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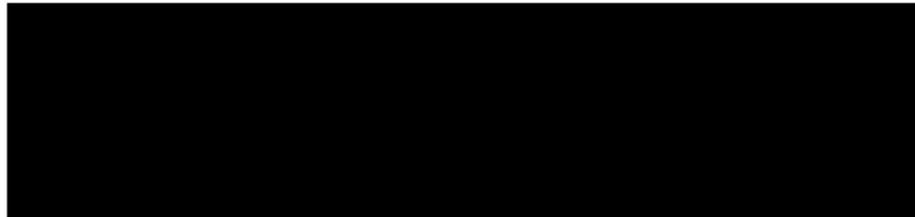
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Washington, DC 20529-2090



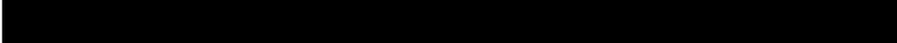
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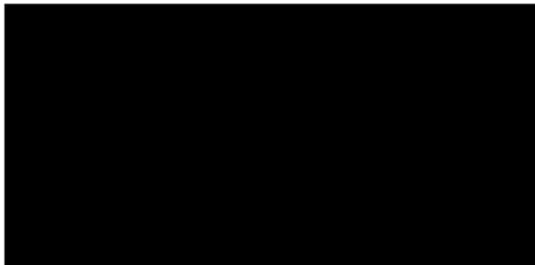


FILE:  Office: CALIFORNIA SERVICE CENTER Date: OCT 04 2010

IN RE: Petitioner: 
Beneficiary: 

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

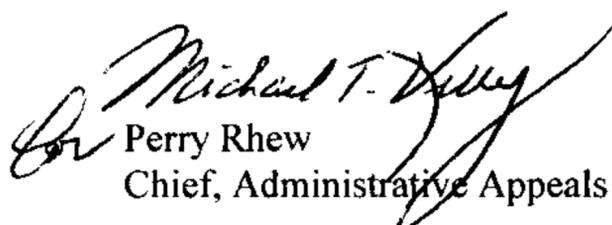
ON BEHALF OF PETITIONER:



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, and a subsequent appeal to the Administrative Appeals Office (AAO) was summarily dismissed for failure to timely provide a brief in support of the appeal. The matter is again before the AAO on a motion to reopen. The motion will be granted. The petition will be denied.

The petitioner describes itself as “an internet leader in Supply Management solutions,” and seeks to employ the beneficiary in the position of 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 establish that: (1) the petitioner does not qualify as a United States employer or agent; or (2) the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation.

The petitioner, through counsel, filed a timely Notice of Appeal on Form I-290B, and indicated that a brief and additional evidence would be submitted to the AAO within 30 days. The AAO summarily dismissed the appeal on June 1, 2010, noting that no additional evidence to supplement the record had been received. On motion, counsel for the petitioner submits documentation demonstrating that a timely brief was in fact submitted to the AAO. Upon review, the AAO finds that the petitioner supplemented the record as claimed and the AAO’s summary dismissal of the appeal was improper. The prior decision of the AAO is withdrawn, and the petitioner’s appeal will be considered.

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 the director’s decision; (5) Form I-290B and supporting materials; (6) the notice of the AAO’s decision on the appeal; and (7) the submissions constituting the motion to reopen. The AAO reviewed the record in its entirety before issuing its decision.

In a letter of support dated March 7, 2009, the petitioner stated that it “delivers valuable results to its numerous customers worldwide through its offices in China, France, Italy, Mexico, Spain, the UK and the US.” Regarding the proffered position, the petitioner stated that it wished to employ the beneficiary in the position of Consultant, and provided the following description of the proposed position:

[S]pecifically, [the beneficiary] will develop excellent relationships with existing clients, demonstrating a full understanding of their business needs and their projects [sic] requirements, deliverables and expectations, along with an ability to easily convey the use of the [petitioner’s] technology and services. He will communicate authoritatively, both verbal and written, through various different media. He will demonstrate good working knowledge of strategic sourcing process, spend analysis and business case development, eTendering and response evaluation, supplier sourcing and analysis, full eSourcing solutions, and eAuction delivery. He will be available to train and support users on the use of [the petitioner’s] sourcing tools. He will make recommendations to clients on ways in which their sourcing process can be made more efficient and cost effective. In addition, [the beneficiary] will

support the client through full implementation of the [petitioner's] offering, being ready to give advice and support at every stage. He will continuously strive to 'up sell' clients to increase their usage of [the petitioner's] technology and services. He will also contribute to the ongoing development of products and services.

On April 15, 2009, the director issued an RFE which requested that the petitioner submit additional evidence pertaining to the petitioner's business, including any contracts and work orders pertaining to the beneficiary's job assignments in the United States. The director requested a complete itinerary for the beneficiary's services while in the United States as well as additional evidence in support of the contention that the proffered position was a specialty occupation.

In a response dated May 9, 2009, the petitioner, through counsel, submitted additional evidence in support of the petition. The petitioner submitted an offer of employment to the beneficiary dated May 14, 2008 and signed by the beneficiary on May 24, 2008, which outlined the nature of the agreement between the beneficiary and the petitioner. Specifically, this document indicated that the beneficiary would receive an annual salary of \$57,000, and indicated that employment with the company would commence on September 1, 2008.

An additional document, entitled "Confidential Information, Invention, and Non-Competition Agreement," was also submitted in response to the RFE. This document, also signed by the beneficiary on May 24, 2008, outlines the terms of the beneficiary's employment with the petitioner with respect to issues of confidentiality and proprietary work products. No additional evidence pertaining to client projects or specific duties of the beneficiary was provided.

The director denied the petition on May 15, 2009, finding that absent contracts or work orders with the petitioner's end clients, it was impossible to determine whether the beneficiary would be employed in a specialty occupation. Additionally, the director found that the minimal evidence in the record failed to establish that the petitioner met the definition of a United States employer or agent.

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

The first issue in the present matter is whether the petitioner has established that it meets the regulatory definition of an intending United States employer. Section 101(a)(15)(H)(i)(b) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). Specifically, the AAO must determine whether the petitioner has established that it will have "an 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.

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

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

¹ Under 8 C.F.R. §§ 214.2(h)(2)(i)(F), it is possible for an "agent" who will not be the actual "employer" of a beneficiary to file an H petition on behalf of the actual employer and the alien. While an employment agency

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

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

Darden, 503 U.S. at 323-324 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. at 751-752); see also *Restatement (Second) of Agency* § 220(2) (1958); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) (hereinafter "*Clackamas*"). As the common-law test contains “no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.” *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. at 258 (1968)).²

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.

² While the *Darden* court considered only the definition of "employee" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(6), and did not address the definition of "employer," courts have generally refused to extend the common law agency definition to ERISA's use of employer because "the definition of 'employer' in ERISA, unlike the definition of 'employee,' clearly indicates legislative intent to extend the definition beyond the traditional common law definition." See, e.g., *Bowers v. Andrew Weir Shipping, Ltd.*, 810 F. Supp. 522 (S.D.N.Y. 1992), *aff'd*, 27 F.3d 800 (2nd Cir. 1994), *cert. denied*, 513 U.S. 1000 (1994). However, in this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. Instead, in the context of the H-1B visa classification, the term "United States employer" was defined in the regulations to be even more restrictive than the common law agency definition. A federal agency's interpretation of a statute whose administration is entrusted to it is to be accepted unless Congress has spoken directly on the issue. See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*,

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 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).

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).

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

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

To qualify as a United States employer, all three criteria at 8 C.F.R. § 214.2(h)(4)(ii) must be met. The Form I-129 and 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, the employment letter, and the confidentiality agreement indicate its intent to engage the beneficiary to work in the United States, this documentation is insufficient to establish that an employer-employee relationship exists between the petitioner and the beneficiary.

Although the petitioner submitted documentary evidence such as the employment offer letter and confidentiality agreement, the petitioner did not submit any documents outlining the nature and scope of the beneficiary's employment and associated duties. The director found that, based on the petitioner's description of its business, where it claims to have offices worldwide in order to better serve its global clients, the petitioner is an employment contractor in that it will place the beneficiary at multiple work locations to perform services established by contractual agreements for third-party companies. Despite requesting additional evidence to clarify this finding in the RFE issued on April 15, 2009, the petitioner failed to discuss the nature of its relationship with its clients and the beneficiary. The director correctly noted that without evidence of contracts, work orders, or statements of work describing the duties the beneficiary would perform for clients, the petitioner failed to establish that the duties that the beneficiary would perform are those of a specialty occupation.

The minimal information contained in the job offer letter and confidentiality agreement is not supported by documentary evidence describing the beneficiary's claimed employment relationship with the petitioner. Although the petitioner responded to the director's RFE by submitting these documents, it failed to provide a statement or cover letter discussing the nature of the beneficiary's proposed position with the company, and the manner in which he would provide services to clients or for the petitioner. Other than the petitioner's generic description of the proposed position of "consultant," the record contains no information regarding the nature of the work to be performed. As stated by the director in the denial, without evidence of contracts, work orders, or statements of work describing the duties the beneficiary would perform and for whom, the petitioner fails to establish that the duties that the beneficiary would perform are those of a specialty occupation. 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)).

On appeal, the petitioner submits a letter from [REDACTED] for the petitioner. In this letter, [REDACTED] states that contrary to the director's finding, the petitioner is not a

staffing company that provides temporary employees to a customer on location for a specific time period. He further claimed that its customers are not involved in assigning specific duties to the beneficiary. Instead, he claimed that the petitioner maintains ultimate control and authority over the beneficiary's work.

Regarding the petitioner's specific business operations, ██████████ explained that its customer enter into a long-term subscription license agreement, whereby the petitioner grants the customer internet access to its proprietary software products that it hosts on its computer servers. Its employees, including the beneficiary, are assembled into teams and to execute a particular project, and can either work from the petitioner's offices or travel to a customer's place of business. Finally, ██████████ claimed that the petitioner's employees can work on several projects simultaneously.

The AAO notes several problems with these statements. First, the petitioner's June 16, 2009 letter explains the exact nature of the company's business operations for the first time on appeal. Despite the director's request for information clarifying the nature of its operations in the April 15, 2009 RFE, the petitioner failed to address this issue and merely submitted copies of the employment offer letter and confidentiality agreement. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The petitioner's letter is not supported by any independent documentary evidence corroborating these statements. Merely claiming that it exercises full control over the beneficiary is not sufficient to satisfy the petitioner's burden of proof in this matter. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Despite the claims made by the petitioner to the contrary, the AAO finds that the explanation provided by ██████████ further supports the director's conclusion that the petitioner has not satisfied the regulatory requirements for a United States employer or agent. The petitioner acknowledges that the beneficiary, as well as other staff members, can occasionally be sent to client sites, and also may work simultaneously on multiple projects for different clients. While this statement alone does not automatically warrant a conclusion that the petitioner is not an employer as contemplated by the regulatory definition, the absence of documentation to clarify the exact nature of the beneficiary's role in the proffered position in relation to the petitioner and its clients renders it impossible to conclude that the petitioner exercises ultimate control over 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 that the petitioner will exercise complete control over the beneficiary, without evidence to support the claim, is insufficient to 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 control the work of the beneficiary. Despite the director's specific request for evidence such as employment contracts or agreements, payroll records, or work orders 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 neither 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.

Prior to addressing the final basis for the director's denial, the AAO will address two issues not discussed by the director in the decision.³ Specifically, the AAO finds that the petitioner has failed (1) to substantiate that the Labor Condition Application (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;⁴ and (2) to provide a concise itinerary for all work locations, as required by 8 C.F.R. §

³ The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In the exercise of this *de novo* function, the AAO discovered these two issues when reviewing the record of proceeding.

⁴ 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 does not correspond to the location 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. §§

214.2(h)(2)(i)(B). The LCA in this matter lists the beneficiary's work location as Chicago, Illinois. However, in reviewing the statements of the petitioner, in which it claims that the petitioner maintains offices throughout the world, and that the beneficiary may work on location at various client sites as needed, the actual work location(s) of the beneficiary cannot be determined. This is particularly relevant since the petitioner's main office is in Malvern, Pennsylvania. Moreover, there is no discussion in the record regarding in whose office the beneficiary would be working (i.e., a branch of the petitioner or a client site) in Chicago, Illinois. The employment offer letter merely states that the job location is "Chicago, Illinois," and provides no business address or reference to where the worksite is actually located. Finally, it is noted that the human resources department of the petitioner, as specified in the offer letter, is located in Edina, Minnesota, yet another location of the petitioner.

In the same manner, the petitioner has failed to provide a concise itinerary evidencing that the beneficiary will work only at one location in Chicago, Illinois, and not in multiple locations, for the entire requested validity period.

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.

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 submit a valid LCA that corresponds to the petition, and the petition must be denied for this additional reason.

The petitioner acknowledges that it will send the beneficiary to work on client sites as needed, but fails to provide any details regarding the needs and locations of these clients. Moreover, in the June 16, 2009 letter submitted on appeal, the petitioner claims that "there is no detailed itinerary per se that we could submit to you in advance with projected customer location information." Since the petitioner claims to maintain multiple offices throughout the United States and throughout the world, and since no information with regard to the locations of the clients for which the beneficiary will perform services has been submitted, it is likely that the beneficiary will work at multiple locations throughout the course of the validity period.

As discussed earlier in this decision, no contracts or statements of work were submitted which outlined in detail the nature of the beneficiary's duties and the potential client locations at which he would work. Absent the contracts or other documentation establishing the projects to which the beneficiary will be assigned, the AAO cannot conclude that the LCA submitted corresponds with the petition (since the locations where the beneficiary would work have not been established) or that a complete itinerary has been submitted, as required by regulation when the duties of the beneficiary are to be performed in more than one location. For these additional reasons, 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 (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 specialty occupation. Specifically, the petitioner’s claim that the beneficiary will work as a “consultant,” without additional evidence to demonstrate the exact nature of the position, is insufficient to establish that the proffered position is a specialty occupation.

The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that “[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation.” Moreover, the regulation at 8 C.F.R. § 214.2(h)(4)(iv)(A)(I) indicates that contracts are one of the types of evidence that may be required to establish that the services to be performed by the beneficiary will be in a specialty occupation.

As discussed above, the letter of support dated March 7, 2009 provided the following overview of the beneficiary’s position:

Specifically, [the beneficiary] will develop excellent relationships with existing clients, demonstrating a full understanding of their business needs and the projects [sic] requirements, deliverables and expectations, along with an ability to easily convey the use of the [petitioner’s] technology and services. He will communicate authoritatively, both verbal and written, through various different media. He will demonstrate good working knowledge of strategic sourcing process, spend analysis and business case development, eTendering and response evaluation, supplier sourcing and analysis, full eSourcing solutions, and eAuction delivery. He will be available to train and support users on the use of [the petitioner’s] sourcing tools. He will make recommendations to clients on ways in which their sourcing process can be made more efficient and cost effective. In addition, [the beneficiary] will support the client through full implementation of the [petitioner’s] offering, being ready to give advice and support at every stage. He will continuously strive to ‘up sell’ clients to increase their usage of [the petitioner’s] technology and services. He will also contribute to the ongoing development of products and services.

In the RFE dated April 15, 2009, the director requested specific documentary evidence to support the claim that the proffered position is a specialty occupation. Specifically, the director requested:

- A detailed description of the duties the beneficiary will perform;
- The qualifications required to perform the job duties;
- Salary or wages paid;
- Hours worked;
- Benefits; and
- A brief description of who will supervise the beneficiary and their duties, and any other related evidence.

Although the petitioner submitted the offer letter dated May 14, 2008, which outlined the beneficiary’s salary, benefits and identified the city and state of employment as well as the name of his supervisor, no specific details were provided regarding the nature of the position. The offer letter merely indicated that the beneficiary was being offered the position of “consultant” in the “consulting” department. In addition, while counsel submitted a cover letter listing the documents submitted in response to the RFE, no statement from the petitioner was submitted to clarify the nature of the beneficiary’s employment with the petitioner.

For the first time on appeal, the petitioner and counsel contend that, according to the Occupational Information Network (*O*Net*), the position of consultant is defined within the context of industrial engineers.

The vague description of duties previously submitted was restated again on appeal. Counsel and the petitioner conclude that since *O*Net* requires a bachelor's degree for entry into most industrial engineer positions, the petitioner has satisfied its burden of proof. The AAO disagrees.

First, the generic and vague description of the beneficiary's proposed duties does not adequately describe the proffered position. The AAO routinely consults the Department of Labor's *Occupational Outlook Handbook (Handbook)* to determine whether a particular position warrants classification as a specialty occupation. However, a search of the term "consultant" in the *Handbook's* online directory yields a wide array of consulting positions in fields ranging from computers to human resources to management. Despite the director's specific request for additional evidence demonstrating that the proffered position qualified as a specialty occupation, the petitioner failed to address this issue. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

It was not until the appeal was filed that the petitioner likened the proffered position to that of industrial engineer. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits the requested classification. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

In this manner, the petition provides documentary evidence in the form of excerpts from *O*Net* as well as job vacancy postings for industrial engineer positions in support of the claim that the proffered position is a specialty occupation. However, these assertions are not persuasive and cannot be considered. If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided on appeal alters the title of the proffered position and is therefore will not be considered.

Even if the petitioner had not altered the title of the proffered position on appeal, the evidence of record would still be insufficient to establish that the proffered position was a specialty occupation. The petitioner failed to provide any specific description of the nature of the beneficiary's proposed duties, and submitted no contracts, work orders, or job description that adequately described what the beneficiary would do on a daily basis. Moreover, since the petitioner claims on appeal that the beneficiary may simultaneously work on multiple projects for different clients, it is clear that the beneficiary's duties may vary based on client needs.

Therefore, while the petitioner provided a brief description of the duties of the proffered position in its initial support letter, these statements are generic and fail to specifically describe the nature of the services required by the beneficiary. 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 both counsel and the petitioner contend 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). 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.

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 statements by [REDACTED] in the June 16, 2009 letter indicate that the beneficiary will be working on different projects throughout the duration of the petition as opposed to a single, long-term project for one client. Despite the director’s specific request for documentation to establish the ultimate location(s) and job duties of the beneficiary, 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, or a specific description of duties which the beneficiary will perform on a daily basis, renders it impossible to conclude for whom the beneficiary will ultimately provide services, and exactly what those services would entail. Therefore, even if the petitioner had not altered the title of the position on appeal, the AAO would not be able to 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)(1).

Another evidentiary deficiency, which is in itself so critical as to preclude approval of this petition, is the fact that, to the extent described in the record of proceeding, the duties of the proffered position do not indicate that they comprise a position that requires or is usually associated with at least a bachelor’s degree in a specific specialty. In this regard, the AAO finds that the duties of the proffered position are described in exclusively generalized and generic terms which do not illuminate the nature and level of education that they would require. More particularly, neither the title ascribed to the proffered position nor the duties as described in the record of proceeding comport substantially with the industrial engineer occupational category as addressed in the *O*Net* and the *Handbook*. In fact, the AAO finds that the duties are described in such generalized and nebulous terms that they neither communicate the specific performance requirements that the

beneficiary would be expected to meet in the course of his employment, nor, for that matter, any particular occupational category that he would fill. Consequently, the record of proceeding is insufficient to establish that the beneficiary would perform the duties of an industrial engineer or any other position that would require the application of at least a bachelor's degree level of highly specialized knowledge in a specific specialty closely related to the duties of the position. This lack of substantial detail about the specific work that the beneficiary would perform precludes approval of the petition under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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.