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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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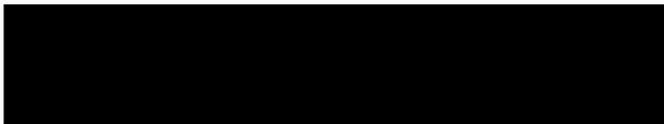


FILE: WAC 07 154 50230 Office: CALIFORNIA SERVICE CENTER Date: SEP 28 2009

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

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

John F. Grissom
Acting Chief, Administrative Appeals Office

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

To employ the beneficiary in what it designates a computer software engineer position, the petitioner filed this nonimmigrant petition seeking to classify the beneficiary as an H-1B nonimmigrant in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b). On the Form I-129, the petitioner describes its type of business as software consulting and development services.

The director denied the petition on three independent grounds, namely, his findings that the petitioner failed to: (1) establish that it is qualified to file an H-1B petition, that is, as either (a) a U.S. employer as defined at 8 C.F.R. § 214.2(h)(4)(ii), or (b) a U.S. agent, in accordance with the regulation at 8 C.F.R. § 214.2(h)(2)(i)(F); (2) submit a valid Labor Condition Application (LCA); and (3) establish that the proffered position is a specialty occupation.

On appeal, counsel contends that the evidence of record does not support any of the grounds for denial cited by the director, and that, therefore, the appeal should be sustained and the petition approved. In addition to the Form I-290B, a copy of the director's decision, and a brief, counsel submits: (1) a copy of a December 2000 memorandum from the Director of the Nebraska Service Center (NSC) which provides guidance to NSC adjudicators on assessing computer-related positions; (2) and Version 1.5 of a document produced by the petitioner that is entitled "Market Analysis & Development [D]ocument for 1StopHub" (hereinafter referred to as the 1StopHub MA&D document). Counsel comments as follows with regard to the MA&D document:

Following the submission of the petitioner's RFE [request for additional evidence] response on September 24, 2007, the beneficiary completed the project he had been working on at Blue Cross/Blue Shield in Owings Mill, Maryland. After returning to his residence in Columbus, the beneficiary received notice of the director's decision, and then returned to India to visit his ailing mother. The beneficiary has been given a new in-house project controlled completely by the petitioner and is currently still in India awaiting return to the U.S. to begin new work at the petitioner's headquarters in Columbus, Ohio. A detailed [MA&D] Document of the new project assigned to [the] beneficiary is attached to this appeal brief. As the attached information indicates, the beneficiary has been assigned to the petitioner's massive 1StopHub software development project, and the petitioner anticipates that this project will occupy the beneficiary for the entire three-year period covered by the H-1B petition. The document lists expected [sic] to be played by the beneficiary and it in the project and enumerates his expected job duties. This information clearly indicates that a specialty occupation does, and will continue to exist for the beneficiary, with the petitioning employer.

As will be discussed below, the AAO finds that the director was correct in denying the petition on each of the grounds that she cited. Accordingly, the director's decision will not be disturbed. The

appeal will be dismissed, and the petition will be denied. The AAO reaches this conclusion on the basis of its review of the entire record of proceeding, as supplemented by the submissions on appeal.

As a preliminary matter, the AAO notes that it is not considering the 1StopHub MA&D document for any purpose. Prior to the appeal, there was no mention of the 1StopHub project or of any software engineer work being reserved for the beneficiary in the course of the project. Moreover, there is no documentary evidence indicating that, when the petition was filed, the project existed and included definite work for the beneficiary for the period of employment specified in the petition. U.S. Citizenship and Immigration Services (USCIS) regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Further, the AAO is precluded from considering 1StopHub MA&D document because it is of a type requested by the RFE but not provided with the RFE response. The regulation states 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). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal. Consequently, the appeal will be dismissed.

Next, the AAO will identify some other aspects of the evidence of record that bears on the disposition of the issues on appeal.

In its letter submitted with the Form I-129, the petitioner describes itself as an IT consulting firm specializing in Business Intelligence, Data Warehousing, and Data Integration. The letter also states that the petitioner provides “end to end services from Data Architecture, Implementation, [and] Project Management, as well as Long-Term Support and Training to Fortune 500, middle market, and small business companies.” The letter and the copies of contracts submitted into the record as representative of the petitioner’s business services establish that the petitioner’s business is generated mainly by contracts between it and business entities seeking temporary assignment of consultants to provide computer and IT services for themselves or their clients. Further, the only evidence of definite work for the beneficiary when the petition was filed are documents related to a contract between the petitioner and A Core Projects and Technologies Company (ACPTC) for the petitioner to provide an Informatica Administrator to one of ACPTC’s clients, named Keane, Inc., for that client’s “engagement” with yet another company, namely, Care First Blue Cross/Blue Shield of Maryland.

Counsel's reliance on the December 2000 memorandum from the Director of the Nebraska Service Center to his adjudicating officers is misplaced. For several reasons, this memorandum has no evidentiary impact. The memorandum is not relevant, as the petition was not adjudicated at the Nebraska Service Center. More importantly, the memorandum does not have the force of law. USCIS memoranda articulate internal guidelines for agency personnel; they do not establish judicially enforceable standards. Agency interpretations that are not arrived at through precedent decision or notice-and-comment rulemaking - such as those in opinion letters, policy statements, agency manuals, and enforcement guidelines - lack the force of law and do not warrant *Chevron*-style deference. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely." *Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000) (quoting *Fano v. O'Neill*, 806 F.2d 1262, 1264 (5th Cir. 1987)). Agency policy memorandum and unpublished decisions do not confer substantive legal benefits upon aliens or bind USCIS. *Romeiro de Silva v. Smith*, 773 F.2d 1021, 1024 (9th Cir. 1985); see also *Prokopenko v. Ashcroft*, 372 F.3d 941, 944 (8th Cir. 2004). In contrast to agency memoranda, a legacy INS or USCIS decision is binding as a precedent decision once it is published in accordance with 8 C.F.R. § 103.3(c).

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

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

The Petitioner Has Not Established Itself as a U.S Employer

The AAO reiterates its earlier determination that it will not consider the evidence, which was submitted for the first time on appeal, that the beneficiary would next be assigned to the petitioner's 1StopHub project.

The AAO finds that the record of proceeding contains only one set of documents relating to a work assignment that existed for the beneficiary at the time the petition was filed. These documents are copies of: (1) an Agreement for Consultant Services between ACPTC and the petitioner, executed on June 12, 2007; (2) an ACPTC Work Order, dated June 12, 2007, by which the petitioner commits itself to assign the beneficiary to ACPTC as an Informatica Administrator for six months, with opportunity to extend, commencing June 18, 2007; (3) a July 27, 2007 letter from the delivery manager of Keene, Inc., that states, in part, that the beneficiary is an employee of the petitioner; that the petitioner has contracted the beneficiary's services to ACPTC; and that, in turn, ACPTC has contracted with Keane, Inc., "who has placed [the beneficiary] in a consulting role on an engagement with Care First Blue Cross/Blue Shield of Maryland [hereinafter referred to as Care First]"; and (4) an Invoice from the petitioner to ACPTC for 80 hours of work by the beneficiary.

The AAO notes that the Agreement for Consultant Services includes terms expressly stating: that any persons assigned by the petitioner to ACPTC under the Agreement shall at all times be employees of the petitioner; that the petitioner will pay all taxes related to compensation paid to persons assigned by the petitioner to ACPTC; that the petitioner shall provide a specified amount of

insurance for such persons; that the petitioner shall not withdraw an assigned person from an ACPTC project prior to its completion; and that, for a specified period, ACPTC will not offer employment to any person referred by the petitioner. The AAO also notes that the petitioner's March 1, 2007 confirmation-of-employment letter to the beneficiary states that it is confirming that the beneficiary is being employed by the petitioner in the capacity of Software Engineer; that his salary shall be \$50,153 per year; that the beneficiary will be covered by the standard group benefit plans and fringe benefits that have been explained to him; and that his first year vacation time will be prorated, entitling him to 10 vacation days in 2007.

However, the AAO also notes that, while the evidentiary context before the director indicated that the beneficiary would be subject to some direction and control by the petitioner and three other business entities, there is no documentation delineating the relative levels of control that the four business entities would exercise over the beneficiary and his work. In this regard, the AAO notes that the record before the director contained no agreements among the petitioner, Keene, and Care First. Also, there is no evidence of record of whatever terms and conditions that ACPTC, Keene, and Care First may have imposed upon the beneficiary. Further, the record contains no documentary evidence from Care First regarding the terms and conditions under which the beneficiary is to work for it, on its project, at its headquarters and who will ultimately control or direct the work of the beneficiary.

On application of the analytical framework discussed below, the AAO finds that the director was correct in denying the petition for failure to establish that the petitioner qualifies as an intending U.S. employer in accordance with section 101(a)(15)(H)(i)(b) of the Act and the implementing regulation at 8C.F.R. § 214.2(h)(4)(ii). Specifically, the AAO finds that the petitioner has not established that it will have "an employee-employer 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.

The record reflects that the one project documented as establishing, at the time the petition was filed, definite work for the beneficiary during the period of employment specified in the Form I-129 was generated by contracts between Keene, Inc. and its client Care First; between ACPTC and its client Keene, Inc.; and between ACPTC and the petitioner. The relevant documents submitted into the record indicate that all four business entities just named would exercise some control over the beneficiary and his work. However, the record of proceedings does not document the scope of control that each party would exert over the beneficiary and his work during the course of the Care First project. In this regard, the AAO notes that the RFE issued with regard to this petition provided ample notice to the petitioner of the critical importance of its providing documentary evidence of whatever contracts existed at the time that the petition was filed that would generate definite software engineer work for the beneficiary during the employment period sought in the petition.

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."¹ Therefore, for purposes of the H-1B visa classification, these terms are undefined.

¹ 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"

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)).²

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.

² While the *Darden* court considered only the definition of "employee" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(6), and did not address the definition of "employer," courts have generally refused to extend the common law agency definition to ERISA's use of employer because "the definition of 'employer' in ERISA, unlike the definition of 'employee,' clearly indicates legislative intent to extend the definition beyond the traditional common law definition." See, e.g., *Bowers v. Andrew Weir Shipping, Ltd.*, 810 F. Supp. 522 (S.D.N.Y. 1992), *aff'd*, 27 F.3d 800 (2nd Cir. 1994), *cert. denied*, 513 U.S. 1000 (1994). However, in this matter, the Act does not exhibit a 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

Therefore, in considering whether or not one is an "employee" in an "employer-employee relationship" with a "United States employer" for purposes of H-1B nonimmigrant petitions, USCIS will focus on the common-law touchstone of control. *Clackamas*, 538 U.S. at 450. Factors indicating that a worker is an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. 503 U.S. at 323-324; *see also Restatement (Second) of Agency* § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. *See Clackamas*, 538 U.S. at 448-449; *cf. New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1), (EEOC 2006) (adopting a materially identical test and indicating that said test was based on the *Darden* decision); *see also Defensor v. Meissner*, 201 F.3d 384, 388 (5th Cir. 2000) (determining that hospitals, as the recipients of beneficiaries' services, are the true "employers" of H-1B nurses under 8 C.F.R. § 214.2(h), even though a medical contract service agency is the actual petitioner, because the hospitals ultimately hire, pay, fire, supervise, or otherwise control the work of the beneficiaries).

It is important to note that the factors listed in *Darden* and *Clackamas* are not exhaustive and must

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).

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."

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 other documents in the record indicate that the petitioner has an Internal Revenue Service Tax Identification Number. While the petitioner's letter of support indicates its engagement of the beneficiary to work in the United States, no evidence in the record of proceeding establishes the relative levels of control over the beneficiary and his work that would actually be exercised by the petitioner, the petitioner's client contracting for the work (ACPTC), the petitioner's client's client (Keene, Inc.), and the petitioner's client's client's client (Care First). Therefore, as the petitioner has failed to establish the extent that it and the other entities responsible for the work ultimately to be performed by the beneficiary would exercise control over him and that work during execution of the Care First project, the record does not establish that an employer-employee relationship exists.

Therefore, based on the tests outlined above, 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." 8 C.F.R. § 214.2(h)(4)(ii).

The Petitioner Has Not Established Itself as a U.S Agent

Next, the AAO finds that the director was correct in finding that the evidence of record does not qualify to establish the petitioner as an agent. The relevant regulation, at 8 C.F.R. § 214.2(h)(2)(i)(F), states

Agents as petitioners. A United States agent may file a petition in cases involving workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers, and in cases where

a foreign employer authorizes the agent to act on its behalf. A United States agent may be: the actual employer of the beneficiary, the representative of both the employer and the beneficiary, or, a person or entity authorized by the employer to act for, or in place of, the employer as its agent. A petition filed by a United States agent is subject to the following conditions:

(1) An agent performing the function of an employer must guarantee the wages and other terms and conditions of employment by contractual agreement with the beneficiary or beneficiaries of the petition. The agent/employer must also provide an itinerary of definite employment and information on any other services planned for the period of time requested.

(2) A person or company in business as an agent may file the H petition involving multiple employers as the representative of both the employers and the beneficiary or beneficiaries if the supporting documentation includes a complete itinerary of services or engagements. The itinerary shall specify 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. In questionable cases, a contract between the employers and the beneficiary or beneficiaries may be required. The burden is on the agent to explain the terms and conditions of the employment and to provide any required documentation.

(3) A foreign employer who, through a United States agent, files a petition for an H nonimmigrant alien is responsible for complying with all of the employer sanctions provisions of section 274A of the Act and 8 CFR part 274a.

The AAO finds that the petitioner did not submit either (1) an “itinerary of definite employment and information on any other services planned for the period of time requested,” as 8 C.F.R. § 214.2(h)(2)(i)(F)(1) requires of an agent/employer, or (2) “a complete itinerary of services or engagements,” that “shall specify 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,” as 8 C.F.R. § 214.2(h)(2)(i)(F)(2) requires of a person or company in business as an agent and filing on behalf of multiple employers and the beneficiary.

The AAO disagrees with counsel’s assertion on appeal that the evidence it provided about the Care First Blue Cross/Blue Shield project satisfies the requirement for the “itinerary of definite employment” 8 C.F.R. § 214.2(h)(2)(i)(F)(1). In pertinent part, counsel contends:

The work order from Core Projects and the letter from Keane, Inc., also provide an itinerary of definite employment for the beneficiary, stating that he would be working on a specific project for at least six months and [that] there was a possibility for an extension of the project. Finally, in any consultation business it is impossible to know the identity and duration of all future clients and projects, but it is apparent

from the information that [the] petitioner would be utilizing the beneficiary to complete other computer consultation projects (see attached [MA&D document]).

The requirement at 8 C.F.R. § 214.2(h)(2)(i)(F)(1) for an itinerary of definite employment must be read in the context of all of the USCIS regulations pertaining to H-1B petitions. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1). Further, the precedent decision *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978), holds that a visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248. In this light the “definite itinerary” required of 8 C.F.R. § 214.2(h)(2)(i)(F)(1) must extend through whatever period of employment the petitioner intends to have approved under the petition. It follows that the agent/employer petitioner should file the petition only for such period for which it has identified definite employment for the beneficiary. In fact, as indicated on appeal, the assignment with Care First Blue Cross/Blue Shield was anything but definite given the beneficiary’s reassignment from this project.

In summary, the AAO finds that the director’s decision to deny the petition because the petitioner failed to establish that it filed the present petition as a U.S. employer or agent is correct.

THE LCA ISSUE

The AAO concurs with the director’s finding that the LCA is not valid for this petition, as it does not relate to the location where the beneficiary would perform work under the petition.

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

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

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

While the Department of Labor (DOL) is the agency that certifies LCA applications before they are submitted to USCIS, the DOL regulations note that it is within the discretion of the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) to determine whether the

content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part:

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

(Italics added.)

The LCA submitted with this petition is for one work location only, namely Columbus, Ohio. However, the evidence before the director indicated that the only work location that the petitioner designated for the beneficiary under the petition was Owings Mills, Maryland. Subparagraph C of the ACPTC work order specifies as "Job Site/Client Contact": "Care First Blue Cross Blue Shield Headquarters, 10455 Mill Run Circle, Owings Mill, MD 21147." The petitioner produced no documentation from ACPTC or Care First to rebut the clear statement of the ACPTC work order. Further, the Beneficiary's Employment Information section of counsel's letter in response to the RFE includes this statement:

[The beneficiary's services] were directly contracted to Core Projects, who contracted his work to Keane, Inc., who then subsequently *placed him* with the end client, Blue Cross/Blue Shield.

(Italics added.)

As the record establishes that the LCA submitted with the petition does not relate to the beneficiary's actual work site, the LCA does not correspond to this petition. For this reason also the appeal will be dismissed and the petition denied.

THE SPECIALTY OCCUPATION ISSUE

The statutory and regulatory framework under which the AAO determines whether a proffered position is a specialty occupation appears below.

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.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), USCIS consistently interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

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.”

The AAO has reviewed the claims of the petitioner and its counsel that the position that is the subject of this petition is that a software engineer operating at a specialty occupation level for the period June 1, 2007 to May 31, 2010. However, their claims are only as effective as the strength of the documentary evidence supporting them. As will be discussed below, the evidence of record does

not establish that the beneficiary would be employed in a specialty occupation for any part of the employment period specified in the petition.

Some evidentiary matters deserve attention at the outset. For the reasons previously discussed, the evidence about the 1StopHub project is not relevant to this appeal. Consequently, for the purposes of this appeal, only the First Care project evidence relates definite work for the beneficiary in the period of employment specified in the petition. Based upon (a) the information in the related ACPTC work order, and (b) the absence of any subsequent work order extending the period of employment specified in the ACPTC work order, the AAO finds that the record establishes definite employment for only the sixth month period beginning on June 18, 2007 (that is, from June 18, 2007 to December 18, 2007.) As a corollary determination, the AAO also finds that there is no evidence supporting the claim of specialty occupation work for the beneficiary for the remainder of the petition's employment period, that is, December 19, 2007 to May 31, 2010. 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)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The only aspect of the specialty occupation issue left to be decided is whether the evidence of record is sufficient to establish that the work specified for the beneficiary under the First Care project is sufficient to establish a specialty occupation for the related period, that is, through June 18, 2007.

The AAO finds that the evidence of record about the beneficiary's work on the First Care project does not establish a specialty occupation.

The AAO must first state that it accords little weight to the petitioner's descriptions of the beneficiary's responsibilities at First Care, which the petitioner provided in its letter replying to the RFE. First, there is no documentary evidence confirming that the entity generating the actual work requirements, First Care, agrees with these descriptions or that these descriptions comport with the actual work generated by First Care for the 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. at 165. Second, these descriptions are materially more expansive than the duty descriptions included in the record's letter from the Delivery Manager of Keene, Inc., but the petitioner provides no evidence addressing and resolving the inconsistency. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The Work Description and Skill Level section of the ACPTC work order designates the proffered position as Informatica Administrator, not Computer Software Engineer. Likewise, the letter from the Delivery Manager of Keane, Inc. states a Job Title of Senior Informatica Administrator. There is no evidence of record establishing that an Informatica Administrator position is equivalent to a

Computer Software Engineer position or that the performance of any Informatica Administrator position requires the educational credentials of a Computer Software Engineer. In fact, the record is devoid of any documentation comparing Informatica Administrators and Computer Software Engineers.

The AAO also finds that the description of duties that the Delivery Manager of Keane, Inc. provides in his letter do not appear to comprise computer software engineer work. That description reads:

Job Duties Include:

- Provides installations and ongoing administration of the Informatica Toolset.
- Provides administration functions in Informatica Power Center 6 and 8 environments.
- Responds to and resolves issues as reported by the application users.
- Proactively keeps production environments in working order.
- Performs small enhancements to team-supported application.
- Assists in coordination of operational outages.
- Reviews ETL development prior to production loads.
- Executes changes to Informatica workflows.

The AAO notes not only that the petitioner has failed to provide evidence that such duties comprise a computer software engineer position, as proffered in the petition, but also that the 2008-2009 edition of the *Occupational Outlook Handbook (Handbook)* indicates that these are not the duties of a Computer Software Engineer. The *Handbook's* chapter on Computer Software Engineers includes this narrative about the usual work of this occupation:

Computer software engineers apply the principles of computer science and mathematical analysis to the design, development, testing, and evaluation of the software and systems that make computers work. The tasks performed by these workers evolve quickly, reflecting new areas of specialization or changes in technology, as well as the preferences and practices of employers. (A separate section on computer hardware engineers appears in the engineers section of the *Handbook*.)

Software engineers can be involved in the design and development of many types of software, including computer games, word processing and business applications, operating systems and network distribution, and compilers, which convert programs to machine language for execution on a computer.

Computer software engineers begin by analyzing users' needs, and then design, test, and develop software to meet those needs. During this process they create the detailed sets of instructions, called algorithms, that tell the computer what to do. They also may be responsible for converting these instructions into a computer language, a process called programming or coding, but this usually is the responsibility of *computer programmers*. (A separate section on computer

programmers appears elsewhere in the *Handbook*.) Computer software engineers must be experts in operating systems and middleware to ensure that the underlying systems will work properly.

Computer applications software engineers analyze users' needs and design, construct, and maintain general computer applications software or specialized utility programs. These workers use different programming languages, depending on the purpose of the program. The programming languages most often used are C, C++, and Java, with Fortran and COBOL used less commonly. Some software engineers develop both packaged systems and systems software or create customized applications.

Computer systems software engineers coordinate the construction, maintenance, and expansion of an organization's computer systems. Working with the organization, they coordinate each department's computer needs—ordering, inventory, billing, and payroll recordkeeping, for example—and make suggestions about its technical direction. They also might set up the organization's intranets—networks that link computers within the organization and ease communication among various departments.

Systems software engineers also work for companies that configure, implement, and install the computer systems of other organizations. These workers may be members of the marketing or sales staff, serving as the primary technical resource for sales workers. They also may help with sales and provide customers with technical support. Since the selling of complex computer systems often requires substantial customization to meet the needs of the purchaser, software engineers help to identify and explain needed changes. In addition, systems software engineers are responsible for ensuring security across the systems they are configuring.

Computer software engineers often work as part of a team that designs new hardware, software, and systems. A core team may comprise engineering, marketing, manufacturing, and design people, who work together to release a product.

The petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which assigns specialty-occupation status to a position for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties.

As just discussed, Keene, Inc.'s description of duties does not comport with those ascribed to the computer software engineer occupation by the Department of Labor's *Handbook*, which the AAO recognizes as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses. It is not evident on their face that the duties specified by Keene, Inc. comprise a particular position for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties; and

the record of proceedings does not contain evidence establishing that a position comprised of such duties would normally require at least a bachelor's degree or the equivalent in a specific specialty.

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong assigns specialty occupation status to a proffered position whose requirement for at least a bachelor's degree in a specific specialty is common to the petitioner's industry in positions that are both (a) parallel to the proffered position and (b) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The petitioner has not established that its proffered position as described is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. Also, there are no submissions from professional associations, individuals, or firms in the petitioner's industry.

The petitioner also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "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." The evidence of record does not develop any relative complexity or uniqueness aspects of the position.

Next, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). The record has not established a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty.

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. The evidence of record does not address the position's performance requirements as a function of the relative specialization and complexity of specific duties.

For the reasons discussed above, the AAO finds that the petitioner has not established that the proffered position qualifies as specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

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