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

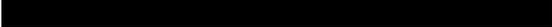


**U.S. Citizenship
and Immigration
Services**



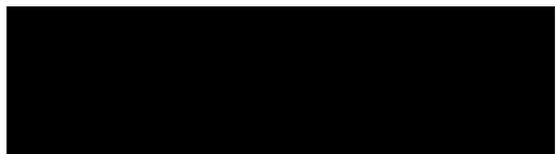
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Date: JUN 02 2011 Office: CALIFORNIA SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

Thank you,

for 
Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a computer services consulting business. It seeks to employ the beneficiary as a software engineer pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The director denied the petition, concluding that the petitioner failed to establish that the proffered position is a specialty occupation and that the petitioner failed to establish that the petitioner qualifies as a U.S. employer or agent.

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

The first issue that the AAO will consider is whether the position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

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 one 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 theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, 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.

The duties of the position are described as follows in the support letter the petitioner submitted with the H-1B petition on behalf of the beneficiary:

- Establish enterprise-wide software practices adoption program;
- Oversee company-wide efforts to unify the software development process;
- Design and implement commercial applications;

- Collaborate with other software engineers and project leaders;
- Test new applications;
- Develop bug-free functional solutions; and
- Create development plans, project documentation, and user stories for new applications.

In the support letter, the petitioner goes on to state that it requires that the person filling the proffered position hold at least a bachelor's degree in computer science or a related degree.

The Form I-129, which was filed on April 1, 2009, states that the beneficiary will work at the address of another company located in Batavia, IL. The petitioner is located in Winnetka, IL.

The submitted Labor Condition Application (LCA) was filed for a software engineer to work in either Batavia, IL or Winnetka, IL.

The petitioner submitted the beneficiary's resume and a copy of his foreign diploma, but the petitioner did not submit a credential evaluation for the beneficiary demonstrating that he has the equivalent of at least a U.S. bachelor's degree in any field.

On July 23, 2007, the director issued an RFE advising the petitioner to submit copies of documentation regarding its business as well as an itinerary and copies of contracts for work and other evidence demonstrating that the proffered position is a specialty occupation. The RFE also requested a more detailed job description and a copy of an employment contract between the petitioner and beneficiary.

Counsel for the petitioner responded that the petitioner is a software development company that develops iPhone applications and web applications both in-house and for clients. Counsel further stated that the petitioner does not participate in outsourcing consulting and management services.

The petitioner stated that it develops its iPhone applications in-house and web applications for clients. For the web applications, the petitioner "will furnish a team, including a project manager and several software engineers, to help that client design and build their new web based project."

The petitioner submitted a copy of its business license indicating that it is licensed to do business in the State of New York where the petitioner has its main office. No documentation was submitted that the petitioner is licensed to do business in Illinois, the state where the beneficiary will work and where the petitioner claims that its headquarters are located. The petitioner further stated on appeal that most of its employees work from home. The beneficiary's home address is listed as a P.O. Box for the same company in Batavia, IL that is listed in the Form I-129 as the location where the beneficiary will be employed.¹

¹ Information regarding the addresses of the petitioner's headquarters (Winnetka, Illinois), the petitioner's main office (New York, New York), and the beneficiary's home address (identified as [REDACTED]) is provided in the [REDACTED] document submitted by the petitioner.

The petitioner also submitted an itinerary that states the projects on which the beneficiary worked in the past, but does not list any locations or any dates for work to be performed during the duration of the petition.

The petitioner further stated that it does not have any agreements with clients mentioning the beneficiary by name.

Additionally, the petitioner submitted an advertisement for a position it posted that it states is similar to the one proffered in this petition. The advertisement calls the job title a "Ruby developer" and does not require any degree, but only advanced knowledge.

The petition was denied on July 27, 2009.

On appeal, counsel maintains that the beneficiary will not work as a computer consultant, but as a software engineer. The petitioner submitted a letter stating that its business model is switching over from consulting work to iPhone application development work with over 80% of its employees working full-time on developing iPhone products in-house. The petitioner states that the beneficiary will work on iPhone application development 75% of the time and will test applications, mentor other employees, and meet with colleagues the other 25% of the time. Although the petitioner maintains that the beneficiary will work in-house, this contradicts the Form I-129, which does not provide the petitioner's location as the location where the work will be performed. Moreover, it appears that the petitioner's headquarters are located at a private residence. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The petitioner submitted a copy of its employment agreement with the beneficiary, which was signed on August 21, 2009, after the petition was denied. The employment agreement states the beneficiary will work as a Software Engineer from October 1, 2009 until September 1, 2012, but does not provide the job description or the location of employment.

To determine whether a particular job qualifies as a specialty occupation position, the AAO does not solely rely on the job title or the extent to which the petitioner's descriptions of the position and its underlying duties correspond to occupational descriptions in the Department of Labor's *Occupational Outlook Handbook (Handbook)*. Critical factors for consideration are the extent of the evidence about specific duties of the proffered position and about the particular business matters upon which the duties are to be performed. In this pursuit, the AAO must examine the evidence about the substantive work that the beneficiary will likely perform for the entity or entities ultimately determining the work's content.

The petitioner states that the beneficiary will work in-house rather than on behalf of clients. However, the location of employment provided in the Form I-129 for the beneficiary is at the offices of another business. Further, it appears that the petitioner's headquarters in Winnetka is at a private residence. Therefore, the petitioner has failed to provide evidence that the beneficiary will work in-house. 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)). Since the only worksite provided is an address of another company, the AAO must conclude that the beneficiary will be working at the location and on behalf of one of the petitioner's clients.

The AAO notes that, as recognized by the court in *Defensor v. Meissner*, 201 F.3d at 387, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. The 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. Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work. The record of proceeding lacks such substantive evidence from any end-user entities that may generate work for the beneficiary and whose business needs would ultimately determine what the beneficiary would actually do on a day-to-day basis. In short, the petitioner has failed to establish the existence of H-1B caliber work for the beneficiary. Further, the advertisement provided by the petitioner indicates that the proffered position does not require at least a bachelor's degree or its equivalent in any field.

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner's normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.²

Applying the analysis established by the Court in *Defensor*, which is appropriate in an H-1B context, like this one, where USCIS has determined that the petitioner is not the only relevant entity for which the beneficiary will provide services, USCIS has found that the record does not contain any documentation from the end user client(s) for which the beneficiary will provide services that establishes the specific duties the beneficiary would perform. Without this information, the AAO cannot analyze whether these duties would require at least a baccalaureate

² Even if the AAO could find that the proffered position would indeed be that of a software engineer, such a position does not by its very nature qualify as a specialty occupation. According to the U.S. Department of Labor's *Occupational Outlook Handbook* (the *Handbook*), while most employers "prefer" to hire individuals with a bachelor's degree computer science, mathematics, or information systems, the *Handbook* does not state that such a degree is a normal, minimum entry requirement for a software engineering position.

degree or the equivalent in a specific specialty, as required for classification as a specialty occupation.

The AAO therefore affirms the director's finding that the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation.

Next, the AAO finds that the petitioner has failed to establish that it will be the beneficiary's employer or agent. Counsel for the petitioner argues that the petitioner is the actual employer.

Under the test of *Nationwide Mutual Ins. Co. v. Darden* (*Darden*), 503 U.S. 318, 322-323 (1992) (hereinafter "*Darden*"), the United States Supreme Court 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." *Darden*, 503 U.S. 318 at 322-323 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). The Supreme Court stated:

"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 *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. at 440 (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)).³

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

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 must focus on the common-law touchstone of "control." *Clackamas*, 538 U.S. at 450; *see also* 8 C.F.R. § 214.2(h)(4)(ii)(2) (defining a "United States employer" as one who "has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise *control* the work of any such employee" (emphasis added)).

Factors indicating that a worker is or will be 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).

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

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 of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee," "employed," "employment" or "employer-employee relationship" indicates that the regulations do not intend 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).

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).⁴

Applying the *Darden* test to this matter, 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." First, under *Defensor*, it was determined 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. *See Defensor v. Meissner*, 201 F.3d at 388.

The petitioner asserts that it will be the employer of the beneficiary. However, the documentation submitted when reviewed in its entirety does not support this conclusion. As discussed previously, the location of employment provided in the Form I-129 is at the offices of another company. Further, it appears that the petitioner's headquarters are located in a private residence.

Other than putting the beneficiary on its payroll and providing benefits, it is unclear what role the petitioner has in the beneficiary's assignment. No independent evidence was provided to indicate that the petitioner would control whether there is any work to be performed or that the petitioner would even oversee the beneficiary's work. Therefore, it must be concluded that the company where the beneficiary will work would oversee any work the beneficiary performs.

In view of the above, it appears that the beneficiary will not be an "employee" having an "employer-employee relationship" with the petitioner or even with a "United States employer" represented by the petitioner in an established agent relationship. It has not been established that the beneficiary will be "controlled" by the petitioner or that the termination of the beneficiary's employment is the ultimate decision of the petitioner. 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).

The AAO therefore affirms the director's finding that the petitioner does not qualify as a United States employer as it also failed to establish that it has sufficient work and resources for the

⁴ It is noted that an employer-employee relationship hinges on the overarching right to control the manner and means by which the product is accomplished. When examining the factors relevant to this inquiry, USCIS must assess and weigh the actual factor itself as it exists or will exist and not the claimed employer's right to influence or change that factor, unless specifically provided for by the common-law test. *See Darden*, 503 U.S. at 323-324. For example, while the assignment of additional projects is dependent on who has the *right* to assign them, it is the *actual* source of the instrumentalities and tools that must be examined, not who has the *right* to provide the tools required to complete an assigned project. *See id.* at 323.

beneficiary. Moreover, the petitioner has not provided sufficient documentation to establish that it is the entity with ultimate control over the beneficiary's work.

The AAO does not need to examine the issue of the beneficiary's qualifications because the petitioner has not provided sufficient documentation to demonstrate that the position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the petitioner did not submit sufficient evidence regarding the proffered position to determine that it is a specialty occupation and, therefore, the issue of whether it will require a baccalaureate or higher degree, or its equivalent, in a specific specialty also cannot be determined. Therefore, the AAO need not and will not address the beneficiary's qualifications further, except to note that, in any event, the petitioner did not submit an education evaluation establishing that the beneficiary has at least a U.S. bachelor's degree in any field even though the beneficiary holds a foreign degree. Therefore, the petitioner has failed to demonstrate that the beneficiary qualifies to perform services in a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C). As such, the petition could not be approved even if the petitioner had established the proffered position as a specialty occupation.

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

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