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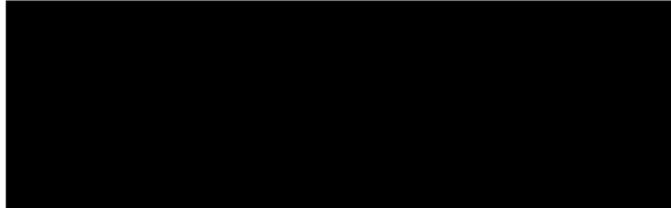
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



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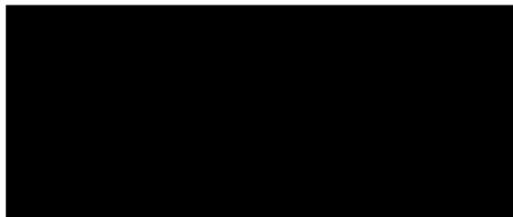


FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: OCT 01 2010

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:



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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

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

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

The director denied the petition, finding that the petitioner failed to: (1) establish that the proposed position qualifies for classification as a specialty occupation; (2) submit a valid Labor Condition Application (LCA) for all work locations of the beneficiary; and (3) submit an itinerary for all work locations of the beneficiary.

On appeal, counsel for the petitioner submits a brief and additional evidence in support of the contention that the petitioner has met all regulatory requirements.

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

In the letter of support dated July 15, 2008, the petitioner claimed that it is an information technology consulting firm that "provides a steady source of high quality computer professionals to meet the growing needs of the US and the World Wide Market places." It stated that it wished to employ the beneficiary in the position of systems analyst at an annual salary of \$55,000, and that it currently employed a total of 12 persons.

The director found the initial evidence submitted with the petition insufficient to establish eligibility, and therefore an RFE was issued on September 30, 2008. In the four-page RFE, the director requested an abundance of supplemental evidence demonstrating the nature of the petitioner's business with the beneficiary and its clients, as well as additional details regarding the proffered position of the beneficiary and his work location(s). The petitioner, through counsel, responded to the director's request on October 21, 2008 and submitted additional documentary evidence such as copies of contracts and a more detailed overview of the proffered position. The director found this documentation insufficient to establish eligibility for the benefit sought, and the petition was denied on April 2, 2009.

The AAO will first address whether the petitioner submitted an itinerary and valid LCA with the petition, and thus established filing eligibility at the time the Form I-129 was received by U.S. Citizenship and Immigration Services (USCIS).

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):

An applicant or petitioner must establish eligibility for a requested immigration benefit. An application or petition form must be completed as applicable and filed with any initial evidence required by regulation or by the instructions on the form . . . .

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). The instructions that accompany the Form I-129 also specify that an H-1B petitioner must document the filing of an LCA with the DOL when submitting the Form I-129.

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

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

In the instant case, the petitioner filed the Form I-129 with USCIS on July 21, 2008. The petitioner submitted a certified LCA with the petition, which indicated that the beneficiary's work location would be Iselin, New Jersey. In response to the director's RFE, the petitioner submitted a copy of its employment offer letter to the beneficiary dated February 1, 2008 in which it indicated that its "base of operations" was headquartered in Iselin, New Jersey, but that the beneficiary may be transferred to any of its associates' sites throughout the country during the course of his employment. In the cover letter, also dated February 1, 2008, the petitioner further indicated that once formalities were disposed of, the beneficiary would start work "in one of our projects in the US." Although the petitioner submitted copies of numerous contracts and work orders with its clients, none of these documents identified the beneficiary as a subcontractor assigned to any of these projects. Moreover, no specific details regarding the nature and location of the project to which the beneficiary would be assigned was submitted.

The Form I-129 filing requirements imposed by regulation require that the petitioner submit evidence of a certified LCA at the time of filing. In this matter, the petitioner submitted a certified LCA for Iselin, New Jersey, which is the location of the petitioner's headquarters. However, the evidence fails to support a finding that the beneficiary will work in Iselin, New Jersey for the duration of the validity period. First, the offer letter dated February 1, 2008 indicates that the beneficiary will work at various client locations as needed. Additionally, a copy of the petitioner's lease for the Iselin office dated November 2, 2007 and submitted in

response to the RFE, indicates that the petitioner leases 250 square feet of commercial space. This amount of space renders it difficult to find that the petitioner's "headquarters" could reasonably employ the petitioner's staff of 12 persons. Based on the lack of specificity regarding the beneficiary's work site(s) for the duration of the petition, the petitioner failed to 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).

On appeal, however, counsel for the petitioner submits additional details regarding the nature of the beneficiary's employment. In the appeal brief, counsel contends that the beneficiary will begin his employment with a three-week orientation session in Edison, New Jersey. Upon completion, counsel contends that the beneficiary will work onsite for Futera, Inc., in North Brunswick, New Jersey. In support of this contention, counsel submits a one-page itinerary indicating that the beneficiary will work for [REDACTED] from July 28, 2008 until July 27, 2011 and a Master Professional Services Agreement with Futera, Inc., dated June 18, 2008. Also submitted are copies of a statement of work and recent invoices demonstrating work billed to Futera, Inc. by the petitioner under this agreement. It is noted that both Edison and North Brunswick, New Jersey are within a commuting distance of 50 miles of Iselin, the location certified on the LCA.

The AAO finds this evidence unacceptable and unpersuasive. First, 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). It is noted that the RFE issued by the director on September 30, 2008 was four pages in length and requested with specificity the types of evidence required to establish eligibility in this matter, including an itinerary for the beneficiary. If the petitioner had wanted the itinerary and other documents pertaining to Futera, Inc. 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 previously requested evidence submitted for the first time on appeal.

Regardless, even if considered, the itinerary would not have sufficed in this matter, since it is simply a one-page typed statement prepared by the petitioner claiming that the beneficiary will work for the same client at the same location for the entire validity period. The record contains no corroborating evidence, such as a statement of work or contract, which identifies the beneficiary as the contractor assigned to a particular project. In response to the RFE, it is noted that the statements of work, purchase orders, and agreements submitted as representations of the petitioner's client base identify the specific contractor who will work on each project by name. The petitioner clearly identifies the contractors assigned to each project in those contracts, yet fails to explain why there is no agreement corroborating its claim that the beneficiary will work

on the Futera, Inc. assignment. 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 petitioner claims that the beneficiary will work for the entire validity period on a client site in North Brunswick, New Jersey, yet fails to submit evidence to corroborate this claim. Additionally, despite not considering the contractual documents submitted on appeal, it should be noted that the statement of work, which the petitioner urges the AAO to accept as evidence of the beneficiary's assignment in this matter, indicates that the project noted in the itinerary is scheduled to terminate on June 30, 2010. Moreover, in its offer letter to the beneficiary, the petitioner states, "Your base of operations will be headquartered in Iselin, NJ or at R3 Tek clients; however, you may also be transferred to any of our associate sites through out the country." This statement clearly leaves open the possibility that the beneficiary will be assigned to multiple client sites as needed. Since the petitioner is requesting approval of the petition through July 26, 2011 and as it fails to provide sufficient evidence demonstrating where and for whom the beneficiary will provide services during this time period, the record does not contain a concise itinerary for the entire requested validity period. The petitioner failed to provide a concise itinerary covering all work locations for the beneficiary during the requested validity period. For this additional reason, the petition may not be approved.

The next 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 the 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.

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

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

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

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (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), 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 systems 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)(I) indicates that contracts are 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 July 15, 2008 support letter submitted by the petitioner describes the proffered position as follows:

- i. Select and implement software tools to support execution and management of automated trading systems;
- ii. Define and implement new software procedures as needed for data collection and analysis;
- iii. Perform daily, weekly and monthly procedures to collect and analyze the data of automated trading operation;
- iv. Perform statistical analyses to optimize system inputs and system performance;
- v. Identify, track, and maintain metrics for trading system operations;
- vi. Perform daily operational procedures to automated trading system[.]

The highly technical nature of the job duties described above [sic] that the incumbent in the position will require at least a [bachelor’s] degree in Sciences or in the related fields. College-level training will equip the individual with a broad and intensive theoretical understanding of computer & software technology, the architecture and also equip them with the practical skills needed to apply such theoretical knowledge to achieve practical solutions under diverse settings.

In response to the RFE, which requested more specific information regarding each project upon which the beneficiary would work, the petitioner submitted a document on company letterhead entitled “Systems Analyst Job Roles and Responsibilities.” This document provided an additional description of the proffered position, which is set forth below:

- Research, analyze, document, and communicate the requirements of system and **business** functions
- Demonstrate good judgment in selecting methods and techniques for obtaining requirements and suggested solutions.
- Network with senior internal and external personnel
- Proceed after receiving general instructions on new assignments and minimal instructions on day-to-day work
- Work in conjunction with the software development group and QA team to review and resolve contradictions and issues.

However, no independent documentation to further explain the nature and scope of these duties was submitted. Noting that the petitioner, as a software development company, 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. Again, 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).

As discussed above, the record contains simply a copy of a job offer to the beneficiary in letter form and a one-page itinerary stating that the beneficiary would work for Futera, Inc. for the duration of the validity period. The petitioner, however, failed to submit contracts, statements of work or purchase orders demonstrating that the beneficiary would in fact work onsite for Futera, Inc., and/or what his duties would entail. Although numerous agreements and work orders were submitted in response to the RFE, none of those documents pertain to 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. 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.

The AAO notes that, on appeal, a statement of work outlining the details of the project accompany the Futera, Inc. agreement. The petitioner, however, was put on notice of this required evidence and was given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit a specific project description and now submits it for the first time on appeal. Again, for the reasons previously discussed, 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). Regardless, the statement of work submitted on appeal does not identify the beneficiary as a contractor assigned to the project and, as such, the document would have been inadequate to meet the burden of proof in this matter.

USCIS routinely looks to *Defensor v. Meissner*, 201 F.3d 384, for guidance, which requires an examination of the ultimate employment of the beneficiary to determine whether the position constitutes a specialty occupation. The petitioner in *Defensor*, Vintage Health Resources (Vintage), is 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." *Defensor v. Meissner*, 201 F.3d 384, 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. *Id.* at 387-8. 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, suggests that the beneficiary will be working on different projects throughout the duration of the petition. Despite the director's specific request for documentation to establish the ultimate location(s) of the beneficiary's employment, the petitioner failed to comply. The petitioner's failure to provide evidence of valid work orders or employment contracts between the petitioner and clients, which identify the beneficiary as personnel and outline the nature of his duties, 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 his duties 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).

Beyond the decision of the director, the petitioner has not 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 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.

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

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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. 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.

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)).<sup>2</sup>

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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).

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).

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

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

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

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

Although the petitioner submitted documentary evidence such as the employment agreement discussed above, the petitioner did not submit any document prior to adjudication which outlined in detail the nature and scope

of the beneficiary's employment. The key element in this matter, which is who will exercise ultimate control over the beneficiary, has not been substantiated.

The petitioner contends that it will assign personnel to various client projects as needed, and claimed in its initial support letter to have clients throughout the United States. Additionally, though requested in the RFE, the petitioner failed to provide an itinerary for the beneficiary's time in the United States.

The evidence, therefore, is insufficient to establish that the petitioner qualified as an employer, as defined by 8 C.F.R. § 214.2(h)(4)(ii). Merely claiming in its letters that the petitioner exercises complete control over the beneficiary, without evidence supporting the claim, does not establish eligibility in this matter. The evidence of record prior to adjudication did not establish that the petitioner would act as the beneficiary's employer in that it will hire, pay, fire, or otherwise control the work of the beneficiary. Despite the director's specific request for evidence such as employment contracts or agreements to corroborate its claim, the petitioner failed to submit such evidence and instead submitted such documents on appeal. While those documents will not be considered for the reasons previously discussed, it should also be noted that even if they were considered in adjudicating the appeal, none of the documents identified the beneficiary as a party to the contracts or as a subcontractor assigned to a particular project.

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).

Likewise, the petitioner is not an agent as defined by the regulations. 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." Absent documentation such as work orders or contracts between the ultimate end clients and the beneficiary, the petitioner cannot 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.

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

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

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