



U.S. Citizenship  
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**JAN 08 2010**

FILE: WAC 07 146 51329 Office: CALIFORNIA SERVICE CENTER Date:

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 Prew  
Chief, Administrative Appeals Office

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

To employ the beneficiary in what the petitioner designates a Quality Assurance Engineer position, the petitioner filed this nonimmigrant petition to classify the beneficiary as an H-1B 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 two independent grounds, namely, the petitioner's failures to establish (1) that it is qualified to file an H-1B petition, that is, as either (a) a U.S. employer as defined at 8 C.F.R. § 214.2(h)(4)(ii), or (b) a U.S. agent, in accordance with the regulation at 8 C.F.R. § 214.2(h)(2)(i)(F); and (2) that the proffered position qualifies as a specialty occupation in accordance with the section 101(a)(15)(H)(i)(b) of the Act and its implementing regulations.

On appeal, counsel for the petitioner submits a brief in which he contends that the director's decision is not supported by the evidence of record. Counsel argues that the petitioner is both a U.S. employer and a U.S. agent and that the proffered position is a specialty occupation. Counsel submits copies of the following documents as additional evidence in support of the appeal: (1) as Exhibit 2, several documents that counsel describes as "Petitioner's contract and SOW [Statement of Work] with Cisco Systems"; (2) as Exhibit 3, an IRS Form W-9 (Request for Taxpayer Identification Number and Certification) signed by the petitioner on March 28, 2007; (3) as Exhibit 4, three documents which counsel submits as "Petitioner's contract with Redback Networks": (a) an Independent Contractor Agreement between [REDACTED] and the petitioner; (b) a Nondisclosure Agreement between Redback Networks, Inc. and the petitioner; and (c) a Redback Networks Supplier Sheet regarding the petitioner; (4) as Exhibit 5, a Contractor Agreement between [REDACTED] and the petitioner, which counsel submits as "Petitioner's contract with [REDACTED]"; and (5) as Exhibit 6, six pages of a Master Service Agreement between [REDACTED] and the petitioner, which counsel submits as "Petitioner's contract with Logitech."

In his brief, counsel identifies the Cisco Systems documents at Exhibit 2 as a contract with "an actual end-client under which the Beneficiary would perform services." Counsel asserts that the Cisco Systems SOW document specifies the nature of the Cisco Systems project and job duties. The AAO notes that this SOW identifies, by name, someone other than the beneficiary as the person to perform the work specified by the SOW. Acknowledging that the Cisco Systems documents do not specifically name the beneficiary, counsel states that the Cisco Systems contract allows the petitioner to "assign any consultant on the project." Counsel states that the Redback Networks, Stubhub, and Logitech documents are submitted not as contracts under which the beneficiary would work, but as "representative" contracts "with the petitioner's end clients to show that it has sufficient work of H-1B caliber."

As will be discussed below, the AAO finds that the record of proceeding supports the director's denial of the petition on each of the grounds cited in her decision, and that the matters submitted on appeal do not overcome either basis of the director's decision.

## **THE ISSUE OF THE PETITIONER'S STANDING TO FILE THIS H-1B PETITION**

The first issue at hand 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 employee-employer relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii)(2).

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

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

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

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

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

Upon review, the AAO 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.

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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, 387-8 (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.

*Darden*, 503 U.S. at 323-324; *see also* *Restatement (Second) of Agency* § 220(2) (1958); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) (hereinafter "*Clackamas*"). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).<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)

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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).

(1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. See *Clackamas*, 538 U.S. at 448-449; cf. *New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1), (EEOC 2006) (adopting a materially identical test and indicating that said test was based on the *Darden* decision); see also *Defensor v. Meissner*, 201 F.3d at 388 (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 that the director's conclusion to the contrary was erroneous. Specifically, the petitioner contends that the record contains sufficient indicia of control over the beneficiary and his work to establish that it is a U.S. employer. As will be discussed below, the record's documentary evidence does not support counsel's contention.

The April 6, 2007 letter from the petitioner to the beneficiary regarding an offer of employment is materially incomplete, and, therefore, of no probative value in establishing the nature of the business relationship between the petitioner and the beneficiary. The second page of the letter includes this statement: "Your employment is subject to the terms and conditions of the Employment Agreement, which is enclosed with this letter." However, the petitioner has not submitted a copy of the Employment Agreement. As the non-submitted Employment Agreement is incorporated by

reference into the offer of employment letter as containing terms and conditions of the employment, its absence from the record precludes the AAO from assessing the complete agreement between the petitioner and the beneficiary and, consequently, the true nature of the business arrangements between them.

Another reason that the April 2, 2007 letter has little evidentiary value is that the record does not include a copy signed by the beneficiary, as requested in the letter to signify the beneficiary's acceptance of its contents. Therefore, the record does not establish that the beneficiary assented to the contents of the letter. Further, as the letter's referenced Employment Agreement has not been submitted, the record fails to establish the terms and conditions that would govern the relationships among the petitioner, other business entities in the United States, and the beneficiary. In fact the record is devoid of documentary evidence of the beneficiary's understanding of and agreement with the terms and conditions under which he would be employed if the petition were approved.

Next, the AAO finds little evidentiary value in the petitioner's April 1, 2007 "Itinerary of Definite Employment" letter, which avers that the beneficiary will be a full-time employee of the petitioner, "providing software development and implementation services to [the petitioner's] client companies located in Fremont and San Jose[,] California," and that the beneficiary's services "will be crucial in developing and implementing software programs according to the requirements of our contracts with [REDACTED] and [REDACTED]. As indicated by the above discussion of the deficiencies of the petitioner's March 21, 2007 letter and the absence of the Employment Agreement between the petitioner and the beneficiary, the record does not corroborate the petitioner's claim that the beneficiary will be an employee of the petitioner. Further, as will now be discussed, the evidence of record does not substantiate the existence of work for the beneficiary under contracts with [REDACTED] and [REDACTED].

The Master Service Agreement (MSA) between [REDACTED] and the petitioner, a copy of which is submitted on appeal, does not constitute a contract for any specific work. Rather, it merely consists of terms that would be automatically incorporated into any contract between Logitech and the petitioner during the effective period of the MSA. Further, the AAO accords no weight to the submitted copy of the MSA, because it appears to be incomplete. The first page of the document states that it consists of eight (8) pages, but only six (6) pages are submitted. Additionally, the MSA does not mention the beneficiary or include any commitment to utilize him.

The AAO accords no probative value to the Sub-Contracting Agreement between the petitioner and [REDACTED] which the petitioner submitted as part of its response to the service center's request for additional evidence (RFE). By its express terms, the Sub-Contracting Agreement between the petitioner and [REDACTED] was in effect only for a one-year period that commenced on October 25, 2004. Therefore, it appears that the agreement was not in effect when the present petition was filed in April 2007.

The period-of-service information in the other [REDACTED] documents, which were submitted in response to the RFE, materially conflicts with the Cisco System documents presented on appeal. The AAO therefore accords no probative value to either of them. [REDACTED]

██████████ Purchase Order, dated March 21, 2007, which specifies the beneficiary by name, states a starting date of October 1, 2007 and an end date of September 30, 2010. On the other hand, the Cisco Systems documents presented as the contract under which the beneficiary would perform services, and the Milestones section of the Cisco SOW included in those documents, indicate that work under the contract would begin in 2007 and continue until July 25, 2008. Consequently, counsel has presented materially conflicting statements and documentary evidence concerning the beneficiary's employment. 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. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Accordingly, the AAO discounts both the ██████████ ██████████ and the ██████████ documents as evidence of work that the beneficiary would perform.

The July 27, 2007 letter from ██████████ president to the service center indicates that he submitted the Purchase Order pursuant to a contract that he also submitted with his letter. However, the only ██████████ contract in the record is the aforementioned Sub-Contracting Agreement which, by its express terms, terminated in October 2005. Therefore, it appears that the record lacks the contract under which the Purchase Order was signed and that describes the overall terms and conditions governing the relationships between the beneficiary, the petitioner, and ██████████ ██████████ at the time that Purchase Order was signed. Consequently, as the record does not establish the full terms and conditions that would govern the performance of work under the Purchase Order, the AAO does not have an adequate basis to ascertain the full scope of the work relationships that would exist between the petitioner, ██████████, and the beneficiary during the period of the Purchase Order.

If the record's Sub-Contracting Agreement between the petitioner and ██████████ is the contract to which the president of ██████████ refers in his letter as the source of the Purchase Order, that Agreement provides cause for the AAO to doubt the credibility of the Purchase Order as a document that the parties meant to actually effect contractual obligations. The Sub-Contracting Agreement between ██████████ and the petitioner nowhere refers to Purchase Orders as an aspect of their course of dealings with each other. Rather, the Sub-Contracting Agreement indicates that ██████████ would bind itself to provide work from the petitioner by "professional services work orders conforming to the Work Order format at the Agreement's Exhibit A,"<sup>3</sup> and that those Work Orders would include "specifications and limitations." The Purchase Order submitted by the petitioner is not such a document.

To qualify as a United States employer, a petitioner must satisfy all three of the criteria at 8 C.F.R. § 214.2(h)(4)(ii). Further, the petitioner must satisfy the criteria at the time that the petition is filed.

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<sup>3</sup> The AAO notes that the petitioner failed to provide a copy of this section of the Sub-Contracting Agreement.

USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Therefore, the director correctly limited her analysis to whatever evidence the record might contain of work existing for the beneficiary at the time the petition was filed.

As reflected in this decision's earlier discussions regarding the deficiencies and apparent contradictions in the documentary evidence submitted to show the work to which the beneficiary would be assigned, which are hereby adopted and incorporated for this discussion, the record lacks credible evidence that the petition was filed to engage the beneficiary in actual work that had been designated for the beneficiary for the employment period specified in the petition. Thus, the record indicates that at the time that the petition was filed the petitioner was not engaging nor was it readily able or prepared to engage the beneficiary for actual work in the United States. Therefore, the petitioner failed to satisfy the requirement at 8 C.F.R. § 214.2(h)(4)(ii)(1).

With regard to the requirement at 8 C.F.R. § 214.2(h)(4)(ii)(2) that a U.S. employer have an employer-employee relationship with its beneficiary, the AAO again adopts and incorporates its earlier comments regarding the deficiencies and apparent contradictions in the documentary evidence submitted to show the work to which the beneficiary would be assigned. The record of proceeding indicates that the petitioner's business involves consulting, technical support, and other services to clients and to clients' clients, and thus that entities other than the petitioner are routinely involved in controlling the work of workers associated with the petitioner. However, the evidence of record does not establish what work relationships and work control dynamics would obtain among the petitioner, its clients, its clients' clients, and the beneficiary. In short, the petitioner has failed to establish the nature and extent of its and its clients' exercise of the essential elements of employee control identified in this decision's earlier discussion on discerning an employer-employee relationship. 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).

For the reasons discussed above, the AAO finds that the petitioner has not satisfied either the first or second criteria of 8 C.F.R. § 214.2(h)(2)(i)(A). Therefore, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

Next, the AAO finds that the director was correct in finding that the evidence of record does not establish the petitioner as an agent. As reflected in this decision's earlier comments about the lack of documentary evidence of the business relationship between the petitioner and the beneficiary, the record of proceedings does not establish the exact nature of that relationship. Due to the lack of documentary evidence detailing where the beneficiary will actually be employed, the record also fails to establish that the petitioner will be an agent representing employers of the beneficiary. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

## THE SPECIALTY OCCUPATION ISSUE

The final issue is whether the record of proceeding establishes that 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 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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must 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 (5<sup>th</sup> 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.

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.”

As part of its evaluation of the specialty occupation issue, the AAO here incorporates and adds to its earlier discussions about the deficiencies of the contractual type of documentary evidence submitted into the record.

The AAO has reviewed the claims of the petitioner and its counsel that the position that is the subject of this petition is that a software engineer operating at a specialty occupation level for the period October 1, 2007 to September 30, 2010. However, their claims are only as effective as the strength of the documentary evidence supporting them. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

As will be discussed below, the evidence of record does not substantiate that approval of the petition would result in the beneficiary's engagement in a specialty occupation for the period sought in the petition, or for any appreciable part of that period. The record of proceeding does not demonstrate that, at the time that it was filed, the petition was based on *bona fide* or genuine specialty occupation work that would definitely exist for the beneficiary for the period sought in the petition. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

Specialty occupation classification is dependent upon the nature and quality of the evidence of record about the actual work to be performed, the associated performance requirements, and the nature and educational level of specialized knowledge in a specific specialty necessary for or usually associated with such performance requirements. Thus, where, as here, the substantive nature of the work to be performed is determined not by the petitioner but by its clients, the AAO focuses on whatever documentary evidence the clients generating the work have issued or endorsed about the work, such as specifications, performance timelines, contract amendments, work orders, and correspondence about performance expectations, to name a few.<sup>4</sup>

As will now be discussed, the record does not contain documentary evidence sufficient to demonstrate that, at the time the petition was filed, the petitioner had contractual commitments for specialty occupation work for the beneficiary to perform for the period specified in the petition. Therefore, the appeal must be dismissed and the petition must be denied.

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<sup>4</sup> In support of this approach, 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 that evidence of the client companies' job requirements is critical if the work is to be performed for entities other than the petitioner. *Id.*

As reflected in this decision's earlier discussion about the deficiency of documentary evidence regarding the work to which the beneficiary would be assigned, the record of proceeding lacks credible evidence of contractual commitments for the beneficiary's services for the period sought in the petition. The July 23, 2007 letter from [REDACTED] and its enclosed Purchase Order identify the beneficiary by name and specify that he will be performing services for [REDACTED] from October 1, 2007 to September 30, 2010. Also, the letter states, in part:

The Contract calls for [the Beneficiary's] services beginning October 2007 to September 2010. During said period, the Beneficiary's services will be crucial in developing and implementing software programs according to our requirements.

However, on appeal counsel presents the Cisco Systems documents as the contract under which the beneficiary would perform services, and the Milestones section of the *Statement of Work* included in those documents indicates that work under the contract would begin in 2007 and continue until July 25, 2008. Consequently, counsel has presented materially conflicting statements and documentary evidence concerning the beneficiary's employment. 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. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Accordingly, the AAO discounts both the [REDACTED] and the [REDACTED] documents as evidence of work that the beneficiary would perform.

Further, the AAO finds that, contrary to counsel's contention, the documents submitted on appeal regarding contracts with [REDACTED], and [REDACTED] do not "prove that [the petitioner] has sufficient work of H-1B caliber" for the beneficiary. As counsel acknowledges in his brief on appeal, these documents "are offered simply as representative contracts and should not be viewed as [the] Beneficiary's assignments." Further, these documents are not in themselves sufficient to establish that the work to be performed under them is H-1B caliber, and counsel's assessment carries no weight without such corroborating documentation. Likewise, the record contains no documentary basis for the AAO to reasonably extrapolate the extent to which the [REDACTED], and [REDACTED] documentation represents the volume, type, and performance requirements of client projects that would be assignable to the beneficiary during the period of proposed employment. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. Also, as earlier observed in this decision, it is incumbent on the petitioner to establish the existence, as of the petition-filing date, of definite, non-speculative H-1B caliber employment for the employment period specified on the Form I-129. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248.

As the record of proceeding lacks documentary evidence sufficient to demonstrate that, at the time the petition was filed, the petitioner had contractual commitments for specialty occupation work for the beneficiary to perform for the period specified in the petition. Accordingly, the petitioner has not established that the proposed position qualifies as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) or that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii).

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

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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