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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

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[REDACTED]

DATE: DEC 01 2011 Office: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

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

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

ON BEHALF OF PETITIONER:
[REDACTED]

INSTRUCTIONS:

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

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

Thank you,

For *Michael T. Kelly*
Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary in the position of senior software test engineer as an H-1B nonimmigrant in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The petitioner describes itself as a computer/software development company and indicates that it currently employs 35 persons.

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

On appeal, counsel for the petitioner submits a brief and additional evidence in support of the appeal, and contends that the director erroneously found that the petitioner would not be the beneficiary’s employer.

When filing the I-129 petition, the petitioner averred in its September 3, 2009 letter of support that it is a software systems integrator that “specializes in information systems and eBusiness solutions for manufacturing companies.” It claimed to have a global presence in California, Oregon, India, and Spain, and further claimed that it catered to Fortune 1000 companies. Regarding the proffered position, the petitioner claimed that it wished to employ the beneficiary in the position of senior software test engineer – SAP, and explained that the beneficiary would be assigned to work onsite for its client, Echostar Satellite, LLC (Echostar) in Englewood, Colorado. The petitioner contended that it is not a staffing agency and that its workers are at all times employees of the petitioner.

On the Form I-129, the petitioner listed various worksites for the beneficiary in addition to the Englewood, California location. Specifically, the petitioner also claimed that the beneficiary would work in Bellevue, Washington; Atlanta, Georgia; and Frisco, Texas. Certified LCAs for all of these locations were submitted in support of the petition.

The petitioner also submitted a letter dated March 10, 2009, which outlined the terms of employment for the beneficiary. The letter stated that the beneficiary would receive an annual salary of \$60,000, and that he would report directly to [REDACTED] project lead of the petitioner’s company. The letter outlined standard employee benefits associated with the position, and was signed as accepted by the beneficiary on October 3, 2009. The petitioner also submitted a business consultant placement agreement, consulting services agreement, and third amendment to the consulting service agreement between the petitioner and Echostar, as well as a copy of an engagement proposal between the petitioner and T-Mobile USA, Inc.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued a request for evidence (RFE) on October 27, 2009. In the request, the director asked the petitioner to submit evidence clarifying who the actual employer(s) of the beneficiary would be. The director requested documentation such as contractual agreements or work orders from the actual end-client firm where the beneficiary would work which demonstrated the start and end dates for each assignment of the beneficiary, and specifically requested signed contracts, agreements, and/or statements of work identifying the beneficiary as a contractor on each claimed project and which outlined the beneficiary's specific duties for each particular assignment/project.

In response, counsel for the petitioner stated in a December 4, 2009 letter that "the beneficiary has been assigned to work on Petitioner's project for Dish Network which is the register operating name for EchoStar Communications Corp." Counsel further claimed that Dish Network/Echostar entered into a service agreement with the petitioner to achieve the following objectives:

- To design and develop Pay EchoStar Rebate
- To convert the current fixed bid offshoring contract to a Time and Material resourcing model so that EchoStar can better leverage the flexibility of the T&M model; and
- To provide transparency and visibility into the resource need and utilization

Counsel resubmitted the previously-submitted documentation pertaining to the petitioner's agreement with EchoStar, and contends that the undated document signed by [REDACTED] of the petitioner, and [REDACTED] Program Manager of Dish Network Corporation, represents the beneficiary's entire itinerary for the validity period, along with his specific duties on the Dish Network project. Counsel also contended that the proffered position was a specialty occupation.

On December 29, 2009, the director denied the petition. The director found that, because the petitioner contracted its employees to clients on an as-needed basis, it was required to submit the requested contracts and itinerary which specifically identified who would delegate and control the work of the beneficiary. The director concluded that, absent specific contracts identifying the client, the duration and nature of the project, and identifying the beneficiary as a contractor, the petitioner could not establish that it met the definition of United States employer or agent.

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.

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; 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. 254, 258 (1968)).²

¹ It is noted that, in certain limited circumstances, a petitioner might not necessarily be the "employer" of an H-1B beneficiary. 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 the H-1B temporary employee to file a petition on behalf of the actual employer and the beneficiary. However, the regulations clearly require H-1B beneficiaries of "agent" petitions to still be employed by "employers," who are required by regulation to have "employer-employee relationships" with respect to these H-1B "employees." See *id.*; 8 C.F.R. §§ 214.2(h)(1) and 214.2(h)(4)(ii) (defining the term "United States employer"). As such, the requirement that a beneficiary have a United States employer applies equally to single petitioning employers as well as multiple non-petitioning employers represented by "agents" under 8 C.F.R. § 214.2(h)(2)(i)(F). The only difference is that the ultimate, non-petitioning employers of the H-1B employees in these scenarios do not directly file petitions.

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

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)

law definition." *See, e.g., Bowers v. Andrew Weir Shipping, Ltd.*, 810 F. Supp. 522 (S.D.N.Y. 1992), *aff'd*, 27 F.3d 800 (2nd Cir. 1994), *cert. denied*, 513 U.S. 1000 (1994). However, in this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. Instead, in the context of the H-1B visa classification, the term "United States employer" was defined in the regulations to be even more restrictive than the common law agency definition. A federal agency's interpretation of a statute whose administration is entrusted to it is to be accepted unless Congress has spoken directly on the issue. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984).

The regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to employ persons in the United States, *and* to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements, thus indicating that the regulations do not indicate an intent to extend the definition beyond "the traditional common law definition." Therefore, in the absence of an intent to impose broader definitions by either Congress or USCIS, the "conventional master-servant relationship as understood by common-law agency doctrine," and the *Darden* construction test, apply to the terms "employee," "employer-employee relationship," "employed," and "employment" as used in section 101(a)(15)(H)(i)(b) of the Act, section 212(n) of the Act, and 8 C.F.R. § 214.2(h). That being said, there are instances in the Act where Congress may have intended a broader application of the term "employer" than what is encompassed in the conventional master-servant relationship. *See, e.g.*, section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F) (referring to "unaffiliated employers" supervising and controlling L-1B intracompany transferees having specialized knowledge); section 274A of the Act, 8 U.S.C. § 1324a (referring to the employment of unauthorized aliens).

Finally, it is also noted that, if the statute and the regulations were somehow read as extending the definition of employee in the H-1B context beyond the traditional common law definition, this interpretation would likely thwart congressional design and lead to an absurd result when considering the \$750/\$1,500 fee imposed on H-1B employers under section 214(c)(9) of the Act, 8 U.S.C. § 1184(c)(9). As 20 C.F.R. § 655.731(c)(10)(ii) mandates that no part of the fee imposed under section 214(c)(9) of the Act shall be paid, "directly or indirectly, voluntarily or involuntarily," by the beneficiary, it would not appear possible to comply with this provision in a situation in which the beneficiary is his or her own employer, especially where the requisite "control" over the beneficiary has not been established by the petitioner.

(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 384, 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).

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."

On appeal, counsel for the petitioner submits a statement asserting that the petitioner is in fact the employer of the beneficiary and asserts that the director's conclusion to the contrary was erroneous. Counsel resubmits evidence previously submitted in support of this contention.

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 petitioner's federal tax returns contained in the record indicate that the petitioner has an Internal Revenue Service Tax Identification Number. While the petitioner's job offer dated July 30, 2009 indicates its engagement of the beneficiary to work in the United States, this letter merely outlines the beneficiary's salary and benefits but provides no details regarding the nature of the job offered or its location(s). Therefore, the petitioner has failed to establish that an employer-employee relationship exists.

Despite the director's specific request in the RFE that the petitioner provide contracts between the petitioner and the beneficiary, the petitioner and its end clients, and/or contracts that specifically identified the beneficiary as the contractor/consultant to work on specific projects, the petitioner did not fully respond to the director's request. The regulations state 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). 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 non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

The minimal information contained in the job offer is not supported by documentary evidence that a valid employment agreement or credible offer of employment existed between the petitioner and the beneficiary. The petitioner did not submit an employment contract or any other document describing the beneficiary's claimed employment relationship with the petitioner. Although the petitioner submits the undated statement signed by [REDACTED] of the petitioner, and [REDACTED] Program Manager of Dish Network Corporation, this statement is not an employment contract. While the record of proceeding does contain several agreements between the petitioner and EchoStar, these documents shed little light on the beneficiary's proposed position, since they (1) refer specifically to other subcontractors,³ not the beneficiary; and (2) provide no information regarding the nature of the work to be performed. Moreover, while counsel asserts in response to the RFE that the beneficiary will be working on a project for Dish Network, which it claims is the "register operating name" for EchoStar, no documentation to support this claim has been submitted. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The AAO further notes that, in support of the petition, the petitioner submitted a copy of an engagement proposal with T-Mobile signed by a representative of T-Mobile on April 24, 2007, and dated, but not signed, by the petitioner on August 16, 2007. However, page one of the agreement is dated March 20, 2008, which raises questions regarding the validity of this document. Nevertheless, the AAO notes that the T-Mobile agreement also contains an addendum, which refers to a statement of work August 20, 2008 (not included in file, unless the addendum erroneously is citing to the March 20, 2008 engagement proposal). It is noted that, contrary to counsel's claims in response to the RFE, this document identifies the beneficiary specifically as the consultant for the project, and claims that he will work as a soft test engineer – SAP on the T-Mobile project in both Bothell and Seattle, Washington, from October 1, 2009 until July 15, 2012. Since neither counsel nor the petitioner claims that the beneficiary will be working for T-Mobile during the requested validity period, the presence of these documents in the record raises significant questions regarding the

³ The business consultant placement agreement between the petitioner and Echostar dated October 1 (year unspecified) pertains specifically to [REDACTED], a java consultant, and not the beneficiary.

actual nature of the beneficiary's assignments. Moreover, it is noted that despite listing four work locations for the beneficiary on the Form I-129, the locations of Bothell and Seattle, Washington are not included. 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).⁴

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. For example, the Statement of Work dated September 18, 2008, identified as Schedule "A" to the Master Consulting Services Agreement between the petitioner and Charter, identifies a team of the petitioner's employees to who will serve on that project, none of whom is the beneficiary.

Moreover, the petitioner has failed to provide a concise itinerary evidencing at which sites and for what duration the beneficiary would work at such sites. 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 of these clients and the durations of the potential assignments. Although it submitted the related consulting agreements referenced above, these documents are not specific to the beneficiary, and cannot suffice as evidence that the petitioner, and not a third-party employer, will act as the beneficiary's employer during the entire three-year period.

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 of support submitted in support of the petition and in response to the RFE that the petitioner would exercise complete control over the beneficiary, without evidence to support the claim, is insufficient to establish eligibility in this matter. Again, 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 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). 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, agreements, or work orders to corroborate its claim, the petitioner failed to submit such evidence that relates specifically to the beneficiary. Moreover, while the petitioner and counsel make one claim regarding the activities of the beneficiary during the requested validity period, the T-Mobile documentation contained in the record directly contradicts these claims, thereby rendering the evidence submitted in support of the petition questionable. Doubt cast on any aspect of the petitioner's proof may, of

⁴ The AAO notes that the petitioner has filed another Form I-129 petition under receipt number [REDACTED] which includes a beneficiary with a very similar name to that of the beneficiary in the instant matter. It is unclear whether the T-Mobile documents are submitted in support of the instant petition, or if they possibly were meant to support the petition filed under the receipt number referenced above.

course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Therefore, based on the tests outlined above, the petitioner has not established that it 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).

Next, 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 that absent documentation such as work orders or contracts between the ultimate end clients and the beneficiary, the petitioner could not alternatively be considered an agent in this matter. As stated above, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. The petitioner submits no new evidence on appeal to support a finding that the petitioner is an agent. For this additional reason, the director's decision will not be disturbed.

The next issue is whether the petitioner submitted a valid LCA for all work locations, as required by 8 C.F.R. § 214.2(h)(2)(i)(B). In this matter, counsel contends that the petitioner satisfied this requirement because it provided a certified LCA for the location of Englewood, Colorado with the petition, in addition to providing "ample evidence" that the beneficiary will be working in Englewood, Colorado on the Echostar/Dish Network project. However, for the reasons discussed in the section above, the AAO does not concur with this statement.

The director concluded that without ultimate end-client agreements, the actual work location(s) for the beneficiary could not be determined. Moreover, the AAO finds that, while not specifically claimed by the petitioner, it appears that the petitioner will outsource the beneficiary to client sites as necessary, since the Form I-129 lists four work sites for the beneficiary, and the petitioner claims to service Fortune 1000 companies throughout the country. On appeal, counsel for the petitioner argues that it did submit a valid LCA for the Englewood, Colorado location, thus concluding that the petitioner fully complied with the requirements for a valid LCA at the time of filing.

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

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

Service or training in more than one location. A petition which requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with

the Service office which has jurisdiction over I-129H petitions in the area where the petitioner is located. The address which the petitioner specifies as its location on the I-129H petition shall be where the petitioner is located for purposes of this paragraph.

Moreover, 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.*

(Emphasis added).

Counsel asserts that the work location of the beneficiary will be Englewood, Colorado. However, she provides no evidence demonstrating that an actual work order or contract identifying the beneficiary as a contractor and verifying the nature, duration, and location of the beneficiary's services exists for this location. Additionally, the record contains a statement of work indicating that the beneficiary will work onsite for T-Mobile during the requested validity period in the state of Washington; however, neither the LCAs nor the Form I-129 identify Bothell or Seattle, Washington, as a work location for the beneficiary. A petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 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). At the time of filing, the petitioner failed to submit an LCA that correspond to the petition in this matter.

Absent end-agreements with clients coupled with corroborating and non-contradictory statements from the petitioner, the duration and location of work sites to which the beneficiary will be sent during the course of his employment cannot be determined. Absent this evidence, the AAO cannot conclude that the LCAs submitted correspond to the petition at the time of filing.

The final issue is whether the beneficiary will be employed in a specialty occupation.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and

- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii):

Specialty occupation means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in field 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 [(2)] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

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

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 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), 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 occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

In addressing whether the proffered position is a specialty occupation, the record contains insufficient and contradictory evidence as to where and for whom the beneficiary would be performing his services, and whether his services would be that of a software test engineer.

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

The petitioner’s letter of support dated September 3, 2009 provided an overview of the beneficiary’s proposed duties, which was also restated in the undated statement from [REDACTED] the petitioner’s [REDACTED]. In relevant part, the petitioner claimed that his duties would include the following:

1. Analyze scripts for automation (25%)
2. Create and Modify Automated Test Scripts for Functional/Regression Testing, Regression Testing, Functional Testing and Integration testing (25%)
3. Execute Automated Scripts using Quality Center (25%)
4. Log the defects in Quality Center (25%)

However, no independent documentation to further explain the nature and scope of these duties was submitted. Noting that the petitioner, as a software development and integration company, was engaged in an industry that typically outsourced its personnel to client sites to work on particular projects, the director requested documentation such as contracts and work orders that would outline for whom the beneficiary would render services and what his duties would include at each worksite. Despite the director’s specific request for these documents, the petitioner failed to comply. Again, failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

As discussed above, the record contains simply a copy of a job offer to the beneficiary in letter form. However, this document provides no details regarding the nature of the beneficiary's proposed position and accompanying duties. Although several consulting/contractual agreements with EchoStar are submitted in support of the petition, none of these documents pertains to the beneficiary. Moreover, while the record contains a statement of work with T-Mobile outlining the beneficiary's duties for that company, the petitioner claims that the beneficiary instead will work for EchoStar, thereby diminishing that document's probative value in this matter. Without evidence of contracts, work orders, or statements of work describing the duties the beneficiary would perform and for whom, the petitioner fails to establish that the duties that the beneficiary would perform are those of a specialty occupation. Providing a generic job description that speculates what the beneficiary may or may not do at each worksite is insufficient. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

In support of this analysis, USCIS routinely cites *Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000), in which an examination of the ultimate employment of the beneficiary was deemed necessary to determine whether the position constitutes a specialty occupation. The petitioner in *Defensor*, Vintage Health Resources (Vintage), was a medical contract service agency that brought foreign nurses into the United States and located jobs for them at hospitals as registered nurses. The court in *Defensor* found that Vintage had "token degree requirements," to "mask the fact that nursing in general is not a specialty occupation." *Id.* at 387.

The court in *Defensor* held that for the purpose of determining whether a proffered position is a specialty occupation, the petitioner acting as an employment contractor is merely a "token employer," while the entity for which the services are to be performed is the "more relevant employer." *Id.* at 388. The *Defensor* court 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. *Id.* In *Defensor*, the court found that that evidence of the client companies' job requirements is critical if the work is to be performed for entities other than the petitioner. *Id.*

Despite the petitioner's repeated claims that it will serve as the beneficiary's employer, the AAO finds that it remains unclear from the record whether the petitioner will in fact be an employer or will act as an employment contractor. Moreover, the petitioner's failure to provide specific and non-contradictory documentation outlining the nature of the beneficiary's employment renders it impossible to conclude for whom the beneficiary will ultimately provide services and exactly what those services would entail. The AAO, therefore, cannot analyze whether the beneficiary's duties in-house or at each worksite would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation, because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered

position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner's normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4. For this additional reason, the petition must be denied. 8 C.F.R. § 214.2(h)(4)(iii)(A). Accordingly, the petitioner has not established that the proposed position qualifies as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) or that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(1)(B)(I).

For the reasons set forth above, even if the other stated grounds of ineligibility had been overcome on appeal, the petitioner has failed to supplement the record with sufficient evidence to establish that the beneficiary would be performing the duties of a specialty occupation, and the petition cannot be approved for this reason.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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