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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
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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: NOV 03 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: SELF-REPRESENTED

INSTRUCTIONS:

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

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary in the position of software programmer as an H-1B nonimmigrant in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The petitioner describes itself as a software development and consulting firm and indicates that it currently employs 110 persons.

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

On appeal, the petitioner submits a brief and additional evidence, and contends that the director’s grounds for denial were based on erroneous assumptions that were not factually accurate.

The petitioner provided minimal information pertaining to the nature of its business when filing the petition. Consequently, the director issued a request for additional evidence (RFE) on March 10, 2009. In the RFE, the director noted that the petitioner appeared to be engaged in consulting, and asked the petitioner to submit evidence demonstrating who the actual employer of the beneficiary would be. The director requested documentation such as contractual agreements or work orders from the actual end-client firm or firms where the beneficiary would work.

In a response dated April 10, 2009, the petitioner stated that the beneficiary was currently working for its client, Allidon Associates, Inc. (Allidon) at a worksite in New York, New York, and would continue to work onsite until at least July 31, 2009. The petitioner indicated that [REDACTED] based in Monroe Township, New Jersey, had placed the beneficiary onsite pursuant to an agreement with its client, 1199 National Benefits Fund (1199 NBF). The petitioner claimed that Allidon reviewed its contracts every six months, and anticipated multiple extensions of this contract for the beneficiary’s service until the end of the requested validity period in the petition. The petitioner stated that, in the unlikely event that the contract was not renewed, the petitioner would employ the beneficiary in-house at its Palatine, Illinois location. In support of these contentions, the petitioner submitted an employment offer letter signed by the beneficiary, a confidentiality agreement between the petitioner and Allidon, a letter dated April 10, 2009 from [REDACTED] of 1199 NBF, confirming that the beneficiary was working on its project in New York, time sheets and payroll records for the beneficiary, and a new LCA certified on April 14, 2009 for New York, New York and Palatine, Illinois.

On March 10, 2009, the director denied the petition. The director found that the petitioner is a contractor that subcontracts workers with a variety of computer skills to other companies who need computer programming services. Noting that the first LCA submitted with the petition did not match the location of the end client identified in the response to the RFE and the DiBiasi work order, the director concluded that the petitioner had failed to establish that it met the definition of United States employer or agent.

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

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

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

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

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

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

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

Although "United States employer" is defined in the regulations, it is noted that "employee," "employed," "employment," and "employer-employee relationship" are not defined for purposes of the H-1B visa classification even though these terms are used repeatedly in both the Act and the regulations, including within the definition of "United States employer" at 8 C.F.R. § 214.2(h)(4)(ii). Section 101(a)(15)(H)(i)(b) of the Act indicates that an alien coming to the United States to perform services in a specialty occupation will have an "intending employer" who will file a labor condition application with the Secretary of Labor pursuant to section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). The intending employer is described as offering full-time or part-time "employment" to the H-1B "employee." Sections 212(n)(1)(A)(i) and 212(n)(2)(C)(vii) of the Act, 8 U.S.C. §§ 1182(n)(1)(A)(i) and 1182(n)(2)(C)(vii). Further, the regulations indicate that "United States employers" must file Form I-129 in order to classify aliens as H-1B temporary "employees." 8 C.F.R. §§ 214.2(h)(1) and 214.2(h)(2)(i)(A). Finally, the definition of "United States employer" indicates in its second prong that the petitioner must have an "employer-employee relationship" with the "employees under this

part," i.e., the H-1B beneficiary, and that this relationship be evidenced by the employer's ability to "hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer"). Accordingly, neither the legacy Immigration and Naturalization Service (INS) nor U.S. Citizenship and Immigration Services (USCIS) has defined the terms "employee," "employed," "employment," or "employer-employee relationship" by regulation for purposes of the H-1B visa classification, even though the law describes H-1B beneficiaries as being "employees" who must have an "employer-employee relationship" with a "United States employer."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 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. at 751-752); see also *Restatement (Second) of Agency* § 220(2) (1958); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) (hereinafter "*Clackamas*"). As the common-law test contains “no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.” *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. at 258 (1968)).²

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, 387-388 (5th Cir. 2000). Accordingly, despite the intermediary position of the employment agency, the ultimate employer must still satisfy the requirements of the statute and regulations: "To interpret the regulations any other way would lead to an absurd result." *Id.* at 388.

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

Therefore, in considering whether or not one is an "employee" in an "employer-employee relationship" with a "United States employer" for purposes of H-1B nonimmigrant petitions, USCIS will focus on the common-law touchstone of control. *Clackamas*, 538 U.S. at 450. Factors indicating that a worker is an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. 503 U.S. at 323-324; see also *Restatement (Second) of Agency* § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. See *Clackamas*, 538 U.S. at 448-449; cf. *New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1), (EEOC 2006) (adopting a materially identical test and indicating that said test was based on the *Darden* decision); see also *Defensor v. Meissner*, 201 F.3d at 388 (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).

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).

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

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

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

To qualify as a United States employer, all three criteria at 8 C.F.R. § 214.2(h)(4)(ii) must be met. The Form I-129 indicates that the petitioner has an Internal Revenue Service Tax Identification Number. While the petitioner's letter of support and job offer letter dated December 1, 2008 indicates its intent to engage the beneficiary to work in the United States, the additional documentation submitted by the petitioner is contradictory and insufficient to establish that an employer-employee relationship exists or will exist between the petitioner and the beneficiary.

On appeal, the petitioner asserts that it is in fact the employer of the beneficiary and asserts that the director's conclusion to the contrary was erroneous. Specifically, the petitioner contends that based on the employment agreement, pay stubs, and contracts submitted on appeal and in response to the request for evidence, the petitioner met its evidentiary burden.

Although the petitioner submitted an employment agreement signed by the beneficiary on December 15, 2008 in response to the RFE, this document is inadequate to demonstrate that an employer-employee relationship existed or will exist. While the offer letter outlines the basic benefits package the beneficiary will receive, it also provides an overview of day-to-day duties the beneficiary will perform. However, as evidenced by the claims made and documents submitted in response to the RFE, the beneficiary will spend the majority of the validity period working for an end client, 1199 NBF, of another client, Allidon, and not the petitioner. Noting that the record did not contain an agreement between Allidon and 1199 NBF outlining the nature and scope of the beneficiary's assignment and duties, the director concluded that the ultimate employment of the beneficiary, and the element of control of the beneficiary's work, could not be determined.

The AAO notes that the record includes a confidentiality agreement between Allidon and the petitioner dated January 16, 2009. The agreement indicates that Allidon would place the beneficiary at its client, 1199 NBF, beginning on February 2, 2009. However, the director correctly noted that no master agreement or work

order between the parties was submitted, nor was a contract between [REDACTED] and [REDACTED] which outlined the nature and scope of the beneficiary's duties provided. The petitioner simply submitted a work order signed by [REDACTED] which claimed that the beneficiary would work on one of its projects in New York. This document is not on company letterhead and failed to articulate the nature of the project or the scope of the beneficiary's duties.

On appeal, the petitioner submits for the first time a copy of a Statement of Work between [REDACTED] executed on January 16, 2009. This document, however, will not be considered. 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 Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the statement of work submitted on appeal.

Since the contentions of the petitioner are not supported by documentary evidence that a valid employment agreement or credible offer of employment existed between the petitioner and the beneficiary at the time of filing, the petitioner has failed to establish that it meets the definition of a United States employer. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The evidence, therefore, is insufficient to establish that the petitioner qualified as a United States employer, as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii). Therefore, based on the tests outlined above, the petitioner has not established that it or any of its clients will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii).

When discussing whether the petitioner was an agent, the director stated that the definition of agent at 8 C.F.R. § 214.2(h)(2)(i)(F) provides for two types of agents: (1) "an agent performing the function of an employer"; and (2) "a company in the business as an agent involving multiple employers as the representative of both the employers and the beneficiary." The director found again that, absent documentation such as

work orders or contracts between the ultimate end clients and the beneficiary, the petitioner could also not be considered an agent in this matter. As stated above, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

The next issue is whether the petitioner submitted a valid LCA for all work locations, as required by 8 C.F.R. § 214.2(h)(2)(i)(B). The director noted that the LCA submitted with the petition listed the beneficiary's work location as Palatine, Illinois. The AAO notes that the petitioner's initial letter of support and Form I-129 petition also claimed under penalty of perjury that the beneficiary would work in Palatine, Illinois. However, the petitioner alleged in response to the RFE that the beneficiary would also be working at a client site in New York, New York during the requested validity period. The petitioner provided a new LCA in response to the RFE which listed both locations. The AAO notes that the new LCA was certified on April 14, 2009.

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

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

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

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

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

The regulations require that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner obtain a certified LCA from the U.S. Department of Labor (DOL) in the occupational specialty in which the H-1B worker will be employed. See 8 C.F.R. §§ 214.2(h)(4)(i)(B) and 214.2(h)(4)(iii)(B)(1). The instructions that accompany the Form I-129 also specify that an H-1B petitioner must document the filing of a labor certification application with the DOL when submitting the Form I-129.

In the instant case, the petitioner filed the Form I-129 with USCIS on January 7, 2009. The petitioner submitted a certified LCA for the location of Palatine, Illinois. In response to the RFE, the petitioner claimed for the first time that the beneficiary would be working in New York, and submitted a new LCA

encompassing both the New York and Illinois locations. However, this new LCA was certified by the DOL on April 14, 2009, over three months after the petitioner filed the Form I-129. Therefore, the record establishes that, at the time of filing, the petitioner had not obtained a certified LCA for all work locations of the beneficiary and, therefore, as indicated by the director, had failed to comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B).

On appeal, the petitioner does not address the requirement to submit a certified LCA at the time of filing for all locations. Rather, it contends that it submitted a second certified LCA in response to the director's request for evidence, and claims that it has therefore complied with the regulatory requirements.

A petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). The petitioner failed to comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B). For this additional reason, the petition may not be approved.⁴

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

⁴ It is further noted that, 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]. As 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary, this regulation inherently necessitates the filing of an amended or new H-1B petition to permit USCIS to perform its regulatory duty to ensure that the new LCA actually supports the H-1B petition filed on behalf of the beneficiary. In addition, as 8 C.F.R. § 103.2(b)(1) requires eligibility to be established at the time of filing, it is factually impossible for an LCA approved by DOL after the filing of an initial H-1B petition to establish eligibility at the time the initial petition was filed. Therefore, in order for a petitioner to comply with 8 C.F.R. § 103.2(b)(1) and for USCIS to perform its regulatory duties under 20 C.F.R. § 655.705(b), a petitioner must file an amended or new H-1B petition with USCIS whenever a beneficiary's job location changes such that a new LCA is required to be filed with DOL.

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

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must also meet one of the following criteria:

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. See *K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); see also *COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA

1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d at 387. To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), 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 substantial documentary evidence as to where and for whom the beneficiary would be performing his services, and whether his services would be that of a software programmer.

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 December 31, 2008 provided a vague overview of the beneficiary’s proposed duties. Specifically, the petitioner stated as follows:

As a Software Programmer, [the beneficiary] is performing the following duties:

Software Systems Design: Approximately 40% of work time.

[The beneficiary] will utilize [h]is extensive theoretical knowledge to perform, and implement, a broad range of computer systems analysis and design functions. He will be designing software modules, and integrated software systems, to accommodate multiple business information functions and Internet data transactions.

After studying and analyzing the company’s management information needs, their data port capacities, their electronic data processing requirements, and their computer hardware specifications, [h]e will consult with management and will prepare a cost-effective design plan. The design plan will include necessary computer software, and computer software systems, to process data in a timely and efficient manner. This will encompass preparing

detailed specifications from which programs will be written and designing, coding, testing and debugging and documenting those programs. He will generate, and supervise the continued generation of, fundamental reports.

Software Architecture Analysis: Approximately 40% of work time.

Analyze User Requirements, Propose Alternative Solutions, Evaluate and Recommend appropriate solutions. This will require [the beneficiary] to develop a thorough knowledge of existing electronic data processing operations, including data structures, in order to create modules.

He will analyze the design, software structure, and administration of information systems and their adaptation to the specific requirements mentioned above. He will also analyze operating systems, identifying bottlenecks, configuration and networking issues, and will study the requests for enhancements and new business functions, determining what new or adapted software and hardware would best fit the proposed software solutions. He will design schematics of the proposed system and translate it into specifications (hardware, software, networking, operating system).

Systems Management: Approximately 10% of work time.

Consult with management regarding software modules' design. This will require [the beneficiary] to design data models for technical reference and a process for functional reference; determining database level changes for enhancements of new programs; design of the scripts to perform database changes, design of software modules, design of integrated software systems, and development of prototypes. He will then prepare designs for the creation of necessary Graphical User Interfaces (GUI). This phase involves the creation of the forms, queries, functions, menus and on-line. This requires him to design testing methodology for, and implement testing for, individual software modules, systems, programs, reports, queries and filters; code the required security constraints within the programs, write scripts to lead data for testing, or for regular production use; test and debug the programs. He will also create high-level test data and complete the execution of all follow-up test plans which are required,

Software Design Finalization: Approximately 10% of work time.

Ensure proper analytical and design communications with management. Design and implement management information and administrative functions, including necessary management information systems.

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

would include at each worksite. Despite the director's specific request for these documents, the petitioner submitted only a confidentiality agreement between the petitioner and Allidon, and a work order from Glenn DiBiasi of 1199 NBF.⁵

In addition, the petitioner provided an additional list of duties the beneficiary would perform in its letter dated April 10, 2009. Specifically, the petitioner listed the types of operating systems and design tools the beneficiary would employ in his position at the petitioner's location as well as the end-client site in New York. However, as discussed above, no independent documentation outlining the scope of the end-client project was provided.

Upon review of the evidence, the AAO concurs with the director's findings. The work order and confidentiality agreements contain little or no information regarding the terms under which the beneficiary would work or the nature of the beneficiary's duties. Moreover, based on the petitioner's claim that it has numerous clients in various industries, it is clear that had the petition been approvable on the previous grounds, the beneficiary's duties could potentially vary widely based on the requirements of a client at any given time. Once again, this possibility renders it necessary to examine the ultimate end clients of the petitioner to determine the exact nature and scope of the beneficiary's duties for each client, since it is logical to conclude that the services provided to one client may differ vastly from the services provided to another, particularly if they varied from one industry sector to another and/or from one project to another.

As discussed above, the record contains no substantiated evidence regarding the end-clients and their requirements for the beneficiary. Without evidence of valid contracts, work orders, or statements of work describing the 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. 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

⁵ As previously noted, although the petitioner submitted a Statement of Work between Allidon and 1199 NBF on appeal, this document will not be considered. The petitioner was been put on notice of a deficiency in the evidence and was given an opportunity to respond to that deficiency. If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Matter of Soriano*, 19 I&N Dec. 764.; see also *Matter of Obaigbena*, 19 I&N Dec. 533.

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

In this matter, it is unclear whether the petitioner will be an employer or will act as an employment contractor. The job description provided by the petitioner, as well as various statements from the petitioner both prior to adjudication and on appeal, indicate that the beneficiary will be working on client projects for clients based throughout the nation. Despite the director's specific request for documentation to establish the ultimate location(s) of the beneficiary's employment, the petitioner failed to fully comply with this request. Moreover, the petitioner's failure to provide evidence of an employer-employee relationship 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).⁶

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.

⁶ It is noted that, even if the proffered position were established as being that of a software programmer, a review of the U.S. Department of Labor's *Occupational Outlook Handbook* (hereinafter the *Handbook*) does not indicate that such a position qualifies as a specialty occupation in that the *Handbook* does not state a normal minimum requirement of a U.S. bachelor's or higher degree in a specific specialty or its equivalent for entry into the occupation of software programmer. *See* Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook*, 2010-11 Edition, "Computer Software Engineers and Computer Programmers," <<http://www.bls.gov/oco/ocos303.htm>> (accessed October 26, 2010). As such, absent evidence that the position of software programmer qualifies as a specialty occupation under one of the alternative criteria available under 8 C.F.R. § 214.2(h)(4)(iii)(A), the instant petition could not be approved for this additional reason.