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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

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[REDACTED]

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date **DEC 29 2010**

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:

[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 \$630. 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 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 software consulting firm and indicates that it currently employs four persons.

The director denied the petition because the petitioner failed to establish that: (1) it meets the regulatory definition of an intending United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii); (2) it meets the definition of "agent" at 8 C.F.R. § 214.2(h)(2)(i)(F); (3) it submitted a valid labor condition application (LCA) for all locations; and (4) the proffered position is a specialty occupation.

On appeal, counsel for the petitioner submits a brief and additional evidence, and contends that the director erroneously found that the petitioner would not be the beneficiary's employer.

The petitioner provided minimal information pertaining to the nature of its business when filing the petition. Consequently, the director issued a request for additional evidence (RFE) on August 29, 2009. In the RFE, the director noted that the petitioner appeared to be engaged in consulting, and asked the petitioner to submit evidence demonstrating who the actual employer of the beneficiary would be. The director requested documentation such as contractual agreements or work orders from the actual end-client firm or firms where the beneficiary would work.

In a response dated September 25, 2009, the petitioner stated that it "undertakes Technical services processing needs of businesses and adapts existing computer technology to fit each company's unique requirements." The petitioner further claimed that its clients ranged from regional to national organizations, and that it interacts with hundreds of information technology partners throughout the nation. Finally, it claimed that it has provided system development services for clients in a variety of industries, including financial, manufacturing, health care, and government.

On November 25, 2009, the director denied the petition. The director found that the petitioner is a contractor that subcontracts workers with a variety of computer skills to other companies who need computer programming services. Noting that the LCA submitted with the petition did not match the location of the end client identified in the work order, the director concluded that the petitioner had failed to establish that it met the definition of United States employer or agent.

The AAO, therefore, must determine whether the petitioner has established that it will have "an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii)(2). Despite claiming on Form I-129 that it employs four persons, the record is devoid of documentation supporting the petitioner's contention.

The AAO issued an RFE on August 25, 2010. Specifically, the AAO requested additional documentation and clarification with regard to the petitioner's relationship with the beneficiary and the end client identified in the record. The evidence submitted in response to this RFE was received by the AAO on September 27, 2010, and will be discussed in detail later in this decision.

The primary issue in the present matter is whether the petitioner has established that it meets the regulatory definition of an intending United States employer. Section 101(a)(15)(H)(i)(b) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). Specifically, the AAO must determine whether the petitioner has established that it will have "an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii)(2).

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

(i) who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 1184(i)(1) . . . , who meets the requirements of the occupation specified in section 1184(i)(2) . . . , and with respect to whom the Secretary of Labor determines . . . that the intending employer has filed with the Secretary an application under 1182(n)(1).

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

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

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

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

Although "United States employer" is defined in the regulations, it is noted that "employee," "employed," "employment," and "employer-employee relationship" are not defined for purposes of the H-1B visa classification even though these terms are used repeatedly in both the Act and the regulations, including within the definition of "United States employer" at 8 C.F.R. § 214.2(h)(4)(ii). Section 101(a)(15)(H)(i)(b) of the Act indicates that an alien coming to the United States to perform services in a specialty occupation will have an "intending employer" who will file a labor condition application with the Secretary of Labor pursuant to section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). The intending employer is described as offering full-time or part-time "employment" to the H-1B "employee." Sections 212(n)(1)(A)(i) and

212(n)(2)(C)(vii) of the Act, 8 U.S.C. §§ 1182(n)(1)(A)(i) and 1182(n)(2)(C)(vii). Further, the regulations indicate that "United States employers" must file Form I-129 in order to classify aliens as H-1B temporary "employees." 8 C.F.R. §§ 214.2(h)(1) and 214.2(h)(2)(i)(A). Finally, the definition of "United States employer" indicates in its second prong that the petitioner must have an "employer-employee relationship" with the "employees under this part," i.e., the H-1B beneficiary, and that this relationship be evidenced by the employer's ability to "hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer"). Accordingly, neither the legacy Immigration and Naturalization Service (INS) nor U.S. Citizenship and Immigration Services (USCIS) has defined the terms "employee," "employed," "employment," or "employer-employee relationship" by regulation for purposes of the H-1B visa classification, even though the law describes H-1B beneficiaries as being "employees" who must have an "employer-employee relationship" with a "United States employer."<sup>1</sup> Therefore, for purposes of the H-1B visa classification, these terms are undefined.

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

"In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party."

*Darden*, 503 U.S. at 323-324 (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*"). 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

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<sup>1</sup> 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, 387-388 (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.

(quoting *NLRB v. United Ins. Co. of America*, 390 U.S. at 258 (1968)).<sup>2</sup>

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; *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 (determining that hospitals, as the recipients of beneficiaries'

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

The regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to employ persons in the United States, *and* to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements, thus indicating that the regulations do not indicate an intent to extend the definition beyond "the traditional common law definition." Therefore, in the absence of an intent to impose broader definitions by either Congress or USCIS, the "conventional master-servant relationship as understood by common-law agency doctrine," and the *Darden* construction test, apply to the terms "employee," "employer-employee relationship," "employed," and "employment" as used in section 101(a)(15)(H)(i)(b) of the Act, section 212(n) of the Act, and 8 C.F.R. § 214.2(h). That being said, there are instances in the Act where Congress may have intended a broader application of the term "employer" than what is encompassed in the conventional master-servant relationship. *See, e.g.,* section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F) (referring to "unaffiliated employers" supervising and controlling L-1B intracompany transferees having specialized knowledge); section 274A of the Act, 8 U.S.C. § 1324a (referring to the employment of unauthorized aliens).

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 tax documentation included in the record indicates that the petitioner has an Internal Revenue Service Tax Identification Number. While the petitioner's letter of support indicates its intent to engage the beneficiary to work in the United States, the additional documentation submitted by the petitioner is contradictory and insufficient to establish that an employer-employee relationship exists or will exist between the petitioner and the beneficiary.

On appeal, the petitioner asserts that it is in fact the employer of the beneficiary and asserts that the director's conclusion to the contrary was erroneous. Specifically, the petitioner contends that based on the employment agreement, pay stubs, and work order it submitted in response to the request for evidence, the petitioner met its evidentiary burden. Additionally, it contends that the proffered position is a specialty occupation and restates the description of duties provided in response to the request for evidence.

Although the petitioner submitted an employment agreement signed by the beneficiary on September 1, 2009 in response to the RFE, this document is not probative of whether a n employer-employee relationship existed at the time of filing. The AAO notes that the petition in this matter was filed on April 27, 2009. However, the employment agreement was executed by the beneficiary and the petitioner on September 1, 2009, over four months after the filing of the petition.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter*

*of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). In this matter, an employment agreement was not submitted with the petition. Instead, it appears that an agreement was drafted after the RFE was mailed in an attempt to meet this evidentiary requirement. The 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). Since the employment agreement was not executed at or before the time of filing, this document will be afforded no weight in these proceedings.

The petitioner also submitted a work order between the petitioner and [REDACTED] the claimed end client for whom the beneficiary will work, located in Clayton, Missouri.<sup>3</sup> This document was signed by [REDACTED] on June 15, 2008 and identifies the beneficiary as the contractor for the petitioner who will be assigned to the project. The document states that the beneficiary will work on this project from June 30, 2008 to September 30, 2009, and confirms that [REDACTED] is the project manager. The agreement further states that the beneficiary will work on this project in-house at the petitioner's location.

In response to the AAO's RFE, the petitioner submitted a second letter from [REDACTED] written by [REDACTED] and dated September 15, 2010. [REDACTED] reconfirmed that the beneficiary will work onsite at the petitioner's "offices" for most of the project.<sup>4</sup> However, [REDACTED] also states: "We believe when we will be ready to roll-out the SAP controlling module application, at that time we will need [the beneficiary] to work onsite. In the meantime, this off-site assignment will continue to be performed at [the petitioner's] offices located in West Des Moines."

The AAO, therefore, finds a significant problem with the petitioner's claims. While it contends that it is the beneficiary's employer in that it will allegedly control the beneficiary's work, the fact remains that the beneficiary's services for the entire validity period are claimed to be devoted solely to the [REDACTED] project. The June 15, 2008 letter signed by [REDACTED] indicates that he is the project manager, and the petitioner has provided no evidence to contradict this claim. Therefore, upon review of the evidence of record, it appears that while the beneficiary may in fact work onsite at the petitioner's office for most of the project, he is working on a project which is managed by an employee of [REDACTED]. Moreover, as noted by [REDACTED] in the September 15, 2010 letter, the beneficiary will eventually work onsite at the [REDACTED] office in order to implement the SAP application server. The petitioner does not acknowledge or discuss this change of work location, and neither does it discuss who will control the beneficiary's work at that point of the project and to what extent. In other words, the record is simply devoid of the evidence necessary to do a proper assessment of the various factors to be weighed under the conventional master-servant relationship test. Based on the evidence of record,

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<sup>3</sup> It is noted that in several documents contained in the record, the location of [REDACTED] is identified as [REDACTED]. The AAO notes that [REDACTED] are approximately 8 miles from each other, and therefore will be considered the same geographic area for purposes of this analysis.

<sup>4</sup> According to public sources, the petitioner's claimed "offices" are located at a residential address. It remains unexplained and undocumented how the petitioner is legally permitted to operate its business in this residential setting under local zoning and business license laws.

therefore, it has not been established that the beneficiary will ultimately be controlled by the petitioner and, as such, will have the requisite employee-employer relationship.

Since the contentions of the petitioner to the contrary are not supported by documentary evidence that the petitioner, and not [REDACTED] or another employee of [REDACTED] will control the work of the beneficiary, the petitioner has failed to establish that it meets the definition of a United States employer. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The evidence, therefore, is insufficient to establish that the petitioner qualified as a United States employer, as defined by 8 C.F.R. § 214.2(h)(4)(ii). 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.

The next issue is whether the petitioner submitted a valid LCA for all work locations, as required by 8 C.F.R. § 214.2(h)(2)(i)(B). The director noted that the LCA listed the beneficiary's work location as West Des Moines, Iowa. However, [REDACTED] the client for whom the beneficiary would perform services during his stay was located in Clayton/St. Louis, Missouri. Therefore, even if the petitioner had been deemed the beneficiary's employer, the LCA provided did not encompass the location of the client for whom the beneficiary would work. While the petitioner contends that the beneficiary would work at the petitioner's worksite in West Des Moines, and not onsite at the client's facility, the letter from September 15, 2010 letter from [REDACTED] clearly indicates that the beneficiary's services will ultimately be required onsite in Missouri to implement the server. Therefore, while the record supports the petitioner's claim that the beneficiary will work in West Des Moines, Iowa, it also demonstrates that the beneficiary will work in a second location when the project is configured and ready for implementation at the client site. The LCA does not identify Clayton or St. Louis, Missouri, as a second work location, and the record lacks the evidence necessary to find that the employment in Clayton or St. Louis, Missouri would otherwise be permitted under the U.S. Department of Labor's short-term placement provisions. *See generally* 20 C.F.R. § 655.735. For this additional reason, the petition may not be approved.

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

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

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

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

*Specialty occupation* means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in 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 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), 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 addition, 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)(I) 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.

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 petitioner’s letter of support dated January 9, 2009 provided a vague overview of the beneficiary’s proposed duties. Specifically, the petitioner stated that his job duties would be as follows:

- Analyze business procedures and problems to refine data and convert it to programmable form for electronic data processing.
- Confer with personnel of organization units involved to ascertain specific output requirements.
- Study existing data programming systems to improve work flow.
- Conduct special studies and investigations pertaining to development of new software systems to meet current and projected needs.
- Design, development, implementation and maintenance of application software.
- Prepare technical reports, memoranda, and instructional manuals related to the establishment and functioning of complete operational systems.

However, no independent documentation to further explain the nature and scope of these duties was submitted. Noting that the petitioner was engaged in an industry that typically outsourced its personnel to client sites to work on particular projects, the director requested documentation such as contracts and work orders, documentation that would outline for whom the beneficiary would render services and what his duties would include at each worksite. Despite the director’s specific request for these documents, the

petitioner failed to comply. 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).

Upon review of the evidence, the AAO concurs with the director's findings. The work order offered in support of the contention that the petitioner was the beneficiary's employer and had a designated project on which he would work provides only a vague overview of the beneficiary's proposed duties, and fails to specifically articulate whether the duties assigned to the beneficiary will be assigned by the petitioner or the end client, Missouri Metals. Moreover, based on the petitioner's claim that it has regional and national clients in various industries, it is clear that had the petition been approvable on the previous grounds, the beneficiary's duties could potentially vary widely based on the requirements of a client at any given time. Once again, this possibility 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, particularly if they varied from one industry sector to another.

As discussed above, the record contains no substantiated evidence regarding the end-clients and their requirements for the beneficiary. Without evidence of valid contracts, work orders, or statements of work describing the specific duties the beneficiary would perform, the petitioner fails to establish that the duties that the beneficiary would perform are those of a specialty occupation. Providing a generic job description that speculates what the beneficiary may or may not do at each worksite is insufficient. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

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

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

In this matter, it is unclear whether the petitioner will be an employer or will act as an employment contractor. The job description provided by the petitioner, as well as various statements from the petitioner both prior to adjudication and on appeal, indicate that the beneficiary will potentially be working on client projects for clients based throughout the nation. Despite the director's specific request

for documentation to establish the ultimate location(s) of the beneficiary's employment, the petitioner failed to fully comply with this request. Moreover, the petitioner's failure to provide evidence of an employer-employee relationship renders it impossible to conclude for whom the beneficiary will ultimately provide services and exactly what those services would entail. The AAO, therefore, cannot analyze whether the beneficiary's duties at each worksite would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation.<sup>5</sup> 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).

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

Beyond the decision of the director, even if the documents submitted into the record were acceptable as evidence of the nature of the beneficiary's alleged employment, the petitioner failed to provide a concise itinerary evidencing that the beneficiary would work only at the petitioner's site in West Des Moines, Iowa and not in multiple locations.

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) provides as follows:

*Service or training in more than one location.* A petition which requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with the Service office which has jurisdiction over I-129H petitions in the area where the petitioner is located. The address which the petitioner specifies as its location on the I-129H petition shall be where the petitioner is located for purposes of this paragraph.

The petitioner acknowledges that it has both regional and national clients, but failed to provide any details regarding the needs and locations of these clients. Moreover, as confirmed in [REDACTED] September 15, 2010 letter, the beneficiary would eventually work onsite for [REDACTED]. Although this is just one of the petitioner's clients, it clearly indicates services to be performed

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<sup>5</sup> It is noted that, even if the proffered position were established as being that of a systems analyst, a review of the U.S. Department of Labor's *Occupational Outlook Handbook* (hereinafter the *Handbook*) does not indicate that such a position qualifies as a specialty occupation in that the *Handbook* does not state a normal minimum requirement of a U.S. bachelor's or higher degree in a specific specialty or its equivalent for entry into the occupation of systems analyst. See Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook*, 2010-11 Edition, "Computer Software Engineers and Computer Programmers," <<http://www.bls.gov/oco/ocos303.htm>> (accessed December 21, 2010). As such, absent evidence that the position of systems analyst qualifies as a specialty occupation under one of the alternative criteria available under 8 C.F.R. § 214.2(h)(4)(iii)(A), the instant petition could not be approved for this additional reason.

in more than one location and suggests that were the beneficiary's services contracted by the petitioner, he may in fact be outsourced off-site to various client locations contrary to the petitioner's claims. As such, the petitioner clearly failed to provide the requisite itinerary in accordance with 8 C.F.R. § 214.2(h)(2)(i)(B), and the petition must be denied for this additional reason.

Finally, the AAO questions whether the petitioner is in compliance with the terms and conditions of employment. Specifically, the petitioner makes inconsistent and contradictory claims regarding its number of employees and the wages paid to the beneficiary.

In response to the AAO's RFE, the petitioner submitted tax documents, such as quarterly wage reports, W-2 and 1099 forms, and tax returns for 2008 and 2009. These documents indicate that, despite the petitioner's claim to employ four persons, the only person it paid wages to in 2008 and 2009 was the beneficiary. Moreover, while it submitted two Miscellaneous Income forms (Form 1099) for the year 2009, and contends that these documents are proof that the petitioner has engaged the services of independent contractors, the compensation paid to these claimed contractors is not accounted for on the petitioner's 2009 tax return.

Finally, while the service agreement between the petitioner and [REDACTED] dated June 30, 2008, indicates that two persons will be assigned to the project, no evidence of a second employee being employed by the petitioner or assigned to the project is contained in the record. [REDACTED] submitted two letters in support of the petition which discuss the beneficiary's assignment to the project, yet neither mentions the terms of the agreement in which the petitioner agreed to provide *two* consultants, not one. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). If USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). For this additional reason, the petition may not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*. 345 F.3d 683.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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 appeal is dismissed. The petition is denied.