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

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

Date: JUL 07 2011 Office: VERMONT SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]

Beneficiary:

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

ON BEHALF OF PETITIONER:

[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 for

Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a healthcare staffing company. It seeks to employ the beneficiary as a critical care nurse in the State of Florida. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

On September 3, 2009, the director denied the petition, determining that the record did not establish that the proffered position is a specialty occupation. On appeal, counsel for the petitioner asserts that the proffered job qualifies as a specialty occupation.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for further evidence (RFE); (3) the petitioner's response to the director's RFE and documentation; (4) the director's denial letter; and (5) the Form I-290B, counsel's brief, and documentation in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation.

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

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

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

> 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 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.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of

the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

In an April 9, 2009 letter appended to the petition, the petitioner states that it is a healthcare staffing provider that "maintains an extensive selection of top certified professionals in the medical industry." It claims that it will employ the beneficiary as a "Critical Care, Registered Nurse, BNS," and further claims this occupation to be a specialty within the field of nursing that "deals specifically with human responses to life-threatening problems."

The petitioner described the occupation of Critical Care nurse as follows:

> The duties associated with a Critical Care Nurse are complex and therefore require an advanced degree of knowledge not associated with a general Staff Nurse position. According to the [American Association of Critical Care Nurses (AACN)], "Critical care nurses practice in settings where patients require complex assessment, high-intensity therapies and interventions, and continuous nursing vigilance. Critical care nurses rely upon a specialized body of knowledge, skills and experience to provide care to patients and families and create environments that are healing, humane and caring. Foremost, the critical care nurse is a patient advocate. Among the duties of a Critical Care Nurse are: the identification, intervention and management of clinical problems to improve care for patients and families. They provide direct patient care, including assessing, diagnosing, planning and prescribing pharmacological and nonpharmacological treatment of health problems. Critical care nurses need to keep pace with the latest information and develop skills to manage new treatment methods and technologies. As issues relating to patient care become increasingly complex and new technologies and treatments are introduced, critical care nurses will need to become more knowledgeable." (Citing Petitioner's Exhibit B).

The petitioner described the beneficiary's proposed duties in the proffered position as follows:

> The Beneficiary will provide prescribed medical treatment and personal care services to the ill and injured. She will take and record patients' vital signs. The Beneficiary will administer specified medication orally or by injection. The Beneficiary will collaborate with physicians, health care team and patients' family in delivering a plan of care.
>
> The Beneficiary will conduct an individualized patient assessment, prioritizing the data collection based on the adult or elderly patient's immediate condition or needs within timeframe specified by client facility's policies, procedures, or protocols. The

> Beneficiary will conduct ongoing assessments as determined by the adult or elderly patient's condition and/or the client facility's policies, procedures, or protocols and reprioritizes care accordingly. The Beneficiary develops a plan of care that is individualized for the adult or elderly patient reflecting collaboration with other members of the healthcare team.

The petitioner further claimed that the beneficiary earned a bachelor of science degree in nursing from of located in India in 2003. The petitioner also submitted a copy of an undated credential evaluation prepared by indicating the beneficiary satisfied similar requirements to the completion of a Bachelor of Science degree in nursing from an accredited institution of tertiary education in the United States.

The director found the initial evidence submitted to be insufficient, and issued an RFE on July 10, 2009. The director requested a more detailed description of the duties of the proffered position, as well as an explanation as to why a registered nurse without a bachelor's degree could not perform these duties. In addition, the director requested evidence demonstrating where the beneficiary will actually work, and further requested documentation regarding the educational requirements for nurses to obtain the appropriate license in the State of Florida.

In response to the RFE, the petitioner through counsel claimed that while it was the beneficiary's actual employer, she would render her services to the petitioner's client, Florida – n Hialeah, Florida. With regard to the director's request for a more specific overview of the duties of the proffered position, the petitioner submitted what appears to be an excerpt from a job description/performance appraisal. It is unclear, however, if this document was prepared by the petitioner or the end client. The document divides the duties of a "Registered Nurse Specialty Critical Care" into the following eight sections: (A) Physical and Mental Demands; (B) Equipment Used; (C) Working Conditions; (D) Hazards; (E) Supervisory [C]ontrol; (F) Required Education/Licensing; (G) Required Work Related Experience; and (H) Miscellaneous. Finally, it is noted that the petitioner did not address the educational requirements for obtaining a license to practice in Florida. Instead, counsel merely stated that "[t]he Petitioner requires a Bachelors degree (or equivalent) and a valid state license."

On September 3, 2009 the director denied the petition. The director determined the proffered position was not a specialty occupation, noting that the Department of Labor's *Occupational Outlook Handbook* (*Handbook*) did not require a bachelor of science degree as a prerequisite for entry into the field of nursing. Specifically, the director noted that, according to the *Handbook*, there were three major educational paths to registered nursing: (1) a bachelor of science degree obtained from four-year programs in colleges and universities; (2) an associate degree in nursing obtained from community or junior colleges, and (3) a diploma in nursing obtained through hospital-sponsored programs. The director noted that according to the *Handbook*, licensed graduates of any of these three programs qualified for entry-level nursing positions. The director further noted that while certain advanced nursing practice occupations are considered H-1B equivalent if a beneficiary has obtained advanced practice certification, no such certification was evident in the instant petition.

Finally, the director found that Florida, the state of intended employment, did not require registered nurses to hold bachelor's degrees.

On appeal, counsel for the petitioner asserts that the director erred by determining that the proffered position is not a specialty occupation. Specifically, counsel contends that the proffered position is not that of a registered nurse as evaluated by the director, but that of a "Critical Care, Registered Nurse, BSN." Counsel contends that both the petitioner and the end-client require a bachelor's degree as the minimum educational requirement for entry into the position, and contends that the director erred by imposing a requirement that the petitioner *always* require a bachelor's degree, rather than *normally* requiring a bachelor's degree, for entry into the position. Counsel also addresses each of the four standards for a specialty occupation and explains how the petitioner has met each of these standards.

To make its determination whether the employment just described qualifies as a specialty occupation, the AAO first turns to the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)*(1)* and *(2)*: a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree. Factors considered by USCIS when determining these criteria include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." *See Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999).

The AAO routinely consults the *Handbook* for information about the duties and educational requirements of particular occupations. The *Handbook* discusses the duties of registered nurses (RNs) as follows:

> [P]erform basic duties that include treating patients, educating patients and the public about various medical conditions, and providing advice and emotional support to patients' family members. RNs record patients' medical histories and symptoms, help to perform diagnostic tests and analyze results, operate medical machinery, administer treatment and medications, and help with patient follow-up and rehabilitation.

The description of the duties of the proffered position aligns with that of a typical nursing position, a position that does not require a four-year BSN degree and is not considered to be a specialty occupation. *See Defensor v. Meissner*, 201 F.3d at 387 (finding that nursing in general is not a specialty occupation). The petitioner indicates that it requires that the incumbent: "take and record patients' vital signs," "administer specified medication orally or by injection," "collaborate with physicians, health care team and patients' family in delivering a plan of care," "conduct an individualized patient assessment," "conduct ongoing assessments as determined by . . . the patient's condition," and "[develop] a plan of care that is individualized for the . . . patient reflecting

collaboration with other members of the healthcare team." These are duties that correspond to the *Handbook's* general overview of the duties of an RN, an individual involved in providing patient care.

As noted by the director, the *Handbook* reports that there are three major educational paths to registered nursing: a bachelor's of science degree in nursing (BSN), an associate degree in nursing (ADN), and a diploma. The *Handbook* indicates that many individuals begin their employment as staff nurses with an ADN or diploma and later study for a BSN. The petitioner's description of duties resembles most closely the duties of a staff nurse performing routine duties involved in the critical function of patient care. The petitioner has not provided any evidence that the position requires the individual in the proposed position to have a bachelor of science degree in nursing.

For the reasons discussed above, the petitioner has not provided sufficient evidence to establish that the position satisfies the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*). This prong alternatively requires a petitioner to establish that a bachelor's degree, in a specific specialty, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

Again, factors often considered by USCIS when determining this criterion include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." *See Shanti, Inc. v. Reno*, 36 F. Supp. 2d at 1165.

As observed above, based on the petitioner's description of duties, the position does not require a four-year degree in a specific specialty as a minimum for entry into the proposed nursing position. The petitioner has not presented evidence that the industry's professional association has made a degree in a specific specialty a minimum entry requirement of a nursing position consisting of the duties described by the petitioner. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The AAO acknowledges counsel's reliance on the [redacted] memorandum, which observes, in part, that an increasing number of nursing specialties, including critical care, require a higher degree of knowledge and skill than a typical RN or staff position, but, the AAO notes, does not cite a basis for that observation and does not state, directly or indirectly, that the enhanced knowledge and skill requirements equate to a need for at least a bachelor's degree in nursing.[1] However, the memorandum goes on to state that the petitioner must still establish that it

meets the statutory and regulatory requirements such that it establishes the nursing specialty as requiring, as a minimum for entry into the occupation, a bachelor's or higher degree in the specific specialty (or its equivalent). *See id.* Here, neither counsel nor the petitioner has presented letters, affidavits, or other documentation from firms or individuals in the industry attesting that such firms "routinely employ and recruit only degreed individuals" for the type of position proffered in this petition. Thus, the petitioner has not established that a degree requirement in a specific discipline is common to the industry in parallel positions among similar organizations. The petitioner has not established the first prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

Under the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*), the petitioner may show that the proffered position is so complex or unique that only an individual with a degree can perform the work associated with the position.

In the instant petition, counsel for the petitioner claims that the duties are so critical and complex and beyond the ordinary that the duties could not be performed with less than a bachelor's degree in the medical field. However, 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). Although the title of the position is "critical care nurse," the petitioner has described a general nursing position and has not provided evidence of any specific element that requires a degree other than an associate's degree in nursing.

Counsel and the petitioner contend that the proffered position of critical care nurse requires an individual who will be responsible for ensuring that critically ill patients and their families receive optimal care through intense and vigilant nursing care. However, as stated in the description of duties provided in response to the RFE, some of the duties of the position, including physical and mental demands, include pushing and pulling equipment/objects, working in awkward, reaching, or strained positions for short periods of time, and pushing, pulling, lifting, carrying and turning patients. Further, the *Handbook* indicates that nurses with an associate's degree in nursing are well qualified to perform these duties. Again, the description of the proposed duties does not extend beyond the routine patient care expected and required of a nurse with an associate degree in nursing. Thus, the petitioner has not established the second prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*) that the proffered position is so complex or unique that it can be performed only by an individual with a bachelor's degree in a specific discipline.

The third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that it normally requires a degree or its equivalent for the position. The petitioner's desire to employ an individual with a bachelor of science degree in nursing is noted, but such a desire does not establish that the position is a specialty occupation. USCIS must still examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d at 384. The critical element is not the title of the position or an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or

higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results. If USCIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a non-professional or non-specialty occupation, so long as the employer required all such employees to have baccalaureate degrees or higher degrees. *See id.* at 388.

The AAO reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas when determining whether the petitioner has satisfied this criterion. The AAO acknowledges counsel's claim on appeal that the petitioner has never hired a nurse who has not held a bachelor's degree. However, the record does not contain copies of previous employees' diplomas, their dates of employment, or evidence that each of the petitioner's previous nurses had at least a bachelor of science degree in nursing. Again, 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.

In response to the RFE and again on appeal, counsel 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.[2] 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.*

In this matter, counsel asserts that [redacted] is the "more relevant employer," and claims that [redacted] letter dated March 27, 2009 demonstrates that it normally hires degreed nurses for the proffered position. In this letter, [redacted] states that it employs a total of 88 registered nurses. It further claims that of these 88 nurses, 7 hold masters' degrees, 31 have bachelor's degrees, 27 have associate's degrees, and the remaining individuals without degrees (23 in total) "were hired only

[2] It is noted that counsel incorrectly refers to this case by the name of *Vintage v. Meissner*.

because of our vacancy rate." Contrary to counsel's assertions, the AAO is not persuaded that normally hires degreed nurses for the proffered position, since at least 50 of its 88 registered nurses, according to its statements in the March 27, 2009 letter, do not possess a bachelor's degree. Moreover, with regard to the education/licensing requirements of the position, the document submitted in response to the RFE, which appears to be the job description for the position, states that candidates must be graduates of an accredited school of nursing and possess a current Florida license. It is noted that a bachelor of science degree in nursing is "preferred," not required. Based on this documentation, the petitioner has also failed to establish that the end client normally requires a bachelor of science in nursing as the minimum entry requirement into the position. Accordingly, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*) based on its normal hiring practices.

Next, the AAO finds that the evidence in the record is also inadequate to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*). Again, USCIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation as required by the Act. The AAO is not persuaded that the nature of the specific duties of the proposed position is more specialized and complex than that of a registered nurse; and, according to the *Handbook*, the knowledge required to perform the duties of a registered nurse is not usually associated with the attainment of a bachelor's or higher degree in nursing. The petitioner, therefore, has not established that this position fulfills the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*).

Upon review of the totality of the record, the record fails to reveal any evidence that the offered position requires a bachelor's degree, or its equivalent, in a specific discipline. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the Act and its implementing regulations. Therefore, the AAO will not disturb the director's denial of the petition.

Additionally, and beyond the director's decision, the petitioner has failed to establish 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 an H-1B nonimmigrant 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.

The record is not persuasive in establishing that the petitioner or its client 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 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."[3] 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. 254, 258 (1968).[5]

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[3] 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 at 387-388. 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.

[5] While the *Darden* court considered only the definition of "employee" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(6), and did not address the definition of "employer," courts have generally refused to extend the common law agency definition to ERISA's use of employer because "the definition of 'employer' in ERISA, unlike the definition of 'employee,' clearly indicates legislative intent to extend the definition beyond the traditional common law definition." *See, e.g., Bowers v. Andrew Weir Shipping, Ltd.*, 810 F. Supp. 522 (S.D.N.Y. 1992), *aff'd*, 27 F.3d 800 (2nd Cir. 1994), *cert. denied*, 513 U.S. 1000 (1994). However, in this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section

Therefore, in considering whether or not one is an "employee" in an "employer-employee relationship" with a "United States employer" for purposes of H-1B nonimmigrant petitions, USCIS will focus on the common-law touchstone of control. *Clackamas*, 538 U.S. at 450. Factors indicating that a worker is an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. 503 U.S. at 323-324; *see also Restatement (Second) of Agency* § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. *See Clackamas*, 538 U.S. at 448-449; *cf. New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1), (EEOC 2006) (adopting a materially identical test and indicating that said test was based on the *Darden* decision); *see also Defensor v. Meissner*, 201 F.3d at 388 (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

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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).

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."

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 contained in the record indicates that the petitioner has an Internal Revenue Service Tax Identification Number. While the petitioner's letter of support and job offer letter to the beneficiary, both of which are dated April 9, 2009, indicate its engagement of the beneficiary to work in the United States, this documentation alone is insufficient corroborating evidence of the nature of the job offered or the location(s) where the services will be performed. Therefore, the petitioner has failed to establish that an employer-employee relationship exists.

The petitioner submitted several documents in support of its claim that it will be a United States employer for purposes of the definition above. Specifically, the April 9, 2009 job offer letter discussed above was submitted, which outlines the terms of employment between the petitioner and the beneficiary. Although the petitioner relies on this document as evidence that it will serve as the beneficiary's employer, the petitioner overlooks the fact that this letter is merely an offer of employment, and no evidence has been submitted to show that the beneficiary has accepted this offer of employment. The petitioner has submitted no contracts or work orders with [redacted], or statements of work describing the duties the beneficiary would perform and for whom.

It is unclear, therefore, whether the petitioner will be an employer or will act as an employment contractor. The job description provided by the petitioner, as well as various statements from the petitioner both prior to adjudication and on appeal, claim that the beneficiary will be working at [redacted] but will be employed and ultimately controlled by the petitioner. The petitioner, however, has failed to submit contracts or agreements outlining this claimed relationship with the beneficiary. Moreover, while a letter from [redacted], dated March 27, 2009 fails to specifically identify the beneficiary in this matter, it states that *it* will employ the beneficiary, and makes no mention of its relationship with the petitioner. The petitioner's failure to provide evidence in the form of work

orders or employment contracts between the petitioner and beneficiary, or the petitioner and , renders it impossible to conclude with whom, if anyone, the beneficiary will have an employer-employee relationship during the requested period of H-1B employment.

The minimal information contained in the April 9, 2009 letter of support and the incomplete information reflected in the offer letter are insufficient to show that a valid employment agreement or credible offer of employment existed between the petitioner and the beneficiary at the time the petition was filed. The petitioner did not submit an employment contract or any other document describing the beneficiary's claimed employment relationship with the petitioner. It has not been established that the beneficiary will be "controlled" by the petitioner under the common law touchstone of control master-servant relationship test. The AAO, therefore, is prohibited from concluding that the petitioner would be the beneficiary's employer. 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.

Therefore, based on the tests outlined above, the petitioner has not established that it or its client, Palmetto, will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." *See* 8 C.F.R. § 214.2(h)(4)(ii).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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