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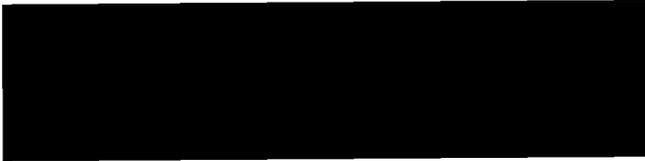
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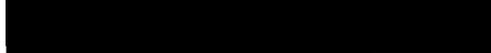
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FILE: WAC 08 145 52351 Office: CALIFORNIA SERVICE CENTER Date: **JAN 05 2010**

IN RE: Petitioner: 
Beneficiary: 

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

ON BEHALF OF PETITIONER:


INSTRUCTIONS:

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

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



Perry Rhew
Chief, Administrative Appeals Office

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

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

The director denied the petition because the petitioner failed to establish that: (1) it complied with the terms and conditions of employment; (2) it meets the regulatory definition of an intending United States employer as defined at 8 C.F.R. § 214.2(h)(4)(ii); (3) it meets the definition of “agent” at 8 C.F.R. § 214.2(h)(2)(i)(F); (4) it submitted a valid labor condition application (LCA) for all locations; or (5) the proffered position is a specialty occupation.

On appeal, 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 first issue in this matter is whether the petitioner is in compliance with the terms and conditions of employment. Specifically, the director found that the petitioner made inconsistent and contradictory claims regarding its employment of and wages paid to its H-1B employees.

The director notes that the petitioner appears to be operating its business out of a residential address, and further has failed to compensate its other H-1B employees as claimed. The director found discrepancies between the petitioner’s payroll records and the actual wages paid and hours worked by these employees. As explained by the petitioner on appeal, however, one of these representative employees, [REDACTED] returned to India and did not inform the petitioner that his H-1B visa had been issued nor of his return to the United States until August 2005, despite approval of his visa in October 2004 and commencement of his employment with the petitioner in November of 2004. This explanation, however, is insufficient to overcome the director’s findings. The Act and the H-1B regulations do not permit a grace period during which an employee may take personal time to settle affairs and/or run personal errands. *See generally* 8 C.F.R. §214.2(h)(4). While the non-payment of [REDACTED]’s wages during this time period may be excused under U.S. Department of Labor Standards, these activities or rather non-H-1B activities represent a violation of status and further do not excuse the petitioner under USCIS H-1B program rules from not employing [REDACTED]

Similarly, the dates of absence provided for [REDACTED] for the second and third quarters of 2005 represent a violation of status and further do not excuse the petitioner under USCIS H-1B program rules from not employing [REDACTED] whose petition was approved in October of 2004. While the petitioner claims that it in fact employed [REDACTED] from June to December of 2005, the quarterly tax returns for the second and third quarters of 2005 submitted by the petitioner do not include [REDACTED] on the list of employees. Absent a more in-depth explanation and

corroborating evidence to support the petitioner's claim, the AAO is left to conclude that this employee either violated his status of his own volition or was forced to violate his status by being benched by the petitioner. Either way, the director's concerns regarding the petitioner's compliance with the terms and conditions of its alien workforce are justified and, as such, shall not be disturbed.

The second issue in the present matter is whether the petitioner has established that it meets the regulatory definition of an intending United States employer.

When filing the I-129 petition, the petitioner averred in its March 31, 2008 letter of support that it is a computer consulting company. It further claimed that it is in the business of rendering ERP and other related IT solutions to clients in three forms, including "offering the services of consultants for clients on a time and material basis, [o]ffering the services to handle turnkey projects on our own, [and] building customized projects on SAP and web based SAP products based on market needs in general or based on the specific needs of a client, which is then sold." The petitioner further claimed to provide consulting services across vertical markets, and indicated that it recently started operations in India, Singapore, Dubai, and Qatar.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued a request for evidence (RFE) on May 31, 2008. In the request, the director 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 where the beneficiary would work. Additionally, the director noted that if the petitioner was acting as an agent, documentation such as an itinerary and a letter discussing the conditions of the employment from the end-client firms must be submitted.

In a response dated July 7, 2008, the petitioner addressed the director's queries. In its letter, the petitioner claimed that it provided two kinds of services: accepting and performing turnkey projects for clients on a fixed bid or flexible bid basis, and offering consultant services either directly to clients or to other clients by sub-contracting through their preferred agents at a fixed rate of time and material basis. Regarding the beneficiary, the petitioner claimed that he would be employed on an internal project, entitled "WEB-Global Banking Reconciliation" at the company's location in Naperville, Illinois. In addition, the petitioner included an employment agreement, an offer of employment letter, and a tentative itinerary for the beneficiary in support of the contention that the petitioner is the beneficiary's employer.

On August 15, 2008, the director denied the petition. The director found that the petitioner is a contractor that subcontracts workers with a variety of computer skills to other companies who need computer programming services. The director concluded that, because the petitioner was a contractor, it was required to submit the requested end contracts and itinerary and, without this documentation, the petitioner could not establish that it met the definition of United States employer or agent.

In reviewing whether the director erred with regard to this second issue, 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 H-1B nonimmigrants 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."¹ 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; 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

¹ 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.

being decisive.” *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).²

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

² While the *Darden* court considered only the definition of "employee" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(6), and did not address the definition of "employer," courts have generally refused to extend the common law agency definition to ERISA's use of employer because "the definition of 'employer' in ERISA, unlike the definition of 'employee,' clearly indicates legislative intent to extend the definition beyond the traditional common law definition." *See, e.g., Bowers v. Andrew Weir Shipping, Ltd.*, 810 F. Supp. 522 (S.D.N.Y. 1992), *aff'd*, 27 F.3d 800 (2nd Cir. 1994), *cert. denied*, 513 U.S. 1000 (1994). However, in this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in 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).

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."

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 and offer of employment letter 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.

To qualify as a United States employer, all three criteria at 8 C.F.R. § 214.2(h)(4)(ii) must be met. The Form I-129 and the petitioner's tax returns contained in the record indicate that the petitioner has an Internal Revenue Service Tax Identification Number. While the petitioner's letter of support and the employment agreement dated March 12, 2008 indicate its intent to engage the beneficiary to work in the United States as discussed *supra*, the petitioner's failure to comply with the terms and conditions of the H-1B program with regard to its other employees indicates that it is more likely

than not that the petitioner will not engage the beneficiary to work, at least not for the entire period requested. Regardless, the letter of support and employment agreement alone provide no details regarding the nature of the job offered or the location(s) where the services will be performed, precluding an analysis of who will control the beneficiary's work. Therefore, the petitioner has failed to establish that an employer-employee relationship exists.

Despite the director's specific request in the RFE that the petitioner provide contracts between the petitioner and the beneficiary, or between the petitioner and its end clients, the petitioner did not fully respond to the director's request. The regulations state that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The record reflects that the petitioner submitted several documents in support of its claim that it was an employer for purposes of the definition above. Specifically, a document entitled "Employment Agreement" was submitted, which outlines the terms of employment between the petitioner and the beneficiary. Although the petitioner relies on this document, along with the offer of employment in letter form dated March 4, 2008, these documents fail to specify the exact nature, location, and duties of the beneficiary once he commences employment with the petitioner.

The minimal information contained in the March 31, 2008 and July 7, 2008 letters and the incomplete information reflected in the employment agreement and offer letter are 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. While the petitioner relies on the employment contract, this document fails to describe the beneficiary's employment relationship with the petitioner. Absent more detailed information, it has not been established that the beneficiary will be "controlled" by the petitioner or that the beneficiary's employment could be terminated. While the petitioner contends in response to the RFE that the beneficiary will work internally on a project, no documentary evidence supporting this claim has been submitted. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

It is noted that, in both the March 31, 2008 and July 7, 2008 letters, the petitioner indicates that it provides consulting services to clients and to subcontractors of clients through their chosen agents on an as-needed basis. The petitioner's employment agreement with the beneficiary does not specify where or for what duration the beneficiary will work while in the United States, and the itinerary submitted by the petitioner in response to the request for evidence is labeled as a "tentative" itinerary. However, this tentative itinerary suggests that it is possible for the beneficiary to be outsourced to client sites during his stay in the United States. Therefore, the tentative itinerary provided in support of the petitioner's claim that it will employ the beneficiary pursuant to the

regulatory requirements is insufficient. 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).

It is noted that the petitioner submits numerous subcontractor services agreements on appeal as representative samples of its relationship with clients and as evidence that it will remain the employer of the beneficiary. This evidence, however, will not be considered. 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. However, the AAO will not consider this evidence for any purpose. *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.

Therefore, based on the tests outlined above and the evidence in the record, 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 specifically noted that the LCA listed the beneficiary's work location as Naperville, Illinois. In reviewing the petitioner's supporting documentation, the director concluded that without ultimate end-client agreements, the actual work location(s) for the beneficiary could not be determined. On appeal, the petitioner argues that it did submit a valid LCA, and asserts that even if the beneficiary was required to visit client sites for short visits, this would not invalidate the LCA. The petitioner concluded that it therefore fully complied with the requirements for a valid LCA at the time of filing.

Upon review, the AAO concurs with the director's finding. The March 31, 2008 and July 7, 2008 letters indicate that the petitioner's clients are widespread. The letter further claims that one of its services is providing consultancy services directly to clients or to their clients through subcontracts. Absent end-agreements with clients, the duration and location of worksites to which the beneficiary will be sent during the course of his employment cannot be determined. Despite the petitioner's claim that the beneficiary will work internally throughout his tenure in the United States, no

documentary evidence to support this claim has been submitted. Once 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. Absent this evidence, the AAO cannot conclude that the LCA submitted is valid for all of the beneficiary's intended work locations. For this additional reason, the petition may not be approved.

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

It should be noted that for purposes of the H-1B adjudication, the issue of bona fide employment is viewed within the context of whether the petitioner has offered the beneficiary a position that is viewed as a specialty occupation. Of greater importance to this proceeding, therefore, is whether the petitioner has provided sufficient evidence to establish that the services to be performed by the beneficiary are those of a specialty occupation.

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

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

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

Specialty occupation means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

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

occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

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

In addressing whether the proffered position is a specialty occupation, the record is devoid of any documentary evidence as to where and for whom the beneficiary would be performing his services, and whether his services would be that of a programmer 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.

The petitioner’s letter of support dated March 31, 2008 provided the following overview of the beneficiary’s proposed duties, in relevant part:

The Programmer Analyst will be involved in the design and development of software systems and applications for control and automation of manufacturing, business, and management processes.

Also, Programmer Analyst will be responsible for analyzing information to determine, recommend and plan installation of a new system or modification of an existing system, to correct errors, allow it to adapt to new hardware or to improve its performance.

The Programmer Analyst will be called upon to draw on his academic background and professional training in designing [and] performing detailed business process modeling, designing interfaces and data conversion routines, designing end user training, demonstrating systems to key managers and users and performing technical integration testing.

The Programmer Analyst will plan, develop, test, analyze, code, debug, implement and document computer programs, applying knowledge of programming techniques and computer systems. In this position, Programmer Analyst will evaluate user requests for new or modified programs to determine feasibility, cost and time required, compatibility with existing system, and computer capabilities.

The Programmer Analyst will consult with the specified personnel to identify current operating procedures and clarify program objectives. Programmer Analyst will read manuals, periodicals and technical reports to learn ways to develop programs that meet user requirements.

The Programmer Analyst will formulate a plan outlining steps to develop the program, using structured analysis and design. The Programmer Analyst will prepare flowcharts and diagrams to illustrate a sequence of steps the program must follow and to describe logical operations involved.

The Programmer Analyst will convert project specifications using flowcharts and diagrams into sequences of detailed instructions and logical steps for coding into language processable by computer, applying knowledge of computer programming techniques and computer languages. The Programmer Analyst may design and develop both packaged and systems software, including databases, or be involved in creating custom software applications for clients.

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, and simply submitted a "tentative" itinerary for the beneficiary which claimed that he would work on an internal project entitled "WEB-Global Banking Reconciliation."

Upon review of the evidence, the AAO concurs with the director's findings. The employment agreement offered in support of the petition provides no overview or details with regard to the beneficiary's duties. The petitioner's letters dated March 31, 2008 and July 7, 2008 indicate that the beneficiary may be sent to provide consulting services for clients, or clients of clients, on an as-needed basis. Once again, this statement 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.

As discussed above, the record contains simply the letter of support which outlines the proposed duties of the beneficiary, and this deficient agreement which provides no information regarding the end-clients and their requirements for the beneficiary. 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. Again, 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, 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 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, the job description provided by the petitioner, as well as various statements from the petitioner both prior to adjudication and on appeal, indicate that the beneficiary will be working on client projects and will be assigned to various clients’ worksites as necessary. Despite the director’s specific request for documentation to establish the ultimate location(s) of the beneficiary’s employment, the petitioner failed to comply prior to the adjudication of the petition. Moreover, the petitioner’s failure to provide evidence of an employer-employee relationship and/or work orders or employment contracts between the petitioner and its clients 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. 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.

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.