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U. S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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U.S. Citizenship
and Immigration
Services

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FILE: [redacted] Office: VERMONT SERVICE CENTER Date: MAR 02 2011

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:

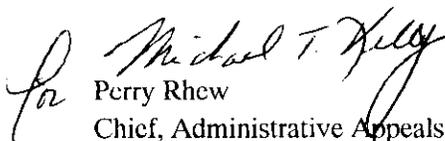


INSTRUCTIONS:

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

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

Thank you,


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director 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.

On the Form I-129 visa petition the petitioner stated that it is an IT (information technology) consulting firm. To employ the beneficiary in what it designates as a senior software engineer position, the petitioner endeavors to classify him 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).

The appeal is filed to contest each of the independent grounds upon which the director denied this petition, specifically, the director's separate determinations that the petitioner failed (1) to establish that it would employ the beneficiary in a specialty occupation position, (2) to establish that the Labor Condition Application (LCA) in this case is valid for the location where the beneficiary would be employed, and (3) to provide the itinerary required by 8 C.F.R. § 214.2(h)(2)(i)(B).

The AAO bases its decision upon its review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's brief in support of the appeal.

The AAO analyzes the specialty occupation issue according to the statutory and regulatory framework below.

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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation "which (1) 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 (2) requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.”

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

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

The regulation at 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 a particular position 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) (hereinafter referred to as *Defensor*). 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 visa petition, which was submitted on August 5, 2008, states that the petitioner is located [REDACTED] but that the beneficiary would work at an address [REDACTED]. The LCA is valid only for employment in Piscataway, New Jersey.

With the visa petition, counsel provided evidence that the beneficiary has a bachelor's degree in electrical engineering and informatics awarded by the Technical University of Budapest and an educational evaluation stating that the beneficiary's degree is equivalent to a bachelor's degree in computer engineering earned in the United States.

Counsel also provided a letter, dated August 3, 2008, from the petitioner's administrative manager. He gave a description of the duties of a computer software engineer taken from the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* and indicated that the beneficiary would perform four of those seven duties. The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹

To determine whether a particular job qualifies as a specialty occupation position, however, 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 U.S. 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 alien will likely perform for the entity or entities ultimately determining the work's content.

The petitioner's administrative manager also stated, "[The proffered] position requires the minimum of a Bachelor's degree in Computer Science, Engineering, Math or a related field." The AAO notes that, to qualify as a position in a specialty occupation, the position proffered must require a minimum of a bachelor's degree or the equivalent *in a specific specialty*. "Computer Science, Engineering, Math, or a related field" do not delineate a specific specialty. To state that a degree in any one of those fields would qualify a person to work in the proffered position is tantamount to an admission that it does not require a minimum of a bachelor's degree or the equivalent *in a specific specialty* and does not, therefore, qualify as a position in a specialty occupation.

Because the evidence submitted was insufficient to demonstrate that the visa petition was approvable, the service center, on August 15, 2008, issued an RFE in this matter. The service center

¹ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2010 – 2011 edition available online, accessed February 14, 2011`.

requested, *inter alia*, (1) an itinerary of the beneficiary's proposed work sites with the dates he would work there and identifying the end-users of his services; (2) contracts tying the petitioner to the end-users of the beneficiary's services, through any intermediaries that exist; and (3) letters from the beneficiary's supervisor at each of the prospective end-users stating the beneficiary's job title, job description, and duties.

In response counsel submitted various contracts and his own letter, dated September 23, 2008.

One of the contracts provided is between the petitioner and [REDACTED] and is dated July 8, 2008. It states terms pursuant to which the petitioner may provide workers to [REDACTED] for it to provide, in turn, to its own clients. An addendum to that contract, entitled Schedule A, indicates that the contract will run from April 1, 2008 to April 30, 2009, unless extended or previously terminated, and that the beneficiary would provide services pursuant to that agreement. That agreement indicates that, for slightly over one year, approximately eight months of which was within the period of requested employment, the petitioner had secured some work for the beneficiary to perform, though not that it was as a software engineer or that it was in a specialty occupation.

Further neither the contract nor the Schedule A addendum states where the work would take place. The addendum states that the jobs involved will be for web administrators and WebSphere architects and administrators, and provides descriptions of the duties of both positions. The AAO notes that the proffered position is ostensibly a position for a software engineer, and that neither of the duty descriptions in the Schedule A bears any resemblance to the description of the duties of the proffered position as provided by the petitioner's administrative manager.

Another contract counsel provided is between the petitioner and [REDACTED] and refers to a previously ratified [REDACTED] Agreement between [REDACTED] which master agreement was not provided. In the contract between the petitioner and [REDACTED] the petitioner agreed to provide services "on a worldwide basis." The contract contains a clause pursuant to which [REDACTED] would reimburse the petitioner's workers' travel expenses. It contains no other indication of where work pursuant to that contract would be performed. It also states that [REDACTED] reserves the right to approve, disapprove, or terminate any of the petitioner's employees at will. That agreement further states:

THERE IS NO BINDING OBLIGATION BETWEEN [THE PETITIONER] AND [REDACTED] WITH REGARD TO A SPECIFIC PROJECT UNTIL THE CORRESPONDING STATEMENT OF WORK IS EXECUTED.

No SOW between [REDACTED] accompanied that contract.

The record contains a statement of work (SOW) entered into by [REDACTED] Pursuant to that SOW [REDACTED] agreed to provide a specific worker, not the beneficiary, to perform services for [REDACTED] The relevance of that document to the approvability of the instant visa petition is unclear. The record contains no SOW executed by [REDACTED] petitioner.

provided a Master Agreement for Recruiting executed by the petitioner and . Pursuant to that agreement, the petitioner agreed to provide recruiting services for , providing it with candidates that it might choose to employ. The petitioner's fee for that service would be 20% of the new employee's base salary after the new employee had remained in 's employ for 90 days. The proposition that agreement was intended to support is unknown to the AAO.

Counsel provided a copy of a Master Subcontract Agreement, dated March 1, 2007, between the petitioner and Fujitsu Consulting, Inc. That agreement provides the terms pursuant to which the petitioner might provide "professional consultants" to Fujitsu for Fujitsu, in turn, to provide to its customers. Although some of the copy provided is illegible, that agreement does not appear to state precisely what work would be performed under that contract, where the work would be performed, how long it was expected to last, or whether the petitioner contemplated providing the beneficiary to Fujitsu's customers, through Fujitsu, pursuant to that agreement.

Summarizing the contents of the contracts and SOWs provided, the AAO notes that the contract with shows that the petitioner might provide some of its workers to perform services for 's clients. The Schedule A provided, if it is taken as evidence of anything at all, despite being unsigned, shows that the petitioner agreed to provide the beneficiary to to provide services essentially unrelated to the proffered position and which do not qualify as specialty occupation services, at an unknown location, for a period of approximately 13 months, almost nine of which were within the period of requested employment, but does not indicate how the petitioner intended to employ the beneficiary for the balance of the period of requested employment.

The contract between the petitioner and shows that the petitioner agreed, in principle, to provide unspecified services to at whatever location throughout the world that might be later specified, subject to reimbursement for travel expenses. Because it was not accompanied by an SOW it is not an indication that the petitioner and ever entered into a binding agreement.

The SOW between has no apparent relevance to the instant visa petition.

The recruiting agreement between the petitioner and shows that the petitioner agreed to recruit personnel to apply for employment with . Any claimed relevance of that document to any issue material to this case is unclear to the AAO.

The contract with Fujitsu shows that the petitioner might provide workers to Fujitsu pursuant to that contract's terms so that Fujitsu could provide them to its customers. When such workers would be provided, where they would work, what work they would do, who would supervise them, and whether the beneficiary would be among them are all unknown.

In his own September 23, 2008 letter, stated, "Currently, the beneficiary is only assigned to work at the company office site listed on the [visa petition]." Counsel did not state his basis for that assertion and did not state that the beneficiary would work at that location throughout the period of requested employment. The AAO notes that the contracts provided clearly form no basis for the assertion that the beneficiary would work at the beneficiary's offices either exclusively, or chiefly, or at all.

The director denied the visa petition on February 6, 2009 finding, as was noted above, that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position, failed to establish that the Labor Condition Application (LCA) in this case is valid for the location where the beneficiary would be employed, and failed to provide the required itinerary.

On appeal, counsel asserted that the proffered position is, in fact, in a specialty occupation, and that, as the beneficiary would work chiefly at the petitioner's Piscataway, New Jersey location, the visa petition is supported by a corresponding LCA and no itinerary is required.

As was noted above, counsel's basis for the assertion that the beneficiary's work would be largely restricted to the Piscataway Park location is unclear. Nothing in the record supports that assertion other than the statements on the visa petition and the LCA.

Rather, the evidence in the instant case suggests that, to the extent that it might locate work for the beneficiary, the petitioner would either provide the beneficiary to another company to hire as that other company's own employee, or would provide the beneficiary to other companies to work for them and charge those other companies for the beneficiary's services. The AAO notes that the petitioner may not, pursuant to the instant visa category, provide the beneficiary to another company as an applicant seeking to be employed by that other company.

The AAO will assume, *arguendo*, that the petitioner does not intend to provide the beneficiary to another company to hire as that other company's own employee, but will provide the beneficiary to other companies as a consultant. Notwithstanding that the petitioner indicates that the beneficiary would work at its own location, the evidence indicates that the beneficiary would routinely be assigned, if any work is actually available, to other companies' locations to perform work there. This suggests that the petitioner does not intend to assign the beneficiary to specific duties, but that his duties would be assigned by those other companies.

Yet further, the Schedule A provided, the only evidence that the petitioner ever had any work for the beneficiary to perform, is not signed by any of the alleged parties to the agreement, and is very poor evidence, therefore, that any such agreement to employ the beneficiary exists. Counsel observed, on appeal, that the master agreement with [REDACTED] was signed, and that it refers to a Schedule A. The record does not show, however, that the document provided is the Schedule A to which [REDACTED] referred. The record does not show that [REDACTED], or any other company, agreed that the beneficiary would perform any services for it.

Because the petitioner will not, itself, be assigning the beneficiary's duties, the petitioner is obliged, in order to demonstrate that the proffered position is a position in a specialty occupation within the meaning of section 214(i)(1) of the Act, to provide a comprehensive description of the beneficiary's proposed duties from an authorized representative of that client of the petitioner who will be the end user of the beneficiary's services. The only evidence that is even ostensibly from an end-user pertinent to the beneficiary's prospective duties, however, is the Schedule A that purports to be an agreement between the petitioner and [REDACTED]. The duties described on that Schedule A, however, are not closely related to the duties of a software engineer. Rather, they are, as labeled, descriptions of web administration and web architecture duties. Web administrator and web architect duties are described in the *Handbook* in the section entitled computer network, systems, and database administrators. Web administrator and web architect positions are not typically specialty occupation positions and, even if they were, that change in the job description and duties of the proffered position would render the instant visa petition unapprovable, even if the agreement was shown to be *bona fide*. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

In *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000), the court held that the Immigration and Naturalization Service, now USCIS, reasonably interpreted the statute and the regulations when it required the petitioner to show that the entities ultimately employing the proposed beneficiaries require a bachelor's degree for all employees in that position. The court found that the degree requirement should not originate with the employment agency that brought the beneficiaries to the United States for employment with the agency's clients.

Thus, without such comprehensive descriptions from the end-user entities of the specific duties that the beneficiary would perform for them in the context of their particular business operations, the petitioner has not demonstrated that the beneficiary will perform work at the external job sites in a specialty occupation. Further, the record contains no indication that the petitioner has located any work at all for the beneficiary to perform, except during eight months of the one-year period of requested employment. 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 at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

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.

Further still, the educational requirements of the proffered position, as stated by the petitioner's administrative manager, are a bachelor's degree or the equivalent in computer science, engineering, math, or a related field. As was noted above, that is not a requirement of a minimum of a bachelor's degree or the equivalent in a specific specialty.

Further, even if the proffered position required a degree in engineering, without further specification, would still not indicate that it is a position in a specialty occupation. This is because the field of engineering is a very broad category that covers numerous and various disciplines, some of which are only related through the basic principles of science and mathematics, e.g., petroleum engineering and aerospace engineering. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration or engineering, without further specification, does not establish the position as a specialty occupation. *See Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988).

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

Because of the wide range of degrees that the petitioner's president indicated would qualify one for the proffered position, the petitioner has not only failed to demonstrate that the proffered position qualifies as a specialty occupation, but has, in effect, admitted that it is not such a position.

The petitioner noted that USCIS approved other petitions that had been previously filed on behalf of the beneficiary. The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. If the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approvals would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Because the petitioner did not demonstrate that it would employ the beneficiary in a specialty occupation, the petition was correctly denied. That basis has not been overcome on appeal, and the appeal will be dismissed and the petition denied for that reason.

Another basis for the director's denial of the petition was the director's finding that the petitioner had not demonstrated that the LCA provided to support the visa petition corresponds with that petition. The regulation at 20 C.F.R. § 655.705(b) states, in pertinent part, that in determining whether to approve a Form I-129 visa petition "[USCIS] determines whether the petition is supported by an LCA which corresponds with the petition." In order for an H-1B petition to be approvable, the location shown on the supporting LCA must correspond to the location where the beneficiary would work, as that location determines the prevailing wage threshold that figures in the calculation of the wage that the petitioner is required to pay.

The LCA submitted to support the instant visa petition indicates that the beneficiary would work [REDACTED]. A lease in the record shows that the petitioner does, in fact, rent offices in [REDACTED]. The record, however, contains no evidence to support the proposition that the beneficiary would work at the petitioner's offices or for an end-user company [REDACTED], and the petitioner has not, therefore, demonstrated that the LCA provided corresponds with the instant visa petition. The appeal will be dismissed and the visa petition will be denied on this additional basis.

Unless the petitioner is able to substantiate the assertion that it would employ the beneficiary in one single location, it is obliged to provide an itinerary of the beneficiary's proposed employment. Here, the record suggests that the petitioner would assign the beneficiary to work for various companies which, in turn, might assign him to various other companies. In any event, the record suggests that the beneficiary would work in various locations. Under these circumstances, the petitioner was obliged to provide the required itinerary, which it has not done. The appeal will be dismissed and the visa petition will be denied on this additional basis, that the petitioner failed to provide the itinerary required by 8 C.F.R. § 214.2(h)(2)(i)(B).

The petitioner's failure to provide an itinerary raises another issue, however, in addition to failure to comply with the requirement of 8 C.F.R. § 214.2(h)(2)(i)(B).

Rather than merely denying the visa petition because of the petitioner's failure to comply with the requirement of 8 C.F.R. § 214.2(h)(2)(i)(B) the service center requested, in the August 18, 2008 request for evidence, that the petitioner "Submit a detailed itinerary of the work sites the beneficiary is to be assigned to, to include specific dates, locations, and clients that the beneficiary will be servicing." The petitioner did not comply with that request.

Even if the petitioner were not compelled by 8 C.F.R. § 214.2(h)(2)(i)(B) to provide an itinerary as part of the initial evidence in this matter, the regulations provide the director with broad discretionary authority to request evidence in support of a petition. Specifically, pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

Moreover, in addition to 8 C.F.R. § 214.2(h)(9)(i), the regulation at 8 C.F.R. § 103.2(b)(8) provides the director broad discretionary authority to require such evidence as contracts and itineraries to establish that the services to be performed by the beneficiary will be in a specialty occupation during the entire period requested in the petition. A service center director may issue a request for evidence that he or she may independently require to assist in adjudicating an H-1B petition, and his or her decision to approve a petition must be based upon consideration of all of the evidence as submitted by the petitioner, both initially and in response to any request for evidence that the director may issue. *See* 8 C.F.R. § 214.2(h)(9). The purpose of a 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)(1), (b)(8), and (b)(12).

The AAO finds that, in the context of the record of proceeding as it existed at the time the request for evidence was issued, the request for itinerary evidence was appropriate under the above cited regulations, not only on the basis that it was required initial evidence, but also on the basis that it addressed the petitioner's failure to submit documentary evidence substantiating the petitioner's claim that it had H-1B caliber work for the beneficiary for the period of employment requested in the petition.

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). Here, in addition to being required initial evidence, as the detailed itinerary was material to a determination of whether the work to be performed by the beneficiary would be in a specialty occupation, the petitioner's failure to provide this specifically requested evidence precluded a material line of inquiry. As such, the petition must be denied for this additional reason.

The record suggests another issue that was not mentioned in the decision of denial.

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(A) identifies a "United States employer" as authorized to file an H-1B petition. "United States employer" is defined 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 regulation at 8 C.F.R. § 214.2(h)(2)(i)(F) allows a "United States agent" to file a petition "in cases involving workers who are traditionally self-employed or workers who use agents to arrange

short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act on its behalf.”

The AAO notes that the petitioner has never claimed to be the beneficiary’s agent and, further, that the evidence in the record does not support that the petitioner and the beneficiary have an agency relationship. Thus, the remaining issue pertinent to standing to file the instant visa petition is whether the petitioner qualifies as the beneficiary’s U.S. employer within the meaning of 8 C.F.R. § 214.2(h)(2)(i)(A) and 8 C.F.R. § 214.2(h)(4)(ii).

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)).²

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 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.

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).

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 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).

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).

In the instant case, the record demonstrates that the petitioner intends to assign the beneficiary to work for various employers, often through an intermediary. Other than putting the beneficiary on its payroll, assigning him to an end-user, and providing benefits, it is unclear what role the petitioner has in the beneficiary's assignment. There is no indication that the petitioner would provide a supervisor to assign the beneficiary's duties and direct the beneficiary's performance of them. The evidence does not establish that the beneficiary would report to anyone employed by the petitioner. Further, the contract with [REDACTED] explicitly states that [REDACTED] would have the authority to terminate any of the petitioner's workers at will.

In view of the above, it appears that the beneficiary will not be an "employee" having an "employer-employee relationship" with the petitioner as its "United States employer." 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. To the contrary, it appears that the third-party client will ultimately control the beneficiary's employment. 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 appeal will be dismissed and the visa petition will be denied on this additional basis.

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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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. The appeal will be dismissed and the petition denied.

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