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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

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)

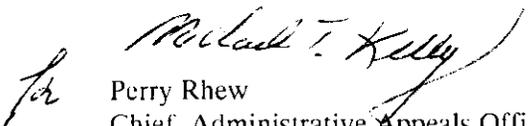
ON BEHALF OF PETITIONER:

[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 service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is a software development and computer consulting company. It seeks to employ the beneficiary as a programmer analyst and to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on the following grounds: (1) the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation; (2) the petitioner does not qualify as a United States employer or agent; and (3) the petitioner failed to submit a Labor Condition Application (LCA) that covers all the locations where the beneficiary will be employed.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) Form I-290B, counsel's appeal brief, and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

In the documentation submitted with the petition on October 9, 2008, the petitioner stated that it wished to continue to employ the beneficiary as a programmer analyst from March 13, 2009 to October 6, 2011 in San Ramon, CA at an annual salary of \$60,000. The petitioner's offices are located in Edison, NJ.

The scope of the position is described as follows in the support letter the petitioner submitted with the H-1B petition on behalf of the beneficiary:

[The beneficiary] will be required to perform design, development and implementation of application and client/server software, he will be responsible for Business analysis, testing, environment set-up, training of end users, generation of progress report and time sheets and participation in project meetings etc. In addition, he will be assigned to code modules and sub modules.

The usual minimum requirement for the performance of the above mentioned job duties with our company, as with any similar organization, is Bachelors of Science degree **(equivalent to from [sic] an accredited college or university in the United States)**[.] It is not unusual for the individual to hold a Master's degree and/or number of years of experience in the filed [sic] of programming. . . .

The submitted Labor Condition Application (LCA) was filed for a programmer analyst to work in San Ramon, CA from October 7, 2008 to October 6, 2011. The LCA lists a prevailing wage of \$51,438.

The beneficiary's education documents, indicating that he has a foreign degree, were submitted with the petition along with an education evaluation stating that the beneficiary's education is equivalent to a

bachelor's degree in computer science from an accredited U.S. college or university.

On February 2, 2009, the director issued an RFE stating that the evidence of record is not sufficient to demonstrate that the proffered position is a specialty occupation. The petitioner was advised to submit documentation clarifying the petitioner's employer-employee relationship with the beneficiary, including copies of any contracts between the petitioner and beneficiary, an itinerary of services, copies of signed and valid contractual agreements between the petitioner and end-client companies, and copies of signed and valid work orders and other documentation between the petitioner and the ultimate end-client companies where the work will actually be performed. The RFE specifically noted that:

The evidence must show specialty occupation work for the beneficiary with the actual end-client company where the work will ultimately be performed. Merely providing contracts between the petitioner and other consultants or employment agencies that provide consulting or staffing services to other companies may not be sufficient. There must be a clear contractual path shown from the petitioner, through any other consultants or staffing agencies, to an ultimate end-client.

The petitioner responded to the RFE on February 27, 2009, and included the following documents:

- A copy of a consulting agreement between the petitioner and [REDACTED] signed on October 22, 2008 for a one-year validity period. The location(s) of assignment is described as being done on a case-by-case basis.
- A copy of a Service Order between the petitioner and [REDACTED] listing the beneficiary by name and dated October 22, 2008. The Service Order states that services will be provided from October 27, 2008 to January 26, 2010 and that the beneficiary will be assigned to work at the offices of a company called [REDACTED], which is [REDACTED] client, located in Redwood City, CA. The Service Order further provides that the beneficiary will work as a .Net Developer "[w]ith the BI Development Team and its business partners to design and develop the .Net application to generate and deploy the SQL Server reports in the intranet, to design the user interface for reports and to generate the interface and customize Dunda's reporting tool."
- A copy of the petitioner's employment agreement with the beneficiary, which states that "[the beneficiary] will comply with the Company's instructions concerning relocation to or from a customer site and reasonable and documented relocation expenses will be reimbursed. . . ."

The petitioner did not submit a copy of the agreement between [REDACTED] or any other documentation from [REDACTED] even though the director requested copies of all contracts leading to the ultimate-end client in the RFE. The petition was denied on April 21, 2009.

On appeal, counsel for the petitioner argues that the petitioner is the beneficiary's employer, that the proffered position is a specialty occupation, and that the LCA is valid because Redwood City, CA, where the beneficiary will work, is in the same metropolitan geographical area as San Ramon, CA, the location listed in the Form I-129 and the LCA as the location where the beneficiary will work. On appeal, counsel submits an

extension of the contract agreement between [REDACTED], dated March 30, 2009. The document states that it is an extension of the initial contract, which began on October 27, 2008. In addition, counsel has submitted a copy of an email from the beneficiary to the petitioner's counsel, which has attached to it an email from [REDACTED]. The e-mail states that the beneficiary is working as a programmer analyst/consultant on a project called the Business Intelligence Executive Dashboard and his project roles are:

[r]equirement analysis, design of N-tier applications using Object Oriented Methodologies, preparation of technical specifications, preparing design documents, development, coding, preparing unit test cases, developing test matrix, unit testing, system testing. The platforms and technologies used for developer are .Net2.0/3.5, ASP.NET2.0/3.5, ADO.NET, C#, Web services, Silverlight, XML, JavaScript, HTML/DHTML, SQL Server 2005/2008, SSRS, SSIS, IIS, Dundas Charting.

Additionally, counsel submits the beneficiary's paystubs and Forms W-2 indicating that the beneficiary resided in San Ramon, CA in 2007 and 2008 as well as shortly before the appeal was filed in 2009.

The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the contract agreement between [REDACTED] and [REDACTED] to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Further, the USCIS regulations regarding the RFE process preclude consideration of evidence encompassed by an RFE but not provided in the RFE response. See 8 C.F.R. §§ 103.2(b)(8), (11), (12), and (14). Under the circumstances, the AAO need not and does not consider the sufficiency of the extended contract agreement submitted on appeal.¹

¹ However, even if the AAO were to consider the documentation provided on appeal that was within the scope of the RFE but not provided in the RFE response, that evidence does not demonstrate that the proffered position is a specialty occupation or that the petitioner is a United States employer or agent. The extension agreement is dated March 30, 2009 and references an initial agreement that was dated October 27, 2008. As both the initial and extension agreements were signed after the petition was filed, the petitioner has failed to demonstrate that, at the time the petition was submitted, it knew where and on which project the beneficiary would work. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 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 AAO will first consider whether the proffered position is 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.

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

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, a proposed position must also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

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

read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), 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 proposed position is a specialty occupation, the AAO agrees with the director’s determination that the record is devoid of documentary evidence with respect to the end-client firm, and therefore whether his services would actually be those of a programmer analyst.

To determine whether a particular job qualifies as a specialty occupation position, the AAO does not solely rely on the job title or the extent to which the petitioner’s descriptions of the position and its underlying duties correspond to occupational descriptions in the U.S. Department of Labor’s *Occupational Outlook Handbook (Handbook)*. Critical factors for consideration are the extent of the evidence about specific duties of the proffered position and about the particular business matters upon which the duties are to be performed. In this pursuit, the AAO must examine the evidence about the substantive work that the beneficiary will likely perform for the entity or entities ultimately determining the work’s content.

The evidence submitted directly contradicts the petitioner’s assertion in the petition that the beneficiary will be assigned to work in San Ramon, CA for the duration of the petition to work on a project that requires at least a bachelor’s degree or the equivalent in a specific specialty. First, the petitioner’s employment agreement with the beneficiary states that the beneficiary will comply with the petitioner’s instructions to relocate to or from a customer site, implying that the beneficiary will work at more than one client site. Second, even though the petitioner indicated on the Form I-129 that the beneficiary’s employment would continue without change, the petitioner stated that the beneficiary would work at a location in San Ramon, CA, while the documentation submitted on appeal indicated that the beneficiary was working in Redwood City, CA. Third, the Service Order submitted in response to the RFE indicated that the beneficiary would work as a .Net developer and not a programmer analyst. 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). Therefore, the petitioner has failed to establish that the beneficiary will work on a project in San Ramon, CA for the duration of the petition in a position that requires at least a bachelor’s degree or the equivalent in a specific specialty. Given that the petitioner failed to submit any documentation regarding the beneficiary’s alleged employment in San Ramon, CA, but instead submitted documentation in response to the RFE that the beneficiary would work in a different location than that stated in the petition, the AAO finds it is more likely than not that the beneficiary will be subcontracted to work at other locations and for other end-clients than those indicated by the petitioner.

As recognized by the court in *Defensor v. Meissner*, 201 F.3d at 387, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. The 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. Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work. The record of proceedings lacks such substantive evidence from any end-user entities covering the duration of the petition that may generate work for the beneficiary and whose business needs would ultimately determine what the beneficiary would actually do on a day-to-day basis. Additionally, the documentation submitted indicates that any work the beneficiary would allegedly perform on the project for [REDACTED] does not require at least a bachelor's degree or the equivalent in a specific specialty. In short, the petitioner has failed to establish the existence of H-1B caliber work for the beneficiary.

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) 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 4.²

Applying the analysis established by the Court in *Defensor*, which is appropriate in an H-1B context, like this one, where USCIS has determined that the petitioner is not the only relevant employer for which the beneficiary will provide services, USCIS has found that the record does not contain sufficient documentation from the end user client(s) for which the beneficiary will provide services that establishes the specific duties the beneficiary would perform. Without this information, the AAO cannot analyze whether these duties would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation. Moreover, the documentation that was submitted does not establish that the petitioner knew where the beneficiary would work for the duration of the petition at the time the petition was filed and thereby whether at least a bachelor's degree or the equivalent in a specific specialty is

² The AAO further notes that even if the petitioner could demonstrate that the beneficiary would work as a programmer analyst for the duration of the petition, the *Handbook's* (2010-11 online edition) information on educational requirements in the programmer-analyst occupation indicates that a bachelor's or higher degree, or the equivalent, in a specific specialty is not a normal minimum entry requirement for this occupational category. Rather, the occupation accommodates a wide spectrum of educational credentials. The evidence submitted by the petitioner, which indicates that the proffered position requires a wide range of credentials rather than at least a bachelor's degree or the equivalent in a specific specialty, does not refute the information provided in the *Handbook*.

required to perform the proffered duties.

The AAO therefore affirms the director's finding that the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation.

Next, the AAO will address the issue of whether or not the petitioner qualifies as a United States employer. Counsel for the petitioner argues that the petitioner is the actual employer.

Under the test of *Nationwide Mutual Ins. Co. v. Darden* (*Darden*), 503 U.S. 318, 322-323 (1992) (hereinafter "*Darden*"), the United States Supreme Court 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." *Darden*, 503 U.S. 318 at 322-323 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). The Supreme Court stated:

"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 *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. at 440 (hereinafter "*Clackamas*"). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).³

³ 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

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 must focus on the common-law touchstone of "control." *Clackamas*, 538 U.S. at 450; *see also* 8 C.F.R. § 214.2(h)(4)(ii)(2) (defining a "United States employer" as one who "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" (emphasis added)).

Factors indicating that a worker is or will be 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).

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

Congress has spoken directly on the issue. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984).

The regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to employ persons in the United States, *and* to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee," "employed," "employment" or "employer-employee relationship" indicates that the regulations do not intend to extend 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).

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).

Applying the *Darden* test to this matter, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." First, under *Defensor*, it was determined 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. See *Defensor v. Meissner*, 201 F.3d at 388.

The petitioner asserts that it will be the employer of the beneficiary. However, the documentation submitted when reviewed in its entirety does not support this conclusion. On appeal, counsel submitted a copy of an email from the Chief Information Officer at [REDACTED] which states that the beneficiary is working on a project for [REDACTED]. The evidence does not establish that the beneficiary reports to anyone employed by the petitioner. No evidence was submitted to indicate that [REDACTED] is aware of the petitioner's existence. Even the beneficiary's e-mail uses [REDACTED] domain rather than the petitioner's domain.

Other than putting the beneficiary on its payroll and providing benefits, it is unclear what role the petitioner has in the beneficiary's assignment. No independent evidence was provided to indicate that the petitioner would control whether there is any work to be performed or that the petitioner would even oversee the beneficiary's work. Therefore, the AAO has no choice but to conclude that [REDACTED] or [REDACTED] would oversee any work the beneficiary performs.

In view of the above, it appears that the beneficiary will not be an "employee" having an "employer-employee relationship" with a "United States employer." It has not been established that the beneficiary will be "controlled" by the petitioner or that the termination of the beneficiary's employment is the ultimate decision of the petitioner. To the contrary, it appears that the third party client will ultimately control the beneficiary's employment. Therefore, based on the tests outlined above, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii).

The AAO therefore affirms the director's finding that the petitioner does not qualify as a United States employer as it also failed to establish that it has sufficient work and resources for the beneficiary. Moreover, the petitioner has not provided sufficient documentation to establish that it is the entity with ultimate control over the beneficiary's work.

The AAO also affirms the director's finding that the petitioner failed to establish that the LCA corresponds to the petition by encompassing all of the work locations and related wage requirements for the beneficiary's full employment period. For this additional reason, the petition cannot be approved.

In pertinent part, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B) 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 regulation at 8 C.F.R. § 103.2(b)(1) states, in pertinent part:

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.

In addition, the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1), states, as part of the general requirements for petitions involving a specialty occupation, that:

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

With regard to Labor Condition Applications, section 212(n)(1)(A), 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)(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.

[Italics added].

The LCA and Form I-129 in this matter, which indicate the proffered position's location as being in San Ramon, CA do not correspond with the statements made by the petitioner in response to the RFE or on appeal that the beneficiary would work in Redwood City, CA or the employment contract, which indicates that the beneficiary may be assigned to any client site. Therefore, no evidence was provided by the petitioner to demonstrate that the beneficiary will work in San Ramon, CA for the duration, or even a portion of the duration, of the petition. Consequently, USCIS cannot ascertain that this LCA actually supports the H-1B petition. Again, a petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 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.

On appeal, counsel for the petitioner argues that Redwood City, CA and San Ramon, CA are in the same metropolitan geographical area because these locations are 41 miles from each other and, therefore, because they are within normal commuting distance, the LCA covers the Redwood City, CA location. Even if the petitioner could establish, which it did not do, that the beneficiary would work in Redwood City, CA for the duration of the petition, according to the U.S. Department of Labor's Foreign Labor Certification *Online Wage Library*, Redwood City is located in the San Francisco metropolitan division for prevailing wage purposes while San Ramon is located in the Oakland metropolitan division and the prevailing wages between those two locations differ for the occupation of programmer analyst. Additionally, counsel notes that the regulation states that the petitioner must pay the beneficiary the required prevailing wage for the area of intended employment determined at the time of filing the application. As discussed previously, the petitioner did not demonstrate that it knew where the beneficiary would work at the time the petition was filed for the duration of the petition. Therefore, the petitioner has failed to demonstrate that the LCA covers the location(s) of intended employment at the time the petition was filed.

Finally, the AAO notes that the record indicates that prior H-1B petitions have been approved for the beneficiary. The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. However, the AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. If any of the previous

nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, it would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). A prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved nonimmigrant petitions on behalf of a beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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

ORDER: The appeal is dismissed. The petition is denied.