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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
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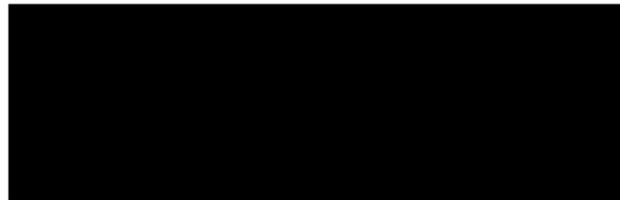


FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **OCT 04 2010**

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)

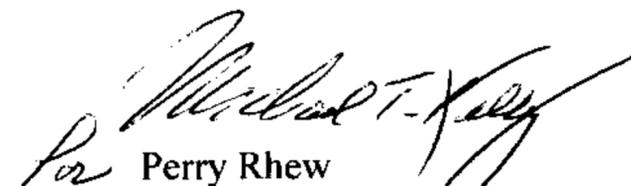
ON BEHALF OF PETITIONER:



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 business consulting and technology services. It seeks to employ the beneficiary as a technical architect 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 on the following grounds: (1) the petitioner does not qualify as a United States employer or agent; (2) the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation; and (3) the petitioner failed to submit a valid Labor Condition Application (LCA) for all work locations of the beneficiary. On appeal, counsel for the petitioner submits a brief and additional evidence.

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 October 31, 2008, the petitioner stated it has 1076 employees and a gross annual income of \$218.1 million. The petitioner indicated that it wished to employ the beneficiary as a technical architect from March 27, 2009 through March 26, 2012 at an annual salary of \$80,500.

With regard to the petitioner's business, the petitioner claimed that it is "a leading business consulting and technology firm serving Global 2000 and major midsize companies in central United States" and that it has offices in St. Louis, Austin, Chicago, and Houston. The petitioner further stated, in a letter dated April 17, 2009, that it assigned personnel to client projects on an as-needed basis, and claimed that during the beneficiary's stay in the United States, he would work for the petitioner's client, McKesson Corporation (McKesson).

The AAO will first address its determination that the petitioner has not established its standing to file the petition, that is, 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 had to 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).

The record reflects that the petitioner's business is generated by contracts between it and business entities seeking temporary assignment of consultants to provide a variety of computer and IT services for themselves or their clients. Accordingly, not only the nature of any work to be assigned to the beneficiary, but also the relative degrees of control over the beneficiary by entities involved in contractual matters involving work by him, will depend upon the contractual agreements addressing the projects to which the beneficiary would be assigned. Accordingly, all agreements, whether expressed in contract or contract-related documents or other form, that relate to the particular projects to which the petitioner would be assigned during the period specified in the petition are material to the employer-employee issue.

As will be discussed below, the AAO finds that the director was correct in denying the petition for failure to establish that the petitioner qualifies as an intending U.S. employer in accordance with section 101(a)(15)(H)(i)(b) of the Act and the implementing regulation at 8 C.F.R. § 214.2(h)(4)(ii). Specifically, the AAO finds that the petitioner has not established that it will have "an employee-employer relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii)(2).

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

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

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

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

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

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

As should be evident in the discussion below, the AAO finds that the petitioner has failed to satisfy the second criterion of 8 C.F.R. § 214.2(h)(4)(ii). That is, the documentation in the record does not establish the substantive nature of the work that the beneficiary would perform if the petition were approved, particular clients whose contracts and specifications would determine the substantive nature of the beneficiary's work, and the relative amounts of control over the beneficiary and his work that would actually be exercised during particular projects by the petitioner, the petitioner's clients contracting for the work, and, in some cases, the petitioner's clients' clients. Therefore, as the petitioner has failed to establish the extent that it and its clients would control the beneficiary and his work, the record does not establish that an employer-employee relationship exists or will exist.

Although "United States employer" is defined in the regulations, it is noted that "employee," "employed," "employment," and "employer-employee relationship" are not defined for purposes of the H-1B visa classification even though these terms are used repeatedly in both the Act and the regulations, including within the definition of "United States employer" at 8 C.F.R. § 214.2(h)(4)(ii). Section 101(a)(15)(H)(i)(b) of the Act indicates that an alien coming to the United States to perform services in a specialty occupation will have an "intending employer" who will file a labor condition application with the Secretary of Labor pursuant to section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). The intending employer is described as offering full-time or part-time "employment" to the H-1B "employee." Sections 212(n)(1)(A)(i) and 212(n)(2)(C)(vii) of the Act, 8 U.S.C. §§ 1182(n)(1)(A)(i) and 1182(n)(2)(C)(vii). Further, the regulations indicate that "United States employers" must file Form I-129 in order to classify aliens as H-1B temporary "employees." 8 C.F.R. §§ 214.2(h)(1) and 214.2(h)(2)(i)(A). Finally, the definition of "United States employer" indicates in its second prong that the petitioner must have an "employer-employee relationship" with the "employees under this part," i.e., the H-1B beneficiary, and that this relationship be evidenced by the employer's ability to "hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer"). Accordingly, neither the legacy Immigration and Naturalization Service (INS) nor U.S. Citizenship and Immigration Services (USCIS) has defined the terms "employee," "employed," "employment," or "employer-employee relationship" by regulation for purposes of the H-1B visa classification, even though the law describes H-1B beneficiaries as being "employees" who must have an "employer-employee relationship" with a "United States employer."<sup>1</sup> Therefore, for purposes of the H-1B visa classification, these terms are undefined.

The Supreme Court of the United States has determined that where federal law fails to clearly define the term "employee," courts should conclude that the term was "intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (hereinafter "*Darden*") (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). That definition is as follows:

"In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the

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<sup>1</sup> Under 8 C.F.R. §§ 214.2(h)(2)(i)(F), it is possible for an "agent" who will not be the actual "employer" of a beneficiary to file an H petition on behalf of the actual employer and the alien. While an employment agency may petition for the H-1B visa, the ultimate end-user of the alien's services is the "true employer" for H-1B visa purposes, since the end-user will "hire, pay, fire, supervise, or otherwise control the work" of the beneficiary "at the root level." *Defensor v. Meissner*, 201 F.3d 384, 387-8 (5th Cir. 2000). Accordingly, despite the intermediary position of the employment agency, the ultimate employer must still satisfy the requirements of the statute and regulations: "To interpret the regulations any other way would lead to an absurd result." *Id.* at 388.

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>

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-

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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).

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

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

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

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

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 McKesson, the end client, as evidenced by a relationship between the petitioner and CollectiveGain Corp. (CollectiveGain). Specifically, the petitioner submitted copies of four documents entitled "Consulting Services Master Agreement – Exhibit A; Individual Work Order," which indicate that the beneficiary will work on a project for McKesson, located in San Francisco, California, through its agreement with CollectiveGain, located in Pleasanton, California. Collectively, the four documents covered various projects over the period from January 28, 2008 through July 12, 2009, and each document named the beneficiary as the person assigned to the project.

On May 11, 2009, the director denied the petition. The director found that, based on the evidence provided by the petitioner, the petitioner was a company engaged in subcontracting computer personnel to clients.

Consequently, the director concluded that the petitioner failed to meet the regulatory definition of employer or agent.

On appeal, counsel for the petitioner asserts that it is in fact the employer of the beneficiary, and asserts that the director's conclusion to the contrary was erroneous. Counsel restates the regulatory definition of employee and agent, and provides a brief argument in which it is contended that the petitioner submitted adequate evidence to demonstrate the petitioner's eligibility.

To qualify as a United States employer, all three criteria at 8 C.F.R. § 214.2(h)(4)(ii) must be met. The Form I-129 and the tax documents submitted by the petitioner indicate that the petitioner has an Internal Revenue Service Tax Identification Number. While the petitioner's letter of support indicates 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 work orders discussed above and a copy of its annual report, the petitioner did not submit an employment agreement outlining the nature and scope of the beneficiary's employment. The petitioner, through counsel, contends both in response to the RFE and again on appeal that the petitioner acquired the beneficiary's prior employer, [REDACTED] and thus the terms of the beneficiary's employment with [REDACTED] apply to the petitioner. However, aside from a copy of a press release indicating the petitioner's acquisition of [REDACTED] no documentary evidence to support the contention that an employer-employee relationship existed at the time of filing was submitted. In any event, neither the press release nor any other document in the record establishes the specific lines of supervision and the relative degrees of control over the beneficiary's on-the-job performance that would extend over the beneficiary when engaged in the work of the proffered position for a specific client or client's client. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In addition, the petitioner relies on W-2 forms and payroll records to support its position that it is the beneficiary's employer. However, as discussed above, the payment of wages does not automatically establish an employee-employer relationship. The key element to examine in this matter is the extent and weight of the evidence related to the exercise of control over the beneficiary.

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 central United States. In support of this contention, the petitioner submitted copies of the work orders with CollectiveGain. 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 business in which [the petitioner] is engaged does not permit the accurate prediction of where [the beneficiary] will be located for the duration of the three years because [the petitioner's] services are not typically engaged so far in advance." In conclusion, the petitioner stated that it provides personnel possessing the "appropriate skill set" for any given project, and therefore this demonstrates that it maintains control over its claimed employees, including the beneficiary. The AAO disagrees.

The work orders submitted into the record shed little light on the beneficiary's proposed position, since they provided no information regarding the nature of the work to be performed. The work orders merely identify the end client, and state "Sr. EAI Consultant" under the heading "services to be performed." The AAO notes that the work orders are identified as "Exhibit A," thereby indicating that they are appendages to a contract or agreement that likely includes terms under which the beneficiary would provide his services. Without evidence of complete contracts or statements of work, the work orders alone do not establish the nature of the petitioner's relationship with the beneficiary. Nor do they establish the relationship between the petitioner and the beneficiary with CollectiveGain and McKesson.

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).

When discussing whether the petitioner was an agent, the director stated that the definition of agent at 8 C.F.R. § 214.2(h)(2)(i)(F) provides for two types of agents: (1) "an agent performing the function of an employer"; and (2) "a company in the business as an agent involving multiple employers as the representative of both the employers and the beneficiary." The director found again that, absent documentation such as work orders or contracts between the ultimate end clients and the beneficiary, the petitioner could not be considered an agent in this matter. As stated above, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

For the reasons discussed above, the AAO finds that the director did not err in denying the petition for the petitioner's failure to establish that it filed the petition as a U.S. employer or agent.

Next, the AAO finds that the petitioner has failed to substantiate that the LCA submitted with the petition is one that corresponds to the petition, particularly with regard to the locations where the beneficiary would perform the duties of the proffered position.<sup>3</sup> The director specifically noted that the LCA listed the

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<sup>3</sup> 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.

beneficiary's work location as Livonia, Michigan. In reviewing the work orders submitted by the petitioner, the director noted that the documents indicate that the beneficiary would be working for McKesson in San Francisco, California. The director concluded that without ultimate end-client agreements or contracts which outlined in detail the nature and scope of the beneficiary's assignment, his actual work location(s) could not be determined.

Upon review, the AAO concurs with the director's finding. The petitioner, in contending that the beneficiary will work in Michigan, provides a copy of its commercial lease as evidence that it maintains an office at this location. However, the petitioner provides no corroborating evidence to demonstrate that the beneficiary will provide computer services to or work on a project for McKesson in Michigan. As discussed above, no employment agreement was submitted between the petitioner and the beneficiary establishing his work

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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 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.

location. Moreover, no contracts or statements of work were submitted which outlined in detail the worksite(s) for the beneficiary in accordance with the project he would perform for McKesson through the petitioner's agreement with CollectiveGain. Finally, there is no evidence to refute the director's finding that the work location for the beneficiary appears to be San Francisco, California.<sup>4</sup>

Absent complete contracts establishing the work sites of the beneficiary, the AAO cannot conclude that the LCA submitted corresponds to the petition.

For the reasons discussed above, the AAO finds that the director did not err in denying the petition on the LCA ground that he cited in his decision.

A related issue not addressed by the director is the petitioner's failure to provide a concise itinerary for the beneficiary's intended course of employment. The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). It was in the exercise of this function that the AAO identified this issue that the director had not addressed.

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.

The petitioner acknowledges in the response to the RFE that it will send the beneficiary to work on client sites as needed, but was unable to provide definitive contracts or details. Moreover, the current work order for the McKesson project indicates that the project will end on July 12, 2009. Since the petitioner is requesting approval of the petition through March 26, 2012, this work order clearly is insufficient to constitute a concise agreement for the entire requested validity period.

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<sup>4</sup> In fact, the documentation in the record collectively establishes that the beneficiary works and resides in California. The petitioner submits copies of work orders for the McKesson project which date back to January of 2008, and all of these work orders list McKesson's address as San Francisco, California. The payroll records and W-2 forms for the beneficiary, which cover 2008 and the first quarter of 2009, list the beneficiary's address as Fremont, California, a location within commuting distance of San Francisco. Since the petitioner contends that the beneficiary was working under these work orders since January 2008, it stands to reason that the beneficiary was working onsite for McKesson in San Francisco during this period. 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).

The petitioner further explained that by nature of its business, potential future assignments or projects for the beneficiary were as yet unknown, and explains that this is normal business procedure in the petitioner's industry. However, 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 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). 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 final issue is whether the beneficiary will be employed in a specialty occupation.

It should be noted that for purposes of the H-1B adjudication, the issue of 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 (5<sup>th</sup> Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

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

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 technical architect.

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 support letter dated October 22, 2008 states that the beneficiary would perform the following duties:

In the position of Technical Architect, [the beneficiary] will continue to lead the company’s largest and most strategic projects. He participates in the overall leadership of the business

unit. [The beneficiary] is responsible for participating in the evolution of the company's offerings for technology areas. As Technical Architect, [the beneficiary] defines overall system requirements including application servers, database servers, middleware, EAI and legacy integration, networking security, and server hardware. He provides technical direction and leadership to team members. He also assesses client technical infrastructure and recommends solutions. Furthermore, [the beneficiary] mentors and recruits employees. He is responsible for planning, designing, documenting and implementing system configuration. He evaluates and critiques technical requirements and selects products and designs the technical architecture for a large enterprise application. Finally, [the beneficiary] directs strategic IT planning utilizing IBM WebSphere version 5.x, IBM WebSphere and Portal version 5.x.

In the RFE dated March 21, 2009, the director, through counsel, contended that according to the Occupational Information Network (*O\*Net*), the position of technical architect was defined within the context of a computer engineering or related field. Counsel further provided an additional overview of the beneficiary's duties, as follows:

- Instill confidence in [the petitioner's] skills and ability to deliver to our customers – 10%
- Gain an understanding of the different technologies on our engagements to facilitate both communications and the solution design – 10%
- Help in requirement gathering, design, writing test cases, analysis, coding, and development in distributed applications using IBM websphere related products like WebSphere Process Server, WebSphere Enterprise Service Bus, WebSphere Message Broker, WebSphere Data Power, WebSphere Partner Gateway – 50%
- Ability to effectively facilitate client discussions in a variety of situations – 10%
- Ability to accurately estimate the effort required for different tasks – 10%
- Ability to support business development efforts as part of a broader team – 10%

These generic and vague descriptions of the beneficiary's proposed duties do not indicate how these duties would be incorporated into the scope of the project for McKesson, or how they require specialized knowledge in their performance. Moreover, the work orders for the beneficiary's services do not state that a minimum of a bachelor's degree in a specific specialty, or related experience, is required for the proffered position.

Additionally, as discussed above, the most recent work order indicates that the beneficiary will be working on the McKesson project until July 12, 2009. The petitioner claims, however, that the exact nature of the beneficiary's assignments throughout the validity period are currently unknown and will vary based on client needs during the duration of the petition, for which approval was requested through March 26, 2012.

It therefore appears that the petitioner is responsible for assigning staff to various client projects as needed. However, details are not provided about the beneficiary's specific role in the McKesson project, on which he will allegedly work until July 2009. Moreover, while the petitioner claims on Form I-129 that it employs over 1,000 people, no information was provided about other technical architects 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 a work order for the period from February 28, 2009 to July 12, 2009 for the McKesson project discussed above. This document provides no 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 response to the request for evidence, 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 Obaighbena*, 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, the petitioner fails to establish that the duties that the beneficiary would perform are those of a specialty occupation. 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.

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.

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. Therefore, the petitioner's failure to provide evidence of valid work orders or employment contracts between the petitioner and clients renders it impossible to conclude for whom the beneficiary will ultimately provide services, and exactly what those services would entail. The AAO, therefore, cannot analyze whether 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).

As a final note, the AAO acknowledges the petitioner's assertion that USCIS has approved other H-1B petitions for the petitioner and its successor in interest. The petitioner provides no supporting evidence submitted to the service center in these prior cases. In the absence of all of the corroborating evidence contained in those records of proceeding, the AAO is unable to determine whether the other H-1B petitions were approved in error.

Each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, USCIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether a prior approval was erroneous, no such determination may be made without review of the original record in its entirety. If the prior petitions were approved based on evidence that was substantially similar to the evidence contained in this record of proceeding, or, rather, the lack of evidence in the current record, the approvals of the prior petitions would have been material or gross error. USCIS is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Neither USCIS nor any other agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), *cert denied*, 485 U.S. 1008 (1988).

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.