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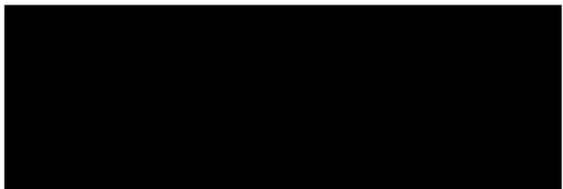


FILE: WAC 08 175 51762 Office: CALIFORNIA SERVICE CENTER Date: **SEP 16 2009**

IN RE: Petitioner:   
Beneficiary: 

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

  
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 development and IT consulting, that it was established in 1998, employs 105 persons, and has an estimated gross annual income of \$10,000,000 and an estimated net annual income of \$100,000 for 2007. It seeks to extend the employment of the beneficiary as a programmer analyst from August 15, 2008 to August 14, 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 November 4, 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 June 5, 2008; (2) the director’s requests for evidence (RFEs); (3) the petitioner’s responses to the director’s RFEs; (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 undated letter appended to 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 \$71,000. The petitioner submitted an April 22, 2008 letter confirming the employment of the beneficiary as a programmer analyst with an annual salary of \$71,000 which is signed by the beneficiary. The initial record also included the petitioner’s approval notice for the beneficiary’s H-1B classification valid from October 1, 2005 to August 14, 2008. The initial record further included a Form ETA 9035E, Labor Condition Application, certified by the Department of Labor on May 29, 2008 for a programmer analyst position in St. Joseph, Michigan with a prevailing wage of \$46,218 and in Arlington Heights, Illinois with a prevailing annual wage of \$70,782 and the annual rate of pay for the intended beneficiary at \$71,000.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued two RFEs; the first RFE is dated June 10, 2008 and the second RFE is dated August 21, 2008. In the requests, 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; requested status of the currently employed H-1B and L-1 employees; requested information regarding the petitioner's premises and its office floor plan; requested a clarification of where the beneficiary would actually work; and requested copies of its federal tax returns and its state and federal quarterly wage reports.

In a response dated August 15, 2008 and a response dated October 21, 2008, the petitioner addressed the director's queries. The petitioner stated: "[c]lients entrust Petitioner with the complete development, implementation and support of mission-critical heavy-duty software solution oriented practices" and that "[i]ts operations model, which efficiently combines onsite and offshore controls, has been well received by its clients." The petitioner indicated that it is an agent performing the function of an employer and thus is the beneficiary's actual employer and "are responsible for all incidents of employment including, hiring, terminations, payment of wages and promotions" and that it "maintain[s] full control over the employment of [the beneficiary]." 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 re-submitted its April 22, 2008 letter confirming the beneficiary's employment, signed by the beneficiary. The petitioner also provided: its August 27, 2003 contract with TEKSYSTEMS, Inc. (Tek Systems) wherein the petitioner agreed to assign its employees to Tek Systems to perform the work described on Exhibit A; and Exhibit A to the Tek Systems agreement identifying the beneficiary as the consultant, indicating the total estimated hours of work at 1,576 (approximately 40 weeks), indicating the primary skill as "SAP Security," and that the customer is Allegisgroup at Whirlpool.

The record also includes an undated letter signed by a professional recruiter at Tek Systems indicating that the beneficiary is a contract resource who had been providing services to Whirlpool on their project "Maytag Integration" and that Tek Systems did not control the beneficiary's work schedule, his promotion/demotion, or his salary. The Tek Systems letter-writer also indicated that the beneficiary would be employed as an SAP Security Analyst and provided an overview of the beneficiary's proposed duties for Whirlpool. The record further includes a letter dated June 12, 2008 signed by ██████████ Whirlpool Global Information Security Support Manager, stating that the beneficiary had been providing services to Whirlpool since April 3, 2006 for ongoing projects and indicating that it anticipated that it would need the beneficiary's services for approximately three more years. ██████████ stated that the beneficiary is not Whirlpool's employee, "[w]e provide the assignments that need to be completed." The record includes a second letter signed by ██████████ that is dated April 22, 2008 wherein ██████████ states: "[t]his assignment is for SAP security configuration

and role assignment” and “[the beneficiary] will be helping to work on the support of our [sic] all our security needs here at Whirlpool.”

The petitioner also provided a document titled “Itinerary of Services” that is dated July 1, 2008. The petitioner indicates: that the duration of the itinerary is from August 15, 2008 to August 14, 2011; that the beneficiary will be working at the petitioner’s offices in Arlington Heights, Illinois 10 percent of the time and will be providing the services of a programmer analyst; that the beneficiary will be working at the Whirlpool offices in St. Joseph, Michigan 90 percent of the time and will be providing the services of an SAP Security Analyst.

In the August 15, 2008 response letter, the petitioner provided a list of steps that it is capable of providing to its clients and an overview of duties the beneficiary would be expected to perform in-house 10 percent of the time and to perform for Whirlpool Corp. (Whirlpool) as an SAP Security Analyst/Administrator 90 percent of the time. The petitioner submitted an undated opinion prepared by [REDACTED], Department of Computer Systems Technology, The New York City College of Technology/CUNY, to establish the proffered position as a specialty occupation. The petitioner also asserted that it is an industry standard to require a baccalaureate degree in a specific field of study for the position of a programmer analyst and provided five Internet job announcements to support its claim. The petitioner referenced the Department of Labor’s *Dictionary of Occupational Titles (DOT)* and the Department of Labor’s *O\*Net Online (O\*NET)* reports regarding computer-related positions, as well as several unpublished decisions issued by the AAO.

The record also includes: a table listing the employment status of the petitioner’s H-1B and L-1 employees; the petitioner’s July 30, 2008 lease agreement and floor plan; the petitioner’s payroll summary; Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statements for 2005 and 2006; IRS Forms 1120, U.S. Corporate Income Tax Return, for 2005 and 2006; quarterly wage reports (IRS Forms 941) for 2005, 2006 and the first quarter of 2007; and website information regarding the petitioner.

On November 4, 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 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, and that it appeared that those H-1B employees still paid by the petitioner worked only on a part-time basis, which is not consistent with the petitioner’s statements regarding wages and hours worked as had been provided by the petitioner to USCIS. The director identified four individuals specifically that the record showed did not receive full-time pay for the time the employment had been requested. The director noted the petitioner’s unusual pattern of H-1B petition filings and conflicting statements regarding wages paid to beneficiaries and determined that the evidence reviewed 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 petitioner explains, on appeal, 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 acknowledges, generally, that some discrepancies in compensation to individuals in H-1B status may arise because a beneficiary takes unpaid leave for medical reasons or for extended home visits. The petitioner notes specifically, in regard to the four individuals referenced by the director, that one individual requested sick leave for five months on two different occasions, one individual only worked for the petitioner for six and one-half months, one individual was on unpaid leave for three months; and another individual was also on unpaid leave and then left the company.

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 the record of intermittent compensation raises concerns regarding the legitimacy of the H-1B petitions the petitioner files. The AAO acknowledges the petitioner's general explanations regarding its perceived failure to comply with the terms and conditions of employment expressed to USCIS as well as the petitioner's explanations regarding the four specific employees. The AAO notes that the petitioner's specific explanations regarding the four employees are not substantiated with independent documentation including information from statements and passports of the pertinent beneficiary. 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)). 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 justified; thus, the AAO will not disturb the director's decision with regard to this issue.<sup>1</sup>

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

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<sup>1</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.

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 the end contract between the petitioner's client Tek Systems and the firm that would ultimately use the beneficiary's services and had not provided a complete itinerary of the beneficiary's services. The director concluded that, without evidence of contracts, the petitioner had not established that it is the beneficiary's employer or 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:

*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>2</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

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<sup>2</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.

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>3</sup>

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<sup>3</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 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 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 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

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 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).

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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).

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. 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 and that it has satisfied the criteria establishing this fact. The petitioner notes that it submitted an employment contract with the beneficiary showing that it guaranteed the wages and other terms of employment and that it submitted an itinerary of the services the beneficiary would be providing. While the petitioner’s job confirmation offer dated April 22, 2008 indicates its engagement of the beneficiary to work in the United States, this employment letter merely notes the beneficiary’s salary and benefits and indicates that the beneficiary’s duties will generally 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 [the beneficiary].” Although the contract also includes the statement that “[the petitioner] will provide you with task-specific instructions for each task assigned to you,” the record lacks the actual task-specific instructions for specific projects.

The AAO observes that the petitioner’s itinerary for the beneficiary provided the generic duties of a programmer analyst and likewise provided an overview of the beneficiary’s proposed duties for its client’s client – Whirlpool. The itinerary did not list the duration of the beneficiary’s proposed employment in Arlington Heights, Illinois and St. Joseph, Michigan but rather noted that the beneficiary would spend 10 percent of his time at the petitioner’s location and 90 percent of his time at its client’s client’s location in St. Joseph, Michigan. The AAO observes that the Exhibit A to the petitioner’s agreement with Tek Systems indicates the duration of the assignment is for approximately 40 weeks, a length of time significantly less than the three years of requested employment. This information conflicts with the subsequent statements of Tek Systems and Whirlpool representatives that Whirlpool has work for the beneficiary for three more years. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Moreover, the record does not contain the necessary information to establish that the petitioner has actual control of the beneficiary’s work product and assignments. The AAO observes that the record does not include an agreement with Whirlpool, the purported end user of the beneficiary’s services.<sup>4</sup> Although both Tek Systems and Whirlpool representatives claim that the beneficiary is

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<sup>4</sup> The AAO acknowledges the petitioner’s statement that it could not provide the contract between Tek Systems and Whirlpool due to confidentiality and business reasons; however, it is this document that must be reviewed to determine the contractual obligations these entities have in relation to the petitioner and the beneficiary.

not their employee, the letter from Whirlpool indicates that it will provide the assignments that the beneficiary will need to complete. The information in the record does not support the petitioner's statement that it is an agent functioning as an employer as the record does not establish that the petitioner will control the beneficiary's work product.

Further, the attachment to the contract between the petitioner and Tek Systems does not provide a description of the work or project the beneficiary will work on or describe any services that the beneficiary will perform at its location. Although Tek Systems, in an undated letter, references the beneficiary's duties as an SAP Security Analyst and a project integrating Maytag and Whirlpool infrastructure, the description of the duties related to the project are necessarily broad, as Tek Systems is not the entity controlling or assigning the beneficiary's work. Again, USCIS is without the end contract with Whirlpool, the claimed ultimate end user of the beneficiary's services, to review the actual duties of the proffered position and to assist in ascertaining the control of the beneficiary's work product and actual assigned projects. 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 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 during the requested employment period. The AAO is unable to discern from the record, the nature of the beneficiary's purported duties for either the petitioner or the ultimate end user company. The record does not include information regarding specific projects, tasks, or other details regarding what the beneficiary will be working on. 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 because it would hire, pay, fire, supervise and otherwise control the beneficiary's work at the petitioner's Arlington Heights and St. Joseph, Michigan location is insufficient. The record is without the underlying evidence of the actual work to be performed or other evidence to support the petitioner's claim that it will control the work to be assigned to the beneficiary. 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. 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. The AAO notes that despite the director's specific request for this evidence, the petitioner failed to submit such evidence that relates specifically to the beneficiary.<sup>5</sup> The record does not substantiate that the petitioner had specific projects for which the beneficiary's services were required, had control over

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<sup>5</sup> 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 beneficiary's work product, or that any work assigned would be work performed by the worker as part of the employer's regular business.

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. 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. 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 noted that the LCA submitted with the petition listed only the beneficiary's work location as Arlington Heights, Illinois and St. Joseph, Michigan. The AAO finds that the petitioner's 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 clients 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. The AAO reiterates that the record does not include an itinerary of definite employment demonstrating that the petitioner had assignments for the beneficiary throughout the 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 (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.

On the Form I-129, the petitioner stated that the proffered position is that of a “Programmer Analyst.” In the petitioner’s undated 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:

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|--|-----|
| • 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’s initial itinerary indicated that the beneficiary will provide these same duties 90 percent of the time at a location in St. Joseph, Michigan. As noted above, in the April 22, 2008 employment letter, the petitioner also indicated that the beneficiary’s duties would generally include: “Programming, Designing, Planning, Consulting, Testing, coding, Analysis, Development and new documents preparation, etc.” and “other tasks suitable for Programmer Analyst. However, such an “all-purpose” description is insufficient to establish a position as a specialty occupation.

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.

In the August 15, 2008 response letter, the petitioner provided the same overview of duties the beneficiary would be expected to perform in-house 10 percent of the time and added duties the beneficiary would be expected to perform for Whirlpool Corp. (Whirlpool) as an SAP Security Analyst/Administrator 90 percent of the time. The petitioner’s second rendition of the itinerary indicated that the beneficiary would work as an SAP Security Analyst 90 percent of the time and would have the following job duties:

1. Work closely with team members, end users and other IT departments to design, implement, support and maintain SAP Security and Security Policies
2. Responsible for Development, Golive and Post Support activities for integrating of Maytag Systems to the Whirlpool SAP System
3. Monitor and Manage Security Access and violations in SAP landscape
4. Responsible for Maytag HR integration, and Retiree Go live
5. Adhering to Whirlpool Security Policy, and responsible for lock's and deletion of inactive users
6. Configuration and Support of SAO Security needs.

The above duties are the same duties described by Tek Systems in an undated letter submitted in response to the director's RFE. Although the petitioner claims that the beneficiary will provide SAP Security Analyst/Administrator duties for Whirlpool, the record does not include statements from Whirlpool detailing those duties. The Whirlpool representative indicates only that the beneficiary will help work on the support of its security needs and that the assignment is for SAP security configuration and role assignment. This information does not provide a comprehensive description of duties sufficient to ascertain that the position may involve specialty occupation duties. The AAO observes that due to the wide range of skills required for many computer positions, there are many paths of entry into such positions including associate degrees, technical certificates, and general fields of study at the baccalaureate level. See the Department of Labor's *Occupational Outlook Handbook* on Computer Specialists.

The AAO has reviewed the five Internet job announcements submitted by the petitioner. Only two of the job announcements indicate that a bachelor's of science degree in a specific discipline is required. The other three indicate that a broad range of degrees may be required or that a bachelor's degree is preferred or does not indicate whether a bachelor's degree is preferred or required. The petitioner's submission of job announcements confirms that there is not an industry standard that requires programmer analysts to possess a baccalaureate degree in a specific discipline; rather it appears that it is the specificity of the duties of a particular position that establishes the educational level criteria.

Likewise, the AAO has reviewed the undated opinion prepared by Associate Professor, Department of Computer Systems Technology, The New York City College of Technology/CUNY, who finds that the proffered position requires "comprehensive, 'full-cycle' engagement across the entire process by which custom software solutions are planned, developed, aligned with client and user business requirements, integrated into client environments, and utilized in order to upgrade the optional capabilities of the client." The record does not include the evidence necessary to support [REDACTED] finding that the beneficiary will perform these broadly-stated duties. There is thus an inadequate factual foundation established to support the opinions. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

Similarly, the AAO does not find the petitioner's reference to *DOT* and *O\*NET* persuasive. The AAO does not consider the *DOT* or its successor *O\*NET* to be a persuasive sources of information as to whether a job requires the attainment of a baccalaureate or higher degree (or its equivalent) in a specific specialty. Both *DOT* and *O\*NET* provide only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. An SVP and Job Zone rating is meant to indicate only the total number of years of vocational preparation required for a particular occupation. They do not describe how those years are to be divided among training, formal education, and experience and it does not specify the particular type of degree, if any, that a position would require.

The AAO also notes the petitioner's reference to unpublished decisions and observes that while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. The AAO further finds that it is the specificity of the descriptions in particular positions, as well as the nature of the end user company of the beneficiary's services that establish whether a computer-related position may be a specialty occupation. The petitioner has furnished no evidence establishing that the facts of this petition are analogous to those in the unpublished decisions. The AAO reiterates that it is the wide range of knowledge, skills, and education that may or may not be required for a particular computer-related position that necessitates the comprehensive description of the duties the beneficiary will be expected to perform.

More importantly than the opinion submitted, the Internet job announcements, the *DOT* and the *O\*NET*, the AAO reiterates that the record in this matter does not include a comprehensive description of the beneficiary's actual duties and the project(s) he will work on for the duration of the requested employment period. 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. Without a meaningful job description, the petitioner may not establish any of the alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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 client 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 will perform. 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 throughout the requested employment period renders it impossible to conclude for whom the beneficiary will ultimately provide 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.