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



U.S. Citizenship
and Immigration
Services

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D2

FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: **OCT 04 2010**

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

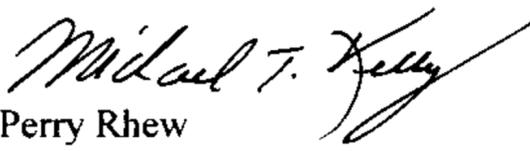
ON BEHALF OF PETITIONER:

[REDACTED]

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,

for 
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 business consulting and technology services. It seeks to employ the beneficiary as a senior technical consultant 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) submit an itinerary for all work locations of the beneficiary; (2) submit a valid Labor Condition Application (LCA) for all work locations of the beneficiary; and (3) to establish that the proposed position qualifies for classification as a specialty occupation.

On appeal, counsel 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 petition submitted on February 2, 2010, the petitioner stated it has 1076 employees and a gross annual income of \$231.4 million. The petitioner indicated that it wished to employ the beneficiary as a senior technical consultant from January 15, 2010 through April 7, 2012 at an annual salary of \$90,000.

With regard to the petitioner's business, the petitioner claimed in its undated letter of support that it is "a leading provider of customized information technology solutions to clients throughout North America," and that it has offices in U.S. cities as well as in Europe, India, and China. The petitioner further explained that it "consults with customers regarding their technology solutions needs, and designs technology strategies to meet those needs." It concluded by stating that once a client's needs are determined, its personnel goes to work to design, develop, architect, and deliver appropriate solutions.

The first issue before the AAO is whether the petitioner submitted the itinerary that the regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) requires when a proffered H-1B position is to be performed at more than one location.

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 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 response to the director's RFE, issued on February 8, 2010, the petitioner provided a copy of an agreement among Blue Cross and Blue Shield of Massachusetts, Inc., Blue Cross and Blue Shield of Massachusetts HMO Blue, Inc. (hereinafter collectively referred to as BCBSMA) and the petitioner dated January 25, 2010, which sets forth the scope of services to be provided by the petitioner to BCBSMA. The agreement demonstrated that BCBSMA was located in Boston, Massachusetts. A clause contained in Exhibit A of the agreement, which does not identify the beneficiary by name as being assigned to the project, states that the petitioner, as the vendor, "will deliver. . . services from designated BCBSMA offices or Vendor offices as agreed to by BCBSMA" There is no specific statement in the agreement or in the record which indicates that the beneficiary will provide services in Boston, Massachusetts for the duration of the validity period. In fact, the above-referenced provision in Exhibit A suggests that personnel working on this project may provide services at any number of undefined offices of the petitioner or BCBSMA "as agreed to by BCBSMA."

Additionally, a clause in Exhibit B of the agreement states that the term of the project is from January 25, 2010 to March 31, 2010. Since the petitioner requests authorization to employ the beneficiary until April 7, 2012, it is evident that more than two years are undefined when viewed in context of the beneficiary's proposed employment and the location(s) of that employment. Since the petitioner is requesting approval of the petition through April 7, 2012, and provides no documentation to demonstrate where and for whom the beneficiary will provide services beyond March 31, 2010, the record does not contain a concise itinerary for the entire requested validity period. Counsel explained that by nature of the petitioner's business, potential future assignments or projects for the beneficiary were as yet unknown, and contends that this is normal business procedure in the petitioner's industry. Again, for purposes of establishing eligibility in this matter, this contention is unacceptable. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248; *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Further, counsel's response to the RFE includes a statement that "the nature of the business in which [the petitioner] is engaged does not permit the accurate prediction of where [the beneficiary] will be located for the duration of three years because [the petitioner's] services are not typically engaged so far in advance." Additionally, the employment agreement between the petitioner and the beneficiary references the proffered

position as a travel position and states the expectation that the beneficiary “be on client site Monday through Friday most weeks.” In any event, the totality of the evidence or record indicates that the beneficiary is expected to, and will likely, perform his services at more than one location. Therefore, the petitioner was required to file with the Form I-129 an itinerary complying with 8 C.F.R. § 214.2(h)(2)(i)(B), and its failure to do so requires that the petition be denied. This is reason alone to not disturb the director’s decision denying the petition.

The AAO will next address why it finds that the director did not err in his determination on the LCA issue.

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 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 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 February 2, 2010. The petitioner submitted a certified LCA with the petition, which indicated that the beneficiary’s work location would be Boston, Massachusetts. In response to the director’s RFE, issued on February 8, 2010, the petitioner provided a copy of an agreement among Blue Cross and Blue Shield of Massachusetts, Inc., Blue Cross and Blue Shield of Massachusetts HMO Blue, Inc. (hereinafter collectively referred to as BCBSMA) and the petitioner dated January 25, 2010, which sets forth the scope of services to be provided by the petitioner to BCBSMA. The agreement demonstrated that BCBSMA was located in Boston, Massachusetts.

As already noted, a clause contained in Exhibit A of the agreement, states that the petitioner, as the vendor, “will deliver. . . services from designated BCBSMA offices or Vendor offices as agreed to by BCBSMA,” and nothing in the agreement or elsewhere in the record indicates that the beneficiary’s work location will be limited to the Boston, Massachusetts area for the duration of the validity period. In fact, the above-referenced provision in Exhibit A suggests that personnel working on this project may provide services at any number of undefined offices of the petitioner or BCBSMA “as agreed to by BCBSMA.” Since the petitioner claims that it has offices nationwide, and BCBSMA undoubtedly maintains a nationwide presence, there is insufficient evidence in the record to find that the LCA submitted with the petition covers all potential work locations for the beneficiary during the course of the requested period.

Moreover, the employment agreement between the petitioner and the beneficiary, signed by the beneficiary on January 29, 2010, indicates in the details of the employment offer that the proposed position “is a travel position and you will be expected to be on client site Monday through Friday most weeks.” This statement is irrefutable evidence that the beneficiary’s work locations will vary on a weekly basis depending on the projects requiring his services and the locations of the clients for whom the projects are performed.

The Form I-129 filing requirements imposed by regulation require that the petitioner submit evidence of a certified LCA at the time of filing. A petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). The petitioner failed to comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B).

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(1) expressly includes a certified LCA among the documents that a petitioner “shall submit” with an H-1B petition, and the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) states:

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

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(1) states that, when filing an H-1B petition, the petitioner must submit with the petition “[a] certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary.”

In order for a petition to be approvable, the LCA submitted for an H-1B petition must correspond to the location where the beneficiary would work, as that location determines the prevailing wage threshold that sets the minimum wage or salary that the petitioner must pay. As the record of proceeding does not establish that the LCA submitted for this petition corresponds to all of the locations where the beneficiary would work, it does not satisfy the regulatory requirements that the petition be filed with a corresponding LCA.

At the time of filing the petition the petitioner must file a certified LCA valid for the work location specified in part E of the LCA, and part F for an additional or subsequent work location. The work location is critical in determining the prevailing wage for the occupation in the area of intended employment. *See* 20 C.F.R. §§ 655.730(c)(4) and (d)(1).

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part:

For H-1B visas . . . DHS accepts the employer’s petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.*

[Italics added]. The regulation at 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. Here, the petitioner has failed to establish that the LCA corresponds to the petition, and the petition must be denied for this additional reason.

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 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 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

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

In addressing whether the 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 senior technical consultant.

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) 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 undated support letter submitted by the petitioner describes the proffered position as follows:

The Senior Technical Consultant is responsible for utilizing understanding of different development options, methodologies and testing procedures to design applications subsystems and lead the design object and data models. The Senior Technical Consultant reviews team members’ designs and codes, as well as mentors other developers. In addition, the Senior Technical Consultant forecasts system capacity requirements; develops entire applications and sites from requirements using cases, technical models and other related materials; and also develops high-level systems and functional specifications.

Moreover, the Senior Technical Consultant draws upon skills in design concepts and techniques to evaluate requirements and their impact on performance, user benefit, project timeline and budget. Further job duties include: identifies architecture, major subsystems and interfaces; selecting design tools and programming language; and incorporating requirements for legacy systems integration and security requirements into the design. The Senior Technical Consultant creates and tests prototypes and provide[s] work estimates to project management using company standard estimating tools. Furthermore, the Senior Technical Consultant identifies potential areas of risk and concern that may impact the project, such as

time, cost, system and reliability. Lastly, the Senior Technical Consultant recruits and mentors other consultants; defines project development standards and system and software requirements; and writes and executes unit tests. The Senior Technical Consultant also manages application deployment and manages development teams.

The Senior Technical Consultant, a position which is supervised by, and reports to, the Project Manager for each project and to the General Manager in the company's reporting structure, must utilize his or her expertise and knowledge of development languages and related environments to lead the design of object and data models, as well as manage small development teams. Drawing upon expertise in computer science, software development, and web-based development methodologies, he or she will conduct code reviews with all technical team members and escalate issues directly to [the petitioner's] project Manager.

In response to the RFE, which requested more specific information regarding each project upon the beneficiary which the beneficiary would work, counsel contended that the petitioner, and not the beneficiary, entered into an agreement with BCBSMA. Therefore, counsel stated that the end client has no authority in determining the nature and scope of the duties of the beneficiary. Rather, counsel claims that the petitioner determines the beneficiary duties and assigns him to work for a client as part of a team. No additional details regarding the specific duties the beneficiary would perform were submitted.

The petitioner did submit a letter dated March 9, 2010 from the beneficiary's project manager, [REDACTED] which claimed that he oversees the day-to-day duties of the beneficiary.¹ This statement, however, paraphrased the petitioner's generic and vague description of the beneficiary's proposed duties that was included in the support letter. Neither of these letters indicates how the proposed duties would be incorporated into the scope of the project for BCBSMA, or how they require specialized knowledge in their performance.

Moreover, Exhibit A of the agreement includes a section which outlines the role and responsibilities of a solution architect and a data architect for the BCBSMA project. While a February 12, 2010 amendment to the agreement added four technical leads as personnel for the project, the amendment did not include a statement of the responsibilities of these technical leads.² Therefore, there is no specific statement of the work the

¹ According to the employment agreement signed by the beneficiary on January 29, 2010, [REDACTED] not [REDACTED] would oversee the beneficiary's duties. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

² It should be noted for the record that the petition in this matter was filed on February 2, 2010. At the time of filing, the position of technical lead, the proffered position for the beneficiary, was not included in the agreement between the petitioner and BCBSMA. The amendment to the agreement, which added four technical leads to the project, occurred on February 12, 2010, ten days after the filing of the petition. As discussed previously in this decision, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or

beneficiary would allegedly perform under the BCBSMA agreement.

Additionally, even if the BCBSMA project identified the beneficiary as a contractor and specifically outlined his duties on the project, the project is scheduled to terminate on March 31, 2010. The petitioner claims that the exact nature of the beneficiary's assignments throughout the validity period will vary based on client needs during the duration of the petition, for which approval was requested through April 7, 2012. The uncertainty surrounding the future projects and work assignments of the beneficiary renders it impossible to examine to find that the proffered position is a specialty occupation, since no specific description of the duties the beneficiary will perform is included in the record.

It appears that the petitioner is responsible for assigning staff to various client projects as needed. As discussed previously, details are not provided about the beneficiary's specific role in the BCBSMA project, on which he will allegedly work until March 31, 2010. Moreover, while the petitioner claims on Form I-129 that it employs over 1,000 people, no information was provided about other senior technical consultants or computer personnel, their qualifications, and how their roles are similar to or different from the beneficiary.

On appeal, counsel for the petitioner contends that the director's finding that the petitioner will locate and place aliens with clients as needed is a gross mischaracterization of the petitioner's line of business. Counsel further states that requiring its clients to provide a statement of work or other description of duties contradicts the fact that the petitioner, not the client, is the user of the beneficiary's services. Counsel concludes by stating that the clients of the petitioner do not have the right to set the requirements for the position or control the beneficiary, as an employee of the petitioner, in any way. The AAO disagrees.

As discussed above, the record contains simply a copy of an agreement for the petitioner's computer services from January 25, 2010 to March 31, 2010 for the BCBSMA project. Neither the agreement nor its amendment provides details regarding the nature of the beneficiary's proposed position and accompanying duties. Although the petitioner provided a brief description of duties in both its initial support letter and its letter from the beneficiary's project manager, these statements are generic and fail to specifically describe the nature of the services required by the beneficiary on the project in question. Moreover, the fact that the beneficiary's assignments will fluctuate throughout the validity period indicates that his duties and responsibilities are subject to change in accordance with client requirements. While counsel on appeal contends that this is not the case, no evidence to support these claims is submitted. 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).

Therefore, absent evidence of contracts or statements of work describing the duties the beneficiary would perform and for whom he would perform them throughout the entire validity period, the petitioner fails to establish that the duties that the beneficiary would perform are those of a specialty occupation. Simply going

beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

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.

USCIS routinely looks to *Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000), 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.”

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.” 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. 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.

On appeal, counsel argues that *Defensor* is not applicable to the facts of this case. Specifically, counsel asserts that unlike the hospitals in that case, the petitioner is the entity overseeing the duties of the beneficiary. Additionally, counsel asserts that the proffered position in this matter is in fact a specialty occupation, unlike the nursing profession which was the subject of the *Defensor* holding.

The AAO does not find counsel’s assertions persuasive. 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 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)(A) or that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(1)(B)(I).

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."³ 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)).⁴

³ 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.

⁴ While the *Darden* court considered only the definition of "employee" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(6), and did not address the definition of "employer," courts have generally refused to extend the common law agency definition to ERISA's use of employer because "the definition of 'employer' in ERISA, unlike the definition of 'employee,' clearly indicates legislative intent to extend the definition beyond the traditional common law definition." See, e.g., *Bowers v. Andrew Weir Shipping, Ltd.*, 810 F. Supp. 522 (S.D.N.Y. 1992), *aff'd*, 27 F.3d 800 (2nd Cir. 1994), *cert.*

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 (5th Cir. 2000) (determining that hospitals, as the recipients of beneficiaries' services, are the true "employers" of H-1B nurses under 8 C.F.R. § 214.2(h), even though a medical contract service agency is the actual petitioner, because the hospitals ultimately hire, pay, fire, supervise, or otherwise control the work of the beneficiaries).

It is important to note that the factors listed in *Darden* and *Clackamas* are not exhaustive and must be evaluated on a case-by-case basis. Other aspects of the relationship between the parties may affect the

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).

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."

In response to the director's RFE, in which contracts and/or work orders between the petitioner and end clients were requested, the petitioner claimed that the beneficiary would work for BCBSMA, the end client, as evidenced by an agreement dated January 25, 2010 and a subsequent amendment dated February 12, 2010. The agreement indicated that the duration of this project was from January 25, 2010 to February 12, 2010.

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 submitted by the petitioner indicates that the petitioner has an Internal Revenue Service Tax Identification Number. While the petitioner's undated letter of support and the employment agreement signed by the beneficiary on January 29, 2010 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.

Although the petitioner submitted documentary evidence such as the BCBSMA agreement and the employment agreement discussed above, the petitioner did not submit any document which outlined in detail the nature and scope of the beneficiary's employment. Counsel for the petitioner claims that it did submit essential evidence such as the agreements and the letter from [REDACTED] the beneficiary's alleged supervisor, in support of this contention. However, the key element in this matter, which is who exercises 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, in response to the RFE, the petitioner stated that it could not provide an itinerary for the beneficiary's time in the United States, since the nature of the petitioner's business does not permit the accurate prediction of where the beneficiary could potentially be located for the duration of the petition. The petitioner concluded by stating that it provides personnel through the assembly of teams in response to client requirements, and therefore maintains control over its claimed employees, including the beneficiary. The AAO disagrees.

The BCBSMA agreement sheds little light on the beneficiary's proposed position, since it does not identify the beneficiary as being assigned to the project and provides no information regarding the nature of the work to be performed. As discussed previously, the amendment which added technical leads to the work order was created after the filing of the petition, and the amendment did not include a description of the role and responsibilities of technical leads as it did for other architects on the project. Moreover, the fact that the petitioner does not know where the beneficiary will be employed after the expiration of the BCBSMA project and for the duration of the validity period suggests that other entities are the true employers of the beneficiary. 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.

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.

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.