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

U.S. Citizenship and Immigration Services

D2

[redacted]

FILE: WAC 09 132 50909 Office: CALIFORNIA SERVICE CENTER Date: AUG 0 3 2010

IN RE: Petitioner: [redacted]
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:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary in the position of senior systems analyst 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). The petitioner describes itself as a computer software development and consultancy company and indicates that it currently employs over 60,000 persons worldwide, including 11,942 persons in the United States.

The director denied the petition because the petitioner failed to establish that: (1) the proffered position was a specialty occupation; or (2) a valid Labor Condition Application (LCA) was submitted for all work locations. On appeal, counsel for the petitioner submitted a brief and additional evidence.

The first issue in this matter is whether the petitioner has offered the beneficiary a position that is viewed as a specialty occupation.

Section 214(i)(l) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(l), 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 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.

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 at 387. 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), U.S. Citizenship and Immigration Services (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.

In addressing whether the proffered position is a specialty occupation, the record contains insufficient evidence as to where and for whom the beneficiary would be performing his services, and whether his services would be that of a senior systems analyst.

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. Even absent these regulatory provisions, the regulations at 8 C.F.R. §§ 103.2(b)(8) and 214.2(h)(9)(i) provide the director broad discretionary authority to require such evidence as contracts to establish that the services to be performed by the beneficiary will be in a specialty occupation.

As discussed above, the petitioner averred that it provides IT design, development, integration, and maintenance services primarily for "Fortune 1,000" companies," and that approximately 100 of its customers and business technology partners are Fortune 500 companies. With regard to the beneficiary's proposed position of senior systems analyst, the petitioner stated that it seeks to directly employ the beneficiary on a worksite in Minneapolis, Minnesota. Regarding the beneficiary's position, the petitioner stated in its April 1, 2009 letter of support:

> As Senior Systems Analyst, which [the petitioner] internally designates as "Senior Associate," [the beneficiary] will modify, test and debug systems to meet client specifications as required; analyze, design, and develop customized software applications; modify and enhance existing software applications or enhance protocols to conform to new/updated systems requirements at various client locations for both long - and short-term projects. In addition, [the beneficiary] may serve as a lead for small teams of up to 8 Programmers, Programmer Analysts, and/or Systems Analysts. Other duties may include installing systems and training end-users as directed; status reporting; supporting Assistant Project Managers in estimation, planning and execution with specific focus on requirement analysis and design; knowledge transfer and meeting deadlines; resolving technical problems; and setting goals and providing performance feedback for subordinates. As a Senior Associate of [the petitioner], [the beneficiary] will report to [the petitioner's] managers.

The petitioner continued by claiming that the minimum requirements for entry into the specialty occupation position of assistant project manager are a Bachelor's degree in Computer Science, Engineering, Business, a closely related science field, or an equivalent thereof, and work experience. With regard to the beneficiary, the petitioner indicated that he held the U.S. equivalent of a Bachelor of Science degree in Mechanical Engineering.

The director issued an RFE on April 16, 2009, requesting additional evidence in support of the claim that the beneficiary would be employed in a specialty occupation. Specifically, the director requested additional information regarding the client for whom the beneficiary would provide services, and further requested documentation such as contracts or work orders which specifically outlined the duties the beneficiary would perform on the designated client site. In a response dated May 27, 2009, the petitioner indicated that the beneficiary would work for Thrivent Financial for Lutherans; however, no documentation to support this contention was submitted. 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).

Regarding its relationship with clients, the petitioner stated in response to the RFE that it enters into a master service agreement with each client to set forth the terms of its contractual relationship. However, the petitioner claimed that for purposes of abiding by the terms of the confidentiality provisions in each such master service agreement, it could not produce copies of such agreements. Moreover, while the petitioner claimed that each of its employees has a single designated position at a defined worksite in the United States, it further claimed that its clients are located throughout North America and the world, and that it "frequently relocates employees within North America or transfers them elsewhere in the world depending on business and client project needs." For such employees, the petitioner claims that it will submit new LCAs to support worksite changes.

On June 8, 2009, the director denied the petition. Specifically, the director found that despite the petitioner's claims that it is the beneficiary's employer and that it will control and oversee the beneficiary's work, the petitioner is not the entity for whom the beneficiary will perform his duties. Based on the overview of its business model, the director concluded that the end-user utilizing the services of the beneficiary actually determines the job duties to be performed at a given worksite.

As discussed above, the director found that contractual agreements between the petitioner and its clients, in the form of service agreements, work orders, or letters from authorized officials of clients companies were necessary in order to determine the exact nature of the duties the beneficiary would undertake in order to evaluate whether he would be employed in a specialty occupation position. Despite the director's specific request for these documents, the petitioner failed to comply. Instead, despite the specific claim by the petitioner that it would frequently relocate its employees to client sites throughout the world as deemed necessary by "business and client project needs," the petitioner maintained that the beneficiary would work solely on projects designed and built by the petitioner. In addition, the petitioner justified its refusal to submit such documentation by claiming that confidentiality provisions in its master service agreements prohibited their submission.

The director concluded that, absent these agreements, it was impossible to determine the project the beneficiary will be assigned to, whether the duties to be performed are those of a specialty occupation, and that specialty occupation work will be available to the beneficiary when he begins employment with the petitioner.

Upon review of the evidence, the AAO concurs with the director's findings. The petitioner's letters dated April 1, 2009 and May 27, 2009 provided a generic summary of the duties of a senior systems analyst. While the petitioner claims that the beneficiary will work on projects designed and developed by the petitioner, the record reflects that the petitioner generally outsources personnel to work at client sites on specific client-mandated projects.

Based on this evidence, it is clear that the beneficiary's duties could potentially vary widely depending on the requirements of a client at any given time. Once again, this renders it necessary to examine the ultimate end clients of the petitioner to determine the exact nature and scope of the beneficiary's duties for each client, since it is logical to conclude that the services provided to one client may differ vastly from the services provided to another.

The record contains simply the letter of support and the response to the request for evidence, both of which contend that the beneficiary, as well as other employees of the petitioner, work on client projects as mandated by business or client needs. The petitioner claims that it enters into master service agreements with all of its clients; however, it refused to submit copies of such agreements citing confidentiality provisions.

It is noted that, subsequent to the filing of the appeal in this matter, the petitioner submits a copy of its master services agreement with [redacted]. However, the AAO will not consider this evidence for any purpose. The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner

failed to submit the requested evidence and now submits it on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

No independent documentation, such as agreements with end clients or contracts for the beneficiary to work on specific projects such as the one in Minneapolis, Minnesota, was submitted prior to adjudication. Despite the director's request for evidence of contractual relationships or agreements which would outline the job duties of the beneficiary, the petitioner refused to submit such documents. While the petitioner never specifically claimed that the evidence was privileged, the AAO notes that the petitioner relies on an affirmation signed by its corporate counsel on May 12, 2009 as the basis for not producing copies of contracts with clients. While a petitioner should always disclose when a submission contains confidential commercial information, the claim does not provide a blanket excuse for the petitioner's failure to provide such a document if that document is material to the requested benefit.[1] Although a petitioner may always refuse to submit confidential commercial information if it is deemed too sensitive, the petitioner, as correctly noted by the director, must also satisfy its burden of proof and runs the risk of a denial by failing to provide this evidence. *Cf. Matter of Marques*, 16 I&N Dec. 314 (BIA 1977).

Without evidence of contracts, work orders, or statements of work describing the duties the beneficiary would perform and for whom, the petitioner fails to establish that the duties that the beneficiary would perform are those of a specialty occupation. Providing a generic job description that speculates what the beneficiary may or may not do at each worksite is insufficient. Moreover, providing such a generic job description, then contending that the beneficiary will not in fact work to design systems for clients but rather will work only on projects designed and built by the petitioner only contradicts the basic nature of the petitioner's described business operations structure. 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).

In support of this analysis, USCIS routinely cites *Defensor v. Meissner,* 201 F.3d 384, 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

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[1] Both the Freedom of Information Act and the Trade Secrets Act provide for the protection of a petitioner's confidential business information when it is submitted to USCIS. *See* 5 U.S.C. § 552(b)(4), 18 U.S.C. § 1905. Additionally, the petitioner may request pre-disclosure notification pursuant to Executive Order No. 12,600, "Predisclosure Notification Procedures for Confidential Commercial Information." Exec. Order No. 12,600, 1987 WL 181359 (June 23, 1987).

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

In this matter, despite the petitioner's repeated claims that it will serve as the beneficiary's employer, it remains unclear from the record whether the petitioner will in fact be an employer or will act as an employment contractor. Regardless, the job description provided by the petitioner indicates that the beneficiary will be working on client projects and will be assigned to various clients' worksites as necessary. However, various statements by the petitioner in response to the RFE and again on appeal indicate that this is not the case, and that the beneficiary instead will work solely on projects designed and developed by the petitioner. Despite the director's specific request for documentation to establish the ultimate location(s) and position requirements of the beneficiary's employment, the petitioner failed to comply with this request. Moreover, the petitioner's failure to provide specific documentation outlining the nature of the beneficiary's employment renders it impossible to conclude for whom the beneficiary will ultimately provide services and exactly what those services would entail. The AAO, therefore, cannot analyze whether the beneficiary's duties in-house or at each worksite would require at least a baccalaureate degree or the equivalent in a specific specialty, the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner's normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4. For this additional reason, the petition must be denied. 8 C.F.R. § 214.2(h)(4)(iii)(A). 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)(iii)(A) or that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii).

The petitioner has failed to establish that the beneficiary would be performing the duties of a specialty occupation. For this additional reason, the petition may not be approved.

The second issue in this matter 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).

General requirements for filing immigration applications and petitions are set forth at 8 C.F.R. §103.2(a)(1) as follows:

> [E]very application, petition, appeal, motion, request, or other document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions . . . being hereby incorporated into the particular section of the regulations requiring its submission . . . .

Further discussion of the filing requirements for applications and petitions is found at 8 C.F.R. § 103.2(b)(1):

> An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. All required application or petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form's instructions. Any evidence submitted in connection with the application or petition is incorporated into and considered part of the relating application or petition.

In cases where evidence related to filing eligibility is provided in response to a director's request for evidence, 8 C.F.R. § 103.2(b)(12) states:

> An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed . . . .

The regulations require that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner obtain a certified LCA from the U.S. Department of Labor (DOL) in the occupational specialty in which the H-1B worker will be employed. *See* 8 C.F.R. § 214.2(h)(4)(i)(B). In pertinent part, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B) also states:

> The petitioner shall submit the following with an H-1B petition involving a specialty occupation: (1) A certification from the Secretary of Labor that the petitioner has filed a labor condition application . . . .

The instructions that accompany the Form I-129 also specify that an H-1B petitioner must document the filing of a labor certification application with DOL when submitting the Form I-129.

With regard to Labor Condition Applications, section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A), requires in pertinent part the following (with emphasis added):

> The employer–
>
> (i) is offering and will offer . . . nonimmigrant wages that are at least–
>
> * * *
>
> (II) the prevailing wage level for the occupational classification *in the area of employment* . . . .

Further, the regulation at 8 C.F.R. § 214.2(h)(2)(i)(E) states:

> *Amended or new petition.* The petitioner shall file an amended or new petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition. An amended or new H-1C, H-1B, H-2A,

> or H-2B petition must be accompanied by a current or new Department of Labor determination. In the case of an H-1B petition, this requirement includes a new labor condition application.

Based on a review of the statutory and regulatory provisions cited above, it is self-evident that a change in the location of a beneficiary's work to a geographical area not covered by the LCA filed with the Form I-129 is a material change in the terms and conditions of employment. Because work location is critical to the petitioner's wage rate obligations, the change deprives the petition of an LCA supporting the period of work to be performed at the new location.

Moreover, while DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining 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.

(Emphasis added).

The LCA submitted with the petition lists Minneapolis, Minnesota as the beneficiary's work location. In reviewing the petitioner's supporting documentation, however, the AAO finds that the actual work location(s) for the beneficiary cannot be determined with any reasonable certainty. The April 1, 2009 letter of support and the response to the RFE indicate that, at a minimum, the petitioner's clients are based throughout the United States and possibly globally. For example, while the petitioner failed to disclose the names of all of its clients, it repeatedly states that many of its clients are Fortune 500 companies, which presumably are based throughout North America and the world.

Absent end-agreements with clients, the duration and location of work sites to which the beneficiary will be sent during the course of his employment cannot be determined. While the petitioner claimed in its May 27, 2009 response to the RFE that each H-1B nonimmigrant "has a single designated position at a defined worksite in the U.S.," it also claims that to support its clients wherever they are located, the petitioner "frequently relocates employees within North America or transfers them elsewhere in the world depending on business and client project needs." Based on this statement, even the beneficiary's claimed work location of Minneapolis, Minnesota cannot be deemed valid without evidence demonstrating an ongoing agreement for the beneficiary's services for the entire validity period at that location.

On appeal, counsel for the petitioner asserts the following:

> It is an abuse of discretion to ignore all facts in the record and to declare, without any evidence, that the petitioner's statements – made in an affidavit and/or under perjury – are not credible and can be dismissed.

First, this attempt to shift the evidentiary burden to the government is unfounded. The law clearly indicates that the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *see also Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966); *Matter of Treasure Craft of California*, 14 I. & N. Dec. 190 (Reg. Comm. 1972). It is not the government's burden to establish that the petitioner is ineligible; instead, the burden of establishing eligibility remains entirely on the petitioner. *See Id.* Second, binding precedent clearly indicates that a petitioner's statements or claims alone, absent supporting documentary evidence, is insufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 164-165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190). In other words, the petitioner must establish with corroborating evidence the veracity of its claims and assertions. This the petitioner has failed to do.

The Form I-129 filing requirements imposed by regulation require that the petitioner submit evidence of a certified LCA at the time of filing. There is no evidence to negate a finding that the beneficiary would ultimately be outsourced to additional client sites as deemed necessary during the validity period. A petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 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). The petitioner, therefore, failed to comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B).

Absent documentary evidence in the form of a concise itinerary, contracts, or work orders outlining the duration and scope of the beneficiary's employment in the United States, the AAO cannot conclude that the LCA submitted is valid for all of the beneficiary's intended work locations, including even the Minneapolis, Minnesota location. For this additional reason, the petition may not be approved.

Beyond the decision of the director, the petitioner claims that in the event that its H-1B nonimmigrant employees are relocated to new worksites during the course of their employment, the petitioner will provide new LCAs as needed to support worksite changes. The statement, however, raises another issue for the AAO to examine; namely, whether the petitioner will comply with the terms and conditions of employment.

As noted above, a petitioner cannot simply file a petition with a certified LCA for one location, then provide a new LCA in the event that it reassigns a beneficiary to another worksite during the course of his employment. Instead, a petitioner must file an amended petition to reflect this change. It is contrary to law to permit or imply that an amended petition need not be filed if an employment location changes such that it requires or necessitates the filing of a new LCA. In any situation where a new LCA is required, an amended petition must be filed. Specifically, according to the statutory and regulatory provisions cited above, it is self-evident that a change in the location of a beneficiary's work to a geographical area not covered by the LCA filed with the Form I-129 is a material change in the terms and conditions of employment. Because work location is critical to the petitioner's wage rate obligations, the change deprives the petition of a corresponding LCA supporting the period of work to be performed at the new location. USCIS policy confirms this reading of the law in stating that "[a]n amended H-1B petition must be filed in a situation where the beneficiary's place of

employment changes subsequent to the approval of the petition and where the change invalidates the supporting labor condition application." *See* Memo. from T. Alexander Aleinikoff, Exec. Assoc. Commissioner, "Amended H-1B Petitions" (Aug. 22, 1996). This policy statement was again reiterated in the Federal Register at 63 Fed. Reg. 30419, 30420 (June 4. 1998) by reminding petitioners that they bear the responsibility "to file an amended petition . . . when the beneficiary's transfer to a new work site necessitates the filing of a new labor condition application." Absent the filing of an amended petition, USCIS cannot fulfill its regulatory duty to ensure a subsequently filed labor condition application corresponds with an H-1B petition filed on behalf of a beneficiary. *See* 20 C.F.R. § 655.705(b).

Based on the claims of the petitioner in its May 27, 2009 response to the RFE, it appears likely that the beneficiary in this matter will be working at more than one worksite during the course of his employment. The petitioner, therefore, is advised that merely submitting a new LCA for a new work location will not suffice; an amended petition must be filed to reflect this change.

Finally, while not addressed by the director, the AAO questions whether the petitioner has established that it meets the regulatory definition of an intending United States employer. Section 101(a)(15)(H)(i)(b) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). Specifically, the AAO must determine whether the petitioner has established that it will have "an 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.

Upon review, the AAO finds that the record is not persuasive in establishing that the petitioner or 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 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."[2] Therefore, for purposes of the H-1B visa classification, these terms are undefined.

The Supreme Court of the United States has determined that where federal law fails to clearly define the term "employee," courts should conclude that the term was "intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (hereinafter "*Darden*") (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). That definition is as follows:

> "In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and

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[2] 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 a beneficiary to file an H petition on behalf of the actual employer and the alien. While an employment agency may petition for the H-1B visa, the ultimate end-user of the alien's services is the "true employer" for H-1B visa purposes, since the end-user will "hire, pay, fire, supervise, or otherwise control the work" of the beneficiary "at the root level." *Defensor v. Meissner*, 201 F.3d 384, 387-8 (5th Cir. 2000). Accordingly, despite the intermediary position of the employment agency, the ultimate employer must still satisfy the requirements of the statute and regulations: "To interpret the regulations any other way would lead to an absurd result." *Id.* at 388.

> 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 (quoting *Community for Creative Non-Violence v. Reid,* 490 U.S. at 751-752); *see also Restatement (Second) of Agency* § 220(2) (1958); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) (hereinafter "*Clackamas*").[3] 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. at 258 (1968).[4]

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[3] It is noted that counsel for the petitioner argues on appeal that the controlling Supreme Court case to be followed in assessing whether an employment relationship exists is *NLRB v. United Ins. Co. of America*, 390 U.S. 254 (1968) (hereinafter "*NLRB*"). The AAO respectfully disagrees. While *NLRB* is still applicable, the common law test was not specifically stated, and the *NLRB* court instead laid out a test based on the common law that fit the specific facts in that case. As such, the test as developed in the Supreme Court's later decisions of *Darden* and *Clackamas* is more representative of the general test to be applied and is, therefore, better suited to be applied in cases, such as this one, in which the facts do not mirror those in *NLRB*.

[4] While the *Darden* court considered only the definition of "employee" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(6), and did not address the definition of "employer," courts have generally refused to extend the common law agency definition to ERISA's use of employer because "the definition of 'employer' in ERISA, unlike the definition of 'employee,' clearly indicates legislative intent to extend the definition beyond the traditional common law definition." *See, e.g., Bowers v. Andrew Weir Shipping, Ltd.*, 810 F. Supp. 522 (S.D.N.Y. 1992), *aff'd*, 27 F.3d 800 (2nd Cir. 1994), *cert. denied*, 513 U.S. 1000 (1994). However, in this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. Instead, in the context of the H-1B visa classification, the term "United States employer" was defined in the regulations to be even more restrictive than the common law agency definition. A federal agency's interpretation of a statute whose administration is entrusted to it is to be accepted unless Congress has spoken directly on the issue. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984).

The regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to employ persons in the United States, *and* to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements, thus indicating that the regulations do not indicate an intent to extend the definition beyond "the traditional common law definition." Therefore, in the absence of an intent to impose broader definitions by either Congress or USCIS, the "conventional master-servant relationship as understood by common-law agency doctrine," and the *Darden* construction test, apply to the terms "employee," "employer-employee relationship," "employed," and "employment" as used in section 101(a)(15)(H)(i)(b) of the Act, section 212(n) of the Act, and 8 C.F.R. § 214.2(h). That being said,

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 at 388 (5th Cir. 2000) (determining that hospitals, as the recipients of beneficiaries' services, are the true "employers" of H-1B nurses under 8 C.F.R. § 214.2(h), even though a medical contract service agency is the actual petitioner, because the hospitals ultimately hire, pay, fire, supervise, or otherwise control the work of the beneficiaries).

It is important to note that the factors listed in *Darden* and *Clackamas* are not exhaustive and must be evaluated on a case-by-case basis. Other aspects of the relationship between the parties may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met; however, the fact finder must weigh and compare a combination of the factors in analyzing the facts of each individual case. The determination must be based on all of the circumstances in the relationship between the parties, regardless of whether the parties refer to it as an employee or as an independent contractor relationship. *See Clackamas*, 538 U.S. at 448-449; *New Compliance Manual* at § 2-III(A)(1).

Likewise, the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450. "Rather, as was true in applying common-law rules to the independent-contractor-versus-employee issue confronted in *Darden*, the answer to whether a shareholder-director is an employee depends on 'all of the incidents of the relationship . . . with no one factor being decisive.'" *Id.* at 451 (quoting *Darden*, 503 U.S. at 324).

Applying the *Darden* and *Clackamas* tests to this matter, the petitioner has not established that it or any of its clients will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee."

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 copies of the petitioner's federal tax returns contained in the record indicate that the petitioner

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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).

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, this documentation alone provides no details regarding the nature of the job offered or the location(s) where the services will be performed. Therefore, the petitioner has failed to establish that an employer-employee relationship exists.

When filing the I-129 petition, the petitioner averred in its April 1, 2009 letter of support that it is a "leading provider of custom information technology ("IT") design, development, integration, and maintenance services primarily for 'Fortune 1,000' companies." It further claimed that approximately 100 of its customers and business technology partners are Fortune 500 companies. Regarding its business model, the petitioner stated as follows:

> [The petitioner] designs, engineers, and implements business solutions on a project basis for companies that are not in the IT sector. All of our employees work directly for [the petitioner] on projects designed and built by our company, and under the supervision of one or more [Project Managers for the petitioner]. All projects are completely managed by [the petitioner]. Accordingly, the petitioner is **not** a placement company, nor an agent that arranges short-term employment.
>
> [The petitioner's] relationship with clients is that of independent contractor, and **no** other relationship exists, including employment, joint venture, or agency. [The petitioner] enters into a master service contract with its clients to set forth this contractual relationship. [The petitioner] is at all times fully responsible for the actions and omission of all its employees, whether or not such employees are working on site at a client facility.

(Emphasis in original).

In its May 27, 2009 letter, the petitioner contended that it maintained an employer-employee relationship with the beneficiary. Regarding the employment of the beneficiary and its other employees, the petitioner claimed:

> All of our employees work directly for [the petitioner] on projects designed and built by our company, and under the supervision of one or more [of the petitioner's] project managers. All projects are completely managed by [the petitioner]. The projects are designed and directed by [the petitioner], using the company's proprietary project management tools and methodologies.

With regard to the beneficiary's position, the petitioner claimed that he would be employed as a senior systems analyst at a worksite in Minneapolis, Minnesota.

As discussed above, no independent corroborating documentation was submitted to support the petitioner's claims, e.g., agreements with end clients or contracts for the beneficiary to work on specific projects such as the one in Minneapolis, Minnesota was submitted. The record contains simply the letter of support and the response to the request for evidence, both of which contend that the beneficiary, as well as other employees of the petitioner, work on client projects as mandated by business or client needs. The petitioner claims that it

enters into master service agreements with all of its clients; however, it refused to submit copies of such agreements citing confidentiality provisions.

While the petitioner never specifically claimed that the evidence was privileged, it relies on confidentiality provisions as justification for not submitting the requested evidence. As discussed previously, while a petitioner should always disclose when a submission contains confidential commercial information, the claim does not provide a blanket excuse for the petitioner's failure to provide such a document if that document is material to the requested benefit, since both the Freedom of Information Act and the Trade Secrets Act provide for the protection of a petitioner's confidential business information when it is submitted to USCIS. *See* 5 U.S.C. § 552(b)(4), 18 U.S.C. § 1905. Again, although a petitioner may always refuse to submit confidential commercial information if it is deemed too sensitive, the petitioner, as correctly noted by the director, must also satisfy the burden of proof and runs the risk of a denial by failing to provide this required, material evidence. *Cf. Matter of Marques*, 16 I&N Dec. 314.

Despite the director's specific request, the petitioner failed to submit the requested material evidence. Any 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). As discussed previously, the master service agreement with [redacted] is submitted for the first time on appeal. However, the petitioner was put on notice of a deficiency in the evidence and was given an opportunity to respond to that deficiency. The AAO, therefore, 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 document in response to the director's RFE. *Id.*

As discussed above, the director found that contractual agreements between the petitioner and its clients, in the form of service agreements, work orders, or letters from authorized officials of clients companies were necessary in order to determine the exact nature of the duties the beneficiary would undertake in order to evaluate whether he would be employed in a specialty occupation position. Despite the director's specific request for these documents, the petitioner failed to comply. Instead, despite the specific claim by the petitioner that it would frequently relocate its employees to client sites throughout the world as deemed necessary by "business and client project needs," the petitioner maintained that the beneficiary would work solely on projects designed and built by the petitioner. In addition, the petitioner justified its refusal to submit such documentation by claiming that confidentiality provisions in its master service agreements prohibited their submission. The director concluded that, absent these agreements, it was impossible to determine the project the beneficiary will be assigned to and thus who would ultimately control the beneficiary's work.

Upon review of the evidence, the AAO concurs with the director's findings. The minimal information contained in the April 1, 2009 and May 27, 2009 letters is insufficient to show that a valid employment agreement or credible offer of employment existed between the petitioner and the beneficiary at the time the petition was filed. The petitioner did not submit an employment contract or any other document describing the beneficiary's claimed employment relationship with the petitioner, nor did it submit any corroborating documentary evidence to support the claims that the beneficiary would work on a specific worksite in Minnesota and be supervised by another employee of the petitioner. This is particularly relevant since the petitioner is a corporation based in New Jersey. Therefore, it has not been established that the beneficiary

will be "controlled" by the petitioner in that relevant factors material to that inquiry cannot be determined based on the evidence of record as currently constituted, e.g., (1) who will oversee and direct the work of the beneficiary; (2) who will provide the instrumentalities and tools; (3) where will the work be located; (4) who has the right or ability to affect the projects to which the alien beneficiary is or will be assigned; and (5) who has the authority to terminate the beneficiary from a project. Without full disclosure of all of the relevant factors, the AAO is unable to properly assess whether the requisite employer-employee relationship will exist between the petitioner and the beneficiary. As such, absent evidence pertaining specifically to the requested validity period of this petition, the AAO is prohibited from concluding that the petitioner would be the beneficiary's employer. 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 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

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).

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 again that, absent documentation such as work orders or contracts between the ultimate end clients and the beneficiary, the petitioner could neither be considered an agent in this matter. As stated above, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

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

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