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



U.S. Citizenship  
and Immigration  
Services

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,

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 software 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 software development and consulting services company and indicates that it currently employs four persons.

The director denied the petition because the petitioner failed to establish that: (1) it meets the regulatory definition of either (a) an intending United States employer as defined at 8 C.F.R. § 214.2(h)(4)(ii), or (b) an agent at 8 C.F.R. § 214.2(h)(2)(i)(F); (2) it submitted a valid labor condition application (LCA) for all locations; and (3) the proffered position is a specialty occupation.

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

In a letter of support dated February 6, 2009, the petitioner indicated that it was a U.S. company based in Scottsdale, Arizona, and claimed to have a branch office in Fountain Hills, Arizona. It indicated that it provides software application development and support services across the globe in both onshore and offshore models, and further claimed that its clients include "Fortune-listed" companies in various sectors, including manufacturing, retail, banking and finance, insurance, mortgage, healthcare, and computer software sectors.

The petitioner asserted that the beneficiary would be employed as a software engineer and provided a brief overview of the duties of the proffered position. The petitioner further stated that the beneficiary "may provide onsite professional services to [the petitioner's] clients" in accordance with the LCA submitted with the petition, which identified the beneficiary's employment areas as Phoenix and Scottsdale, Arizona. The petitioner also submitted a copy of an employment offer letter, signed by the beneficiary on March 8, 2008, which indicated that the petitioner would compensate the beneficiary at an annual salary of \$55,000.<sup>1</sup>

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<sup>1</sup> It is noted that the employment offer letter, as well as a second employment offer letter dated February 8, 2009 submitted in response to the RFE, indicate that the beneficiary will receive an annual salary of \$55,000. However, the Form I-129 petition, the support letter dated February 6, 2009, and the LCA all indicate that his salary would be \$44,000 per year. 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).

Additionally, the petitioner submitted a copy of a Technical Services Vendor Agreement between the petitioner and Syntel, Inc. (Syntel), dated July 14, 2008, as well as a statement of work identified as Addendum "A" to the agreement. According to the Statement of Work, the beneficiary's services would be used by the end client, American Express, as set forth in the vendor agreement, for "12+ Months." The petitioner also submitted a letter dated January 12, 2009 from [REDACTED], Syntel Inc.'s Engagement Director at American Express, which claimed that the beneficiary was working for American Express as an independent contractor at Syntel's office in Phoenix, Arizona.

The petitioner also submitted what it described as an itinerary for the beneficiary, which indicated that as of March 8, 2008, "contracted software development" was scheduled "for the next nine months" and was "extendable until October 24, 2009." The "itinerary" did not name the project upon which the beneficiary would work. Additionally, the "itinerary" stated that the beneficiary is assigned to *various* software development projects manifested by the petitioner and its clients.

The director found that the information provided by the petitioner in support of the petition was insufficient to establish eligibility. Consequently, the director issued a request for additional evidence (RFE) on March 27, 2009. In the RFE, the director noted that the petitioner appeared to be engaged in consulting, and asked the petitioner to submit evidence demonstrating who the actual employer of the beneficiary would be. The director requested documentation such as contractual agreements or work orders from the actual end-client firm or firms where the beneficiary would work. Counsel responded in part to the director's queries, and submitted additional evidence in support of the contention that the petitioner was a United States employer and the proffered position was a specialty occupation. Such evidence included an updated itinerary for the beneficiary as well as a new vendor agreement and statement of work with Syntel.

On May 29, 2009, the director denied the petition. The director found that the petitioner is a contractor that subcontracts workers with a variety of computer skills to other companies who need computer programming services. Noting that the documentation submitted in response to the RFE was incomplete, the director concluded that the petitioner had failed to submit evidence pertaining to the end client(s) for which the beneficiary would render his services. Therefore, the director concluded that, absent this evidence, the petitioner had failed establish that: (1) it met the definition of United States employer or agent, (2) a valid LCA for all of the beneficiary's work locations was submitted; and (3) the proffered position was a specialty occupation.

The primary 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).

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:

subject to section 212(j)(2), who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 214(i)(1) . . . , who meets the requirements for the occupation specified in section 214(i)(2) . . . , and with respect to whom the Secretary of Labor determines and certifies to the [Secretary of Homeland Security] that the intending employer has filed with the Secretary [of Labor] an application under section 212(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." Subsections 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").

Neither the legacy Immigration and Naturalization Service (INS) nor U.S. Citizenship and Immigration Services (USCIS) has defined the terms "employee," "employed," "employment," or "employer-employee relationship" by regulation for purposes of the H-1B visa classification, even though the law describes H-1B beneficiaries as being "employees" who must have an "employer-employee relationship" with a "United States employer."<sup>2</sup> Therefore, for purposes of the H-1B visa classification, these terms are undefined.

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

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

*Darden*, 503 U.S. at 323-324 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. at 751-752); see also *Restatement (Second) of Agency* § 220(2) (1958); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) (hereinafter "*Clackamas*"). As the common-law test contains “no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.” *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. at 258 (1968)).<sup>3</sup>

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<sup>2</sup> Under 8 C.F.R. §§ 214.2(h)(2)(i)(F), it is possible for an "agent" who will not be the actual "employer" of a beneficiary to file an H petition on behalf of the actual employer and the alien. While an employment agency may petition for the H-1B visa, the ultimate end-user of the alien's services is the "true employer" for H-1B visa purposes, since the end-user will "hire, pay, fire, supervise, or otherwise control the work" of the beneficiary "at the root level." *Defensor v. Meissner*, 201 F.3d 384, 387-388 (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.

<sup>3</sup> While the *Darden* court considered only the definition of "employee" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(6), and did not address the definition of "employer," courts have generally refused to extend the common law agency definition

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; *see also* 8 C.F.R. § 214.2(h)(4)(ii) (defining a new "United States employer" as one who 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. . . ." (emphasis added)). 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; *Clackamas*, 538 U.S. at 445; *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 445; *see also* *New*

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

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

*Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1), (EEOC 2006) (adopting a materially identical test and indicating that said test was based on the *Darden* decision); *see also Defensor v. Meissner*, 201 F.3d at 388 (determining that hospitals, as the recipients of beneficiaries' services, are the true "employers" of H-1B nurses under 8 C.F.R. § 214.2(h), even though a medical contract service agency is the actual petitioner, because the hospitals ultimately hire, pay, fire, supervise, or otherwise control the work of the beneficiaries).

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

Moreover, when examining the factors relevant to determining control, USCIS must assess and weigh each actual factor itself as it exists or will exist and not the claimed employer's right to influence or change that factor, unless specifically provided for by the common-law test. *See Darden*, 503 U.S. at 323-324. For example, while the assignment of additional projects is dependent on who has the *right to* assign them, it is the *actual* source of the instrumentalities and tools that must be examined, not who has the *right to* provide the tools required to complete an assigned project. *See id.* at 323.

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 included in the record indicate that the petitioner has an Internal Revenue Service Tax Identification Number. While the petitioner's letter of support and its offer of employment letters dated March 8, 2008 and February 9, 2009 indicate its intent to engage the beneficiary to work in the United States, the additional documentation submitted by the petitioner is contradictory and insufficient to establish that the requisite employer-employee relationship exists or will exist between itself and the beneficiary.

As discussed above, counsel for the petitioner contends that the beneficiary will work on a software development project for American Express via a contract between the petitioner and Syntel, Inc. (Syntel). Copies of the Technical Services Vendor Agreements between the petitioner and Syntel, dated July 14, 2008 and March 10, 2009, are submitted for the record, along with an Addendum which identifies the beneficiary as the person who will provide services to the end client. In response to the RFE, counsel submitted an excerpt (specifically, pages one and two) from a fourteen-page Statement of Work for the American Express project. Also submitted are two letters from Syntel, Inc.'s Engagement Director at American Express (the "American Express letters"), which claim that the beneficiary will be an independent contractor, and that his work will be controlled by the petitioner. While it appears that, based on the employment agreement and pay stubs submitted in the record, the petitioner will engage the beneficiary to work in the United States by virtue of paying his salary, the hiring and paying of an individual are but two factors among many that must be weighed, leaving the issue of control unresolved.

On appeal, counsel contends that Syntel is creating a proprietary software product for American Express, and that Syntel is actually the end client in this matter. Counsel further states that Syntel retains complete control over the project on which the beneficiary will work. However, these claims directly contradict the claims by the petitioner in which it states that it will supervise and control the work of the beneficiary. While the vendor agreement states that the beneficiary, as well as other personnel provided by the petitioner to Syntel, will maintain employee status with the petitioner, there is no claim in the agreement that the petitioner has the right to direct and supervise or otherwise control the work of the beneficiary.

Moreover, the American Express letters indicate that the petitioner is responsible for the work the beneficiary will perform, and will be his direct supervisor. However, it is unclear how the petitioner can supervise the work of the beneficiary as he creates a proprietary software product for Syntel at Syntel's office in Phoenix, Arizona, particularly since there is no evidence in the record which demonstrates that Syntel and the petitioner will collaborate on this project together or that the beneficiary will perform any of his duties relevant to this project at the petitioner's offices. The record fails to clearly establish the exact nature of the beneficiary's assignment in this matter and which entity actually maintains control over his work, including other such unresolved questions such as who will provide the instrumentalities and tools necessary for the beneficiary to perform any assigned duties. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Finally, it should be noted that, while the petitioner submitted a two-page excerpt from the statement of work with American Express, the document indicates that it is actually fourteen pages long. No explanation is provided by the petitioner as to why the entire document was not submitted. While the petitioner never specifically claimed that the evidence was privileged, the AAO notes that counsel asserts on appeal that this document is "highly confidential." While a petitioner should always disclose when a submission contains confidential commercial information, the claim does not provide a blanket excuse for the petitioner's failure to provide such a document if that document is

material to the requested benefit.<sup>4</sup> Although a petitioner may always refuse to submit confidential commercial information if it is deemed too sensitive, the petitioner, as correctly noted by the director, must also satisfy its burden of proof and runs the risk of a denial by failing to provide this evidence. *Cf. Matter of Marques*, 16 I&N Dec. 314 (BIA 1977).

Even if the documents submitted were acceptable as evidence of the nature of the beneficiary's alleged employment, the petitioner failed to provide a concise itinerary evidencing that the beneficiary would work only at the Syntel site in Phoenix, Arizona and not in multiple locations. The petitioner acknowledges that it has national clients, and indicates in both itineraries included in the record that the beneficiary is assigned to various software development projects and may be assigned to multiple locations on an as-needed basis. Counsel argues on appeal that it has complied with the director's request for a concise itinerary "to the extent possible." While this may be the case, the fact remains that the petitioner acknowledges that, despite the agreement with Syntel for services on the American Express project, the beneficiary may be assigned to other client sites during the course of the validity period. Again, absent clearer documentation, it remains unclear who will exercise control over the beneficiary's work and whether the petitioner or Syntel will be the company reassigning the beneficiary to other locations as-needed.

The evidence, therefore, is insufficient to establish that the petitioner will control the work of the beneficiary, and thus qualify as a United States employer as defined by 8 C.F.R. § 214.2(h)(4)(ii). Therefore, 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.

As such, lacking standing to file the instant petition as either a United States employer or as an agent for a United States employer, the petitioner was not qualified to file this petition on behalf of the beneficiary. For this reason, the appeal must be dismissed and the petition denied.

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<sup>4</sup> Both the Freedom of Information Act and the Trade Secrets Act provide for the protection of a petitioner's confidential business information when it is submitted to USCIS. *See* 5 U.S.C. § 552(b)(4), 18 U.S.C. § 1905. Additionally, the petitioner may request pre-disclosure notification pursuant to Executive Order No. 12,600, "Predisclosure Notification Procedures for Confidential Commercial Information." Exec. Order No. 12,600, 1987 WL 181359 (June 23, 1987).

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). Upon review, although the petitioner claims in various documents contained in the record that the beneficiary "may" be assigned to other locations as needed, the petitioner stated that it would file an amended petition if such a material change in employment occurred. Thus, absent evidence that the beneficiary would be employed at a location other than that identified in the LCA, the AAO finds that the submitted LCA corresponds to the petition in that covers the beneficiary's proposed work location. As such, the AAO hereby withdraws this specific ground of denial.

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 requires [(1)] 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 [(2)] 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 at 387. 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 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 is devoid of substantial documentary evidence as to where and for whom the beneficiary would be performing his services, and whether his services would be that of a software 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 February 6, 2009 provided a vague overview of the beneficiary's proposed duties. Specifically, the petitioner stated that his job duties would be as follows:

Research, design, develop and test software/systems applications with product development and enhancement in client/server and Mainframe environments using COBOL, JCL, CICS, DB2, REXX and IMS on MVS/ESA, IBM/OS380, OS/2 and Windows operating systems; Specific projects may include requirement definition, analysis, design, development, testing, implementation and user training, translation of business requirements into technical requirements, test plans, implementation plans and timelines, and development of REXX tools; Modify software designs and specialized utility programs and provide status reports to project manager; Coordinate application development with project team under the closer supervision of project manager. Environments may include: COBOL, JCL, CICS, DB2, REXX, IMS, C, C++, CLIST, SQL, ODBC, MS ACCESS, CHANGEMAN, ENDEVOR, FILEAID, XPEDITOR, SPUFI, DCLGEN, VSAM, ISPF, ASP, JAVA, JAVASCRIPT, JSP, VISIO ARCHITECT, EASITRIVE, MVS/ESA, IBM/OS380, OS/2 and Windows.

Noting that the petitioner was engaged in an industry that typically outsourced its personnel to client sites to work on particular projects, the director requested documentation such as contracts and work orders, documentation that would outline for whom the beneficiary would render services and what his duties would include at each worksite. However, despite submitting the vendor agreements and statements of work for the beneficiary's services with Syntel and American Express, no independent documentation to further explain the nature and scope of these duties was submitted. Moreover, although it claimed that the beneficiary would work on a project entitled "GNST Centralized Development," no documentation discussing the nature or specifications of this project, or the specific duties the beneficiary would be required to perform, was provided by the petitioner.

Upon review of the evidence, the AAO concurs with the director's findings. The generic overview of programming duties provided in the support letter, itineraries, and repeated on appeal fails to specifically identify the exact duties the beneficiary would perform for Syntel on the American Express project. Moreover, based on the petitioner's claim that it has regional and national clients in various industries, it is clear that had the petition been approvable on the previous grounds, the beneficiary's duties could potentially vary widely based on the requirements of a client at any given time. Once again, this possibility renders it necessary to examine the ultimate end-clients of the petitioner to determine the exact nature and scope of the beneficiary's duties for each client, since it is logical to conclude that the services provided to one client may differ vastly from the services provided to another, particularly if they varied from one industry sector to another.

As discussed above, the record contains no substantiated evidence regarding the end-clients and their requirements for the beneficiary. Again, while the vendor agreement and statement of work between the petitioner and Syntel for the American Express project were submitted, none of these documents provide a valid description of the duties the beneficiary would perform and for whom. Therefore,

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 leaves to speculation the substantive nature of 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.<sup>5</sup>

In support of this analysis, USCIS routinely cites *Defensor v. Meissner*, 201 F.3d 384, 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*

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<sup>5</sup> It is further noted that to ascertain the intent of a petitioner, USCIS must look to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. If a petitioner's intent changes with regard to a material term and condition of employment or the beneficiary's eligibility, an amended or new petition must be filed. To allow a petition to be amended in any other way would be contrary to the regulations. Taken to the extreme, a petitioner could then simply claim to offer what is essentially speculative employment when filing the petition only to "change its intent" after the fact, either before or after the H-1B petition has been adjudicated. The agency made clear long ago that speculative employment is not permitted in the H-1B program. A 1998 proposed rule documented this position as follows:

Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. See section 214(i) of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998). While a petitioner is certainly permitted to change its intent with regard to non-speculative employment, e.g., a change in duties or job location, it must nonetheless document such a material change in intent through an amended or new petition in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E).

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.*

It is noted that, on appeal, counsel takes issue with the agency’s reliance on *Defensor*. Counsel further contends that industry recognized standards require a minimum of a U.S. bachelor’s degree for computer programming positions. However, counsel has failed to support these contentions with documentary evidence. 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).

The job description provided by the petitioner, as well as various statements from counsel both prior to adjudication and on appeal, indicate that the beneficiary will potentially be working on multiple client projects for clients based throughout the nation. Despite the director’s specific request for documentation to establish the ultimate location(s) of the beneficiary’s employment, the petitioner failed to fully comply with this request. Moreover, the petitioner’s failure to provide evidence of an employer-employee relationship and/or work orders or employment contracts between the petitioner and its clients outlining the specific nature of the beneficiary’s duties renders it impossible to conclude for whom the beneficiary will ultimately provide services and exactly what those services would entail. The AAO, therefore, cannot analyze whether the beneficiary’s duties 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.

The petitioner’s failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), 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. 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)(1). For this additional reason, the petition must be denied.<sup>6</sup>

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<sup>6</sup> It is noted that, even if the proffered position were established as being that of a software engineer, a review of the U.S. Department of Labor's *Occupational Outlook Handbook* (hereinafter the *Handbook*) does not indicate that such a position qualifies as a specialty occupation in that the *Handbook* does not state a normal minimum requirement of a U.S. bachelor's or higher degree in a specific specialty or its equivalent for entry into the occupation of software engineer. See Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook*, 2010-11 Edition, "Computer Software Engineers and Computer Programmers," <<http://www.bls.gov/oco/ocos303.htm>> (accessed November 30, 2011).

Moreover, the petitioner indicates in its letter dated February 6, 2009 that it only requires its software engineers to "possess the minimum of a Bachelor's Degree or Bachelor's Degree equivalent in one of a variety of industry-recognized areas including Computer Science, Engineering, Computer Information Systems, Mathematics, Commerce, Electronics, Business Administration, Technology or a related field." It must be noted that the petitioner's claimed entry requirement of at least a bachelor's degree in "one of a variety" of majors does not denote a requirement in a specific specialty.

Furthermore, the claimed requirement of a degree in such majors as "Engineering," "Commerce," or "Business Administration" for the proffered position, without specialization, is inadequate to establish that the proposed position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. See *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

To prove that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As discussed *supra*, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. Although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).

Again, the petitioner claims that the duties of the proffered position can be performed by an individual with only a general-purpose bachelor's degree, i.e., a bachelor's degree in business administration. This assertion is tantamount to an admission that the proffered position is not in fact a specialty occupation. As such, even if

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 director's decision is affirmed. The petition is denied.

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the substantive nature of the work had been established, the instant petition could not be approved for this additional reason.