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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

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[REDACTED]

DATE: **JUL 06 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,

Michael T. Kelly
rd Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director of the California Service Center denied the nonimmigrant visa petition and the Administrative Appeals Office (AAO) summarily dismissed a subsequent appeal. On May 2, 2011, the AAO reopened the instant petition *sua sponte* and issued a notice stating that it may issue a new decision unfavorable to the petitioner. As such, pursuant to 8 C.F.R. § 103.5(a)(5)(ii), the AAO provided the petitioner 30 days to submit a brief. Counsel for the petitioner submitted a supplemental brief on June 2, 2011, which the AAO has reviewed. Upon review, the AAO will dismiss the appeal and deny the petition.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary in the position of Dotnet Consultant 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 implementation and integration company and indicates that it currently employs 46 persons.

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

On appeal, counsel for the petitioner submitted a brief and additional evidence, and subsequently submitted a second brief and additional evidence in response to the AAO’s May 2, 2011 notice. Counsel 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 August 17, 2009 letter of support that it “provides organizations with software solutions” and claimed that it provides “business process consulting, software services and solutions, infrastructure management, application support and maintenance, and application development for leading companies around the world.” Regarding the proffered position, the petitioner claimed that it wished to employ the beneficiary in the position of Dotnet Consultant, and explained that the beneficiary would be assigned to work at “the offices of one of several of our clients with whom we have contracts to provide services.” The petitioner contended that it is not a staffing agency and that its workers are at all times employees of the petitioner.

Regarding the assignments of the beneficiary throughout the requested validity period, the petitioner listed various clients such as [REDACTED] and [REDACTED], and listed work locations as Atlanta, Georgia; Bellevue, Washington; Englewood, Colorado; Frisco, Texas; Portland, Oregon; St. Louis, Missouri; and Tampa, Florida. The petitioner claimed, however, that it was unknown at that time at which worksite the beneficiary would work.

The petitioner also submitted a letter dated August 6, 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] of the petitioner’s company.

The letter outlined standard employee benefits associated with the position, and was signed as accepted by the beneficiary on August 6, 2009. The petitioner also submitted contracts between the petitioner and numerous clients, such as [REDACTED] and [REDACTED].

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued a request for evidence (RFE) on August 28, 2009. In the request, the director acknowledged the numerous worksites claimed for the beneficiary, and 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.

In response to the RFE, counsel stated in an October 8, 2009 letter that the petitioner "does not yet know exactly where [the beneficiary] will be placed – his placement will depend on client needs throughout the H-1B validity period." Counsel asserts that the petitioner submitted a list of all potential client locations as well as a corresponding LCA for each location "to allow flexibility in assigning [the beneficiary] to various client sites." Counsel also contended that the proffered position was a specialty occupation.

In a letter dated October 8, 2009, the petitioner also addressed the director's queries. The petitioner reiterated that it was not a staffing agency, and that its workers at all times were "under the exclusive direction and control of [the petitioner]." Regarding the contracts and work orders requested by the director, the petitioner stated that it has long-term contracts with numerous large telecommunications clients, and that it sends its employees to those client sites on an as-needed basis. The petitioner also addressed the issue of whether the proffered position was a specialty occupation.

On November 10, 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 initial 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 and in the supplemental brief, counsel for the petitioner asserts 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 August 6, 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 dated August 28, 2009 that the petitioner provide contracts between the petitioner and its end clients, 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. The record does contain several contracts between the petitioner and end clients such as [REDACTED] and [REDACTED]. However, these documents shed little light on the beneficiary's proposed position, since they (1) do not refer specifically to the beneficiary as a subcontractor; and (2) provide no information regarding the nature of the work to be performed. As stated by the director in the denial, without evidence of contracts, work orders, or statements of work describing the duties the beneficiary would perform and for whom, the petitioner fails to establish that the duties that the beneficiary would perform are those of a specialty occupation. For example, the Statement of Work dated September 18, 2008, identified as Schedule "A" to the [REDACTED] Agreement between the petitioner and [REDACTED], identifies a team of the petitioner's employees to who will serve on that project, none of which is the beneficiary. 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)).

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. 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.

In the supplemental brief submitted on June 2, 2011, counsel contends that the director erred by analyzing the petitioner as it would an "Indian IT Staffing" company, and urges USCIS to look beyond such "boilerplate" analysis in reviewing the facts of this case. Counsel contends simply that the petitioner has the ability to hire, fire and otherwise control the work of the beneficiary, and thus concludes that the petitioner has met the regulatory definition of U.S. employer.

Counsel, however, fails to address the detailed points discussed above, whereby the AAO discusses the basis for concluding that the petitioner has failed to substantiate the record with sufficient evidence to demonstrate that it qualifies as a U.S. employer or agent. In support of her assertions, counsel resubmitted a copy of the contract with Echostar with both the original appeal and the supplemental brief, which was previously submitted into the record and found to be without evidentiary value. Consequently, without documentary evidence to support these claims, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Therefore, 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).

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). As will be discussed below, the AAO finds that the evidence in the record of proceeding supports the director's determination to deny the petition on the LCA issue. Accordingly, the AAO will not disturb this aspect of the director's decision.

In this matter, the petitioner contends that it has satisfied this requirement since it submits a certified LCA for all locations in which its clients are located, thereby covering all potential assignment locations for the beneficiary and allowing flexibility to change his worksite during the duration of the requested validity period. The director concluded that without ultimate end-client agreements,

the actual work location(s) for the beneficiary could not be determined. Moreover, it is noted that the petitioner made specific claims that it would outsource the beneficiary to client sites as necessary. On appeal, the petitioner argues that it did submit valid LCAs for all of its client locations, and that it therefore 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).

The petitioner could not establish the location and duration of the beneficiary's assignments at the time of filing, and contends that the assignments will vary based on client needs. Simply submitting LCAs for all of its clients' locations in an effort to cover all potential worksites for the beneficiary and a list of cities in which the petitioner's clients are based is not sufficient to establish eligibility in this matter. The AAO finds that the extent of the record of proceeding fails to establish that the petition was filed for definite and non-speculative work. A position may be awarded H-1B classification only on the basis of evidence of record establishing that, at the time of the petition's

filing, definite, non-speculative work would exist for the beneficiary for the period of employment specified in the Form I-129. The record of proceeding does not contain such evidence.

The petitioner's letters of support indicate that the petitioner's clients include companies throughout the United States. The letters further claim that client projects are routinely performed at client sites on an as-needed basis. Absent end-agreements with clients, 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.

On appeal and in the supplemental brief, counsel contends that by submitting LCAs for all potential work locations of the beneficiary, it has satisfied its burden in this matter. Counsel argues that there is no requirement that a beneficiary's entire course of employment in H-1B status be defined at the time of filing a petition, and argues that the findings of USCIS to this effect are erroneous. Counsel submitted copies of advisory opinions from USCIS from 1998 and 2003 in support of this contention.

Contrary to counsel's contentions, USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1). 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). 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). Consequently, the AAO finds that LCAs submitted do not correspond to the petition at the time of filing.

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

It must be noted that for purposes of the H-1B adjudication, the issue of bona fide employment is viewed within the context of whether the petitioner has offered the beneficiary a position that is determined to be a specialty occupation. Therefore, of greater importance to this proceeding is whether the petitioner has provided sufficient evidence to establish that the services to be performed by the beneficiary are those of a specialty occupation.

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

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

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

Specialty occupation means an occupation which 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 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), 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 any documentary evidence as to where and for whom the beneficiary would be performing his services, and whether his services would be that of a Dotnet Consultant.

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

The petitioner’s letter of support dated August 17, 2009 provided the following list of the beneficiary’s duties:

- Designing and developing .NET software applications in a web-based environment;
- Analyzing and defining business and project requirements;
- Performing .NET application re-engineering analysis and design;
- Utilizing Object Oriented Programming System (OOPS) concepts and design patterns and programming in JavaScript;
- Identifying and resolving functionality issues by performing error tracking, debugging, and technical troubleshooting; and
- Performing application maintenance and support.

The petitioner expanded on the above list of duties in its October 8, 2009 letter of response to the RFE. Upon review of the letter’s expanded list of duties, which contains comments regarding each of the above listed duties, the AAO finds that the petitioner has described the proffered position in terms of technical functions that obviously involve the application of computer and IT knowledge but that do not in themselves convey any particular academic level of a body of highly specialized knowledge in a specific specialty that would be minimally required to attain such knowledge. Further, no independent documentation to further explain the nature and scope of these duties was submitted.

Noting that the petitioner, as a software implementation 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 agreements are submitted in support of the petition, none of these documents pertains to the beneficiary. 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.*

Counsel contends that *Defensor* does not apply in this case because the petitioner is not an agent. However, despite the petitioner's 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 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. 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 this additional reason, the petition must be denied.

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.