease is signed and witnessed by the same parties as the petitioner's lease and is also for 5,682 square feet of office space at [REDACTED]

the petitioner failed to comply with the terms and conditions of employment of other beneficiaries in other petitions, the AAO observes that the director's concerns are justified.<sup>2</sup> Nevertheless, absent full details regarding the circumstances surrounding the employment of the petitioner's H-1B employees and the petitioner's complete personnel records regarding each of those beneficiaries, the record does not include sufficient evidence to determine whether the petitioner compensated each beneficiary as shown on the LCA; thus the AAO withdraws the director's decision on the issue of non-compliance with the terms and conditions of employment.

The AAO now turns to the director's determination that the petition could not be approved based on the four other grounds delineated in the decision. The director found that the petitioner is a contractor that subcontracts workers with a variety of computer skills to other companies who need computer programming services. The director concluded that, because the petitioner is a contractor, it is required to submit the requested contracts and itinerary, and without this documentation, the petitioner could not establish that it met the definition of United States employer or agent. Moreover, the director determined that the lack of documentation pertaining to the work location of the beneficiary 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 first issue in this matter is whether the petitioner has established that it meets the regulatory definition of an intending United States employer. Section 101(a)(15)(H)(i)(b) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). Specifically, the AAO must determine whether the petitioner has established that it will have "an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii)(2).

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), defines H-1B nonimmigrants as an alien:

(i) who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 1184(i)(1) . . ., who meets the requirements of the occupation specified in section 1184(i)(2) . . ., and with respect to whom the

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<sup>2</sup> While the Department of Labor regulations at 20 C.F.R. § 655.731(c)(7)(ii) may permit the non-payment of wages by an H-1B employer "due to conditions unrelated to employment which take the nonimmigrant away from his/her duties at his/her voluntary request and convenience," this has no bearing on a Department of Homeland Security (DHS) determination regarding an alien's maintenance of status in the United States and a petitioner's compliance with DHS H-1B program requirements. In general, except in situations in which the Family and Medical Leave Act (29 U.S.C. § 2601 et seq.) or the Americans with Disabilities Act (42 U.S.C. § 12101 et seq.) may apply, DHS generally requires that the failure to carry on the specific activities for which the H-1B status was obtained constitutes a failure to maintain status and renders the alien immediately deportable and the employer in non-compliance with the H-1B program requirements.

Secretary of Labor determines . . . that the intending employer has filed with the Secretary an application under 1182(n)(1).

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

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

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

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

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

“employer-employee relationship” with a “United States employer.”<sup>3</sup> 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)).<sup>4</sup>

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<sup>3</sup> 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.

<sup>4</sup> 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

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 (5<sup>th</sup> 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

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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 (2<sup>nd</sup> 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).

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 submits a statement asserting that the petitioner is in fact the employer of the beneficiary and asserts that the director’s conclusion to the contrary was erroneous. No additional evidence is submitted to support this assertion.

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 March 28, 2007 indicates its engagement of the beneficiary to work in the United States, this letter merely outlines the beneficiary’s salary and benefits but provides no details regarding the nature of the job offered or its location. The petitioner did not submit an employment contract or any other document signed by the beneficiary describing the beneficiary’s claimed employment relationship with the petitioner. Therefore, the petitioner has failed to establish that an employer-employee relationship exists. The evidence is insufficient to establish that the petitioner qualifies as an employer, as defined by 8 C.F.R. § 214.2(h)(4)(ii).

Despite the director’s specific requests in the RFEs dated May 18, 2007 and September 10, 2007 that the petitioner provide contracts between the petitioner and the beneficiary, or between the petitioner and its end clients, the petitioner did not fully respond to the director’s request. The regulations state that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See

8 C.F.R. §§ 103.2(b)(8) and (12). Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The minimal information contained in the job offer is not supported by documentary evidence that a valid employment agreement or credible offer of employment existed between the petitioner and the beneficiary. The record does include four consulting agreements: (1) an agreement dated July 11, 2005 between the petitioner and Walgreen Co., a company located in Illinois; (2) an agreement dated November 9, 2005 between the petitioner and MailCode Inc., a company located in Indiana; (3) an agreement dated July 19, 2006 between the petitioner and Atos Origin IT Services, a company located in Pennsylvania; and (4) an agreement dated May 8, 2007 between the petitioner and SAP America, a company located in Pennsylvania. However, these documents shed little light on the beneficiary's proposed position, since they (1) refer specifically to other subcontractors, not the beneficiary; and (2) provide no information regarding the nature of the work to be performed. 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)). Moreover, the petitioner has not substantiated that the beneficiary will work only at the petitioner's site in Arlington Heights, Illinois and not in multiple locations. The petitioner acknowledges that it will send the beneficiary to work on client sites as needed, but fails to provide details regarding the needs and locations of these clients. Although it submitted the consulting agreements referenced above, these documents are not specific to the beneficiary, and cannot suffice as evidence that the petitioner, and not a third party employer, will act as the beneficiary's employer during the entire three-year period. In addition, the locations of the clients included in the contracts are not restricted solely to Arlington Heights, Illinois, where the petitioner is based and which is claimed to be the work location of the beneficiary on the LCA appended to the petition. Instead, the petitioner's clients are located in Indiana and Pennsylvania, as well as in Illinois, thereby suggesting that the beneficiary may in fact be outsourced contrary to the petitioner's claims.

The evidence is insufficient to establish that the petitioner qualifies as an employer, as defined by 8 C.F.R. § 214.2(h)(4)(ii). Merely claiming in its letters in response to the director's RFE and on appeal that the petitioner would exercise complete control over the beneficiary, without evidence to support the claim, is insufficient to establish eligibility in this matter. The evidence of record prior to adjudication did not establish that the petitioner would act as the beneficiary's employer in that it will hire, pay, fire, or otherwise control the work of the beneficiary. Despite the director's specific request for evidence such as employment contracts or agreements, or work orders to corroborate its claim, the petitioner failed to submit such evidence that relates specifically to the beneficiary.

Therefore, based on 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." 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. 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. 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 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). The director specifically noted that the LCA listed the beneficiary’s work location as Arlington Heights, Illinois. In reviewing the petitioner’s supporting documentation, the director concluded that without ultimate end-client agreements, the actual work location(s) for the beneficiary could not be determined. Moreover, the director noted that the petitioner made specific claims that it would outsource the beneficiary to client sites as necessary.

On appeal, the petitioner asserts that it did submit a valid LCA, and that it therefore fully complied with the requirements for a valid LCA at the time of filing.

Upon review, the AAO concurs with the director’s finding. The March 28, 2007 letter indicates that the petitioner’s clients include companies throughout the United States. The letter further claims that client projects are performed either at client sites or at the petitioner’s offices. Absent end-agreements with clients specific to the beneficiary or information regarding specific in-house projects, as well as the petitioner’s acknowledgement that the beneficiary may be assigned to different worksites, 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 final 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 Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii):

*Specialty occupation* means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

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

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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 (5<sup>th</sup> Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), USCIS consistently interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category. To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position’s title. The specific duties of the proffered position, combined with the nature of the petitioning entity’s business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, to determine whether the position qualifies as a specialty occupation. *Defensor v. Meissner*, 201 F. 3d 384.

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

The petitioner’s letter of support dated March 28, 2007 provided the following list of the beneficiary’s duties:

- (1) Developing customer software for enterprise resource planning needs;
- (2) Customizing functional modules on GUI mode like financial accountancy, material management, Human Resources management, sales & distribution and production planning[;]
- (3) Coding in programming languages that suit the particular front end package;
- (4) Writing algorithms required to develop programs using system analysis and design;

- (5) Preparing flowcharts and entity-relationship models and diagrams to illustrate sequence of steps that program must follow and to describe logical operations;
- (6) Using graphic files and text data from a database and presenting it on web;
- (7) Collecting user requirements and analyzing coding to be done;
- (8) Evaluating an existing system's software, hardware, business bottlenecks, configuration and networking issues, understanding the client's requests for enhancements and new business functions;
- (9) Interface programming, debugging and executing of programs;
- (10) Monitoring the database using backup, archive and restoring procedures.

The petitioner broke up the beneficiary's daily tasks 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%

However, no independent documentation to further explain the nature and scope of these duties was submitted. 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 contracts and work orders, documentation that would outline for whom the beneficiary would render services and what his duties would include at each worksite. Despite the director's specific request for these documents, the petitioner failed to fully comply.

As discussed above, the record contains a copy of a job offer to the beneficiary in letter form. However, this document provides no details regarding the nature of the beneficiary's proposed position and accompanying duties. Although four consulting/service agreements are submitted in support of the petition, none of these documents pertain to the beneficiary. Without evidence of contracts, work orders, or statements of work describing the duties the beneficiary would perform and for whom, the petitioner fails to establish that the duties that the beneficiary would perform are those of a specialty occupation. Providing a generic job description that speculates what the beneficiary may or may not do at each worksite is insufficient. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

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

The court in *Defensor* held that for the purpose of determining whether a proffered position is a specialty occupation, the petitioner acting as an employment contractor is merely a “token employer,” while the entity for which the services are to be performed is the “more relevant employer.” *Id.* at 388. The *Defensor* court recognized that evidence of the client companies’ job requirements is critical where the work is to be performed for entities other than the petitioner. The *Defensor* court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary’s services. *Id.* In *Defensor*, the court found that that evidence of the client companies’ job requirements is critical if the work is to be performed for entities other than the petitioner. *Id.*

In this matter, 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. Despite the director’s specific request for documentation to establish the ultimate location(s) of the beneficiary’s employment, the petitioner failed to comply. Moreover, 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 related to the beneficiary renders it impossible to conclude for whom the beneficiary will ultimately provide services, and exactly what those services would entail. The AAO, therefore, cannot analyze whether the beneficiary’s duties at each worksite would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation. Accordingly, the petitioner has not established that the proposed position qualifies as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(A)(iii) or that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(1)(B)(I).

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.

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

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