

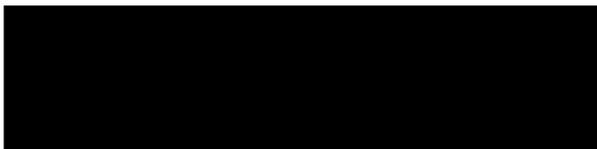
Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

PUBLIC COPY



U.S. Citizenship and Immigration Services



D2

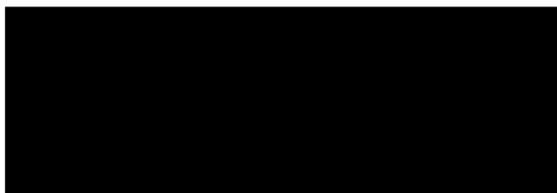
FILE: [Redacted] Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

MAR 02 2011

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:



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 \$585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

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

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is an information technology and software development services company. It seeks to employ the beneficiary as a programmer analyst and 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 director denied the petition, finding that the petitioner failed to: (1) submit an itinerary for all work locations of the beneficiary; (2) submit a valid Labor Condition Application (LCA) for all work locations of the beneficiary; and (3) establish that the proposed position qualifies for classification as a specialty occupation. On appeal, counsel for the petitioner submits a brief and additional evidence.

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

In the letter of support dated March 25, 2009, the petitioner claimed that it is a software development and information technology company whose technical expertise spans a broad range of technical disciplines. It further stated that "[s]ince our inception, [the petitioner] has endeavored to provide effective information technology solutions to clients across all industry segments." The petitioner further stated that it wished to employ the beneficiary as a programmer analyst, and provided a basic overview of the duties of the proffered position.

The director found the initial evidence insufficient to establish eligibility, and thus issued an RFE on May 14, 2009. The petitioner noted that in Part 5 of the Form I-129 petition, the petitioner indicated the beneficiary's work locations (Jacksonville, Florida and Austin, Texas) but noted that the petitioner failed to supplement the record with additional details regarding the entity for whom the beneficiary would provide services at the Austin Texas location. Therefore, the director requested additional details regarding the supervisor of the beneficiary at each worksite, along with clarification regarding whether his supervisor would be the vendor or end client. Additional details regarding the beneficiary's duties at each work location were also requested.

In response, the petitioner, through counsel, addressed the director's queries. In addition to providing extensive legal arguments as the basis for eligibility in this matter, counsel submitted an employment agreement between the petitioner and the beneficiary signed on March 20, 2009, which indicated that, while the beneficiary would render his services at the petitioner's offices in Jacksonville, Florida "or its clients location," he would also "travel on temporary trips to such other place or places as may be required from time to time to perform his duties hereunder." Counsel also submitted a document entitled "Employment Itinerary," which indicated that the beneficiary would be assigned to "various Software development projects manifested by [the petitioner] and its clients [redacted]"

The document indicates that contractual software development is scheduled for the next twelve months and is extendable until September 15, 2012. The document further stated that while the beneficiary's full-time worksite would remain at the petitioner's offices in Jacksonville, Florida, "short-term placements and/or assignments may be required for some projects."

In addition, a document entitled "Temporary Staffing Agreement" dated April 18, 2008 was submitted, which indicated that the petitioner and Incepture, Inc., a Florida-based company, had a temporary staffing agreement for the period from April 21, 2008 until December 31, 2008. Finally, counsel submitted a document entitled "Confirmation of Independent Consultant Assigned to Project," which claimed that the petitioner is a primary technical vendor for Incepture, Inc. Although the writer did not print his name and title and the document is not written on letterhead of any kind, it appears that the signature on this document matches that of the petitioner's [REDACTED] as evidence by his signature on other documents contained in the record.

The director denied the petition, finding that the evidence submitted by the petitioner did not establish eligibility in this matter based on the record's lack of a complete itinerary and valid LCA for the beneficiary's work locations. The director also concluded that absent additional evidence regarding the nature of the beneficiary's work, it could not be determined whether the proffered position was a specialty occupation.

The first issue before the AAO is whether the petitioner established filing eligibility at the time the Form I-129 was received by U.S. Citizenship and Immigration Services (USCIS).

General requirements for filing immigration applications and petitions are set forth at 8 C.F.R. §103.2(a)(1) as follows:

[E]very application, petition, appeal, motion, request, or other document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions . . . being hereby incorporated into the particular section of the regulations requiring its submission

Further discussion of the filing requirements for applications and petitions is found at 8 C.F.R. § 103.2(b)(1):

Demonstrating eligibility at time of filing. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. All required application or petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form's instructions. Any evidence submitted in connection with the application or petition is incorporated into and considered part of the relating application or petition.

Additionally, the regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) provides as follows:

Service or training in more than one location. A petition which requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with the Service office

which has jurisdiction over I-129H petitions in the area where the petitioner is located. The address which the petitioner specifies as its location on the I-129H petition shall be where the petitioner is located for purposes of this paragraph.

The AAO will first address the requirement that the petitioner submit an itinerary under 8 C.F.R. § 214.2(h)(2)(i)(B).

The petitioner alleges in Part 5 of the Form I-129 that the beneficiary will work in both Jacksonville, Florida and Austin, Texas. In the letter of support, response to the RFE, employment agreement, and document submitted as an employment itinerary, the petitioner indicates that, in addition to performing work onsite at the petitioner's offices, the beneficiary will be sent to client sites on an as-needed basis. Finally, despite submitting a letter from the petitioner claiming that the beneficiary will work on a project for Incepture, Inc., no formal documentation outlining the terms and duration of this assignment was submitted.

According to the regulation at 8 C.F.R. § 214.2(h)(2)(i)(B), a petition which requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training. While the petitioner submitted the document entitled "employment itinerary," which claims that the beneficiary will work on software development projects "for the next twelve months" and that such project is extendable until September 15, 2012, there is no contract, work order, or vendor agreement to support this contention. Moreover, the petitioner specifically indicates that the beneficiary may travel to various client sites as needed. Finally, returning to the petitioner's claims on the Form I-129, the beneficiary will also be working in Austin, Texas, yet no discussion of the work assignment, location of the assignment, or the assignment's duration has been submitted. 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).

On appeal, counsel refers to a proposed amendment to 8 C.F.R. § 214.2(h)(2)(i)(B), which, if accepted, would have stated: "**to the extent possible**, a complete itinerary with the dates and locations of the services or training to be performed" must be provided. Counsel further noted that the proposed amendment provided that, if the petitioner had not yet determined all of the work locations for the beneficiary, an itinerary of all definite employment must be provided, along with a description of any proposed or possible employment. However, proposed regulations have no effect until published in final form, and this provision was not accepted into the *Code of Federal Regulations*. Such an amendment would have resulted in the type of speculation USCIS urges petitioners to avoid. Therefore, under the regulations cited above, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 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 failed to comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B).

Therefore, based on the limited evidence submitted pertaining to the assignment(s) of the beneficiary for the duration of the requested validity period, the petitioner has failed to submit the itinerary required by 8 C.F.R. § 214.2(h)(2)(i)(B). Although counsel on appeal indicates that the employment itinerary outlines the location and duration of the beneficiary's services, no supporting documentation, such as contracts or work orders identifying the actual end client and definitively stating where and for whom the beneficiary will work, has been submitted. 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)).

As the petitioner failed to provide the itinerary required by the regulation at 8 C.F.R. § 214.2(h)(2)(i)(B), the appeal will be dismissed and the petition will be denied.

The next issue before the AAO is whether the petitioner submitted a valid LCA covering all work locations for the beneficiary at the time of filing.

The regulations require that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner obtain a certified LCA from the U.S. Department of Labor (DOL) in the occupational specialty in which the H-1B worker will be employed. See 8 C.F.R. § 214.2(h)(4)(i)(B). The instructions that accompany the Form I-129 also specify that an H-1B petitioner must document the filing of a labor certification application with DOL when submitting the Form I-129.

In the instant case, the petitioner filed the certified LCA with USCIS along with the initial petition. As noted above, on the Form I-129, the petitioner indicated that the beneficiary would work in Jacksonville, Florida as well as in Austin, Texas. The certified LCA submitted with the petition identified both of these locations as worksites for the beneficiary.

As noted above, the petitioner claimed that the beneficiary would work primarily at the petitioner's offices in Jacksonville, Florida, but would be assigned to various client sites as needed. Again, no discussion of any project in Austin, Texas, was raised.

The Form I-129 filing requirements imposed by regulation require that the petitioner submit evidence of a certified LCA at the time of filing. Title 20 C.F.R. § 655.705(b) further indicates that an LCA must correspond to the petition with which it is submitted. The LCA submitted with the petition is certified for two locations, one of which is not identified as a work location of the beneficiary according to the petition. On appeal, the petitioner makes no attempt to address this issue, and no explanation as to why the location of Austin, Texas included on the certified LCA is submitted. 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).

Upon review of the record, the AAO finds that the record of proceeding fails to establish that the certified LCA corresponds to the petition by encompassing all of the locations where the beneficiary would work. While the LCA submitted identifies at least one location where the beneficiary may perform services, the record clearly indicates that the beneficiary will be tasked to various, and as yet unidentified, client sites as needed. Since the petitioner indicates in its supporting documentation that it has a diverse client base in the financial, telecommunications, and technology sectors, it is clear that the potential work locations for the beneficiary could vary widely based on client needs during the course of the requested validity period. A petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 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).

Thus, the petitioner failed to comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B). For this additional reason, the petition may not be approved.

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

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

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

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

Specialty occupation means 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, a proposed position must also meet one of the following criteria:

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. See *K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); see also *COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA

1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. See *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

In addressing whether the proffered position is a specialty occupation, the record is devoid of any documentary evidence as to where and for whom the beneficiary would be performing his services during the requested employment period, and whether his services would be that of a programmer analyst.

The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that “[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation.” Moreover, the regulation at 8 C.F.R. § 214.2(h)(4)(iv)(A)(1) indicates that, contrary to counsel’s assertions on appeal, contracts are one of the types of evidence that may be required to establish that the services to be performed by the beneficiary will be in a specialty occupation.

The March 25, 2009 support letter submitted by the petitioner described the proffered position and indicated that the beneficiary would be responsible for the following:

- Analyze, design, modify and implement software/systems applications in a client/server environment using ASP.Net, C#, VB.Net and SQL on Windows operating system; specific projects may include research and gather user requirements and prepare technical requirement specifications according to corporate regulated standards, participate in Data modeling and design of the application database, research system requirements, data modeling, and design of documents for the business process according to requirements, perform security and user management repository backups, design and develop data mappings and provide enhancements; Will work alongside other programmer analysts in a team environment developing user friendly software/systems applications in accordance with project specifications. Will also work under the supervision of the project

manager.

In response to the RFE, which requested more specific information regarding each project upon which the beneficiary would work, the petitioner indicated that the beneficiary would work onsite at its office in Jacksonville, Florida on a project for Incepture, Inc. Although the petitioner slightly expanded on the duties of the proffered position in the "employment itinerary" document, none of the aforementioned documents submitted in response to the RFE outlined with specificity the nature of the beneficiary's duties on the alleged project.

The statement of duties set forth in the record is generic and vague, and fails to specifically discuss the duties of the beneficiary on the alleged Incepture, Inc. project. In fact, the employment itinerary states that the beneficiary "is assigned to various Software development projects manifested by [the petitioner] and its clients," and, with regard to the duties of the proffered position, the petitioner indicates that the beneficiary "may" be required to perform such duties. Such a statement implies that the beneficiary's duties can vary greatly based on client needs and project specifications. Therefore, it is evident that the end client on a particular project determines the exact nature of the beneficiary's duties.

As discussed briefly above, the record is devoid of evidence of an agreement between the petitioner and Incepture, Inc. outlining the nature of the proposed project on which the beneficiary would be assigned. Again, the document entitled "Confirmation of Independent Consultant Assigned to Project" submitted on blank paper and signed by the petitioner's president simply restates the vague and generic duties discussed above, and is not accompanied by any documentation, such as a contract or work order, which outlines the details of the agreement between the parties.

The petitioner indicates that the exact nature of the beneficiary's assignments throughout the validity period will vary based on client needs during the duration of the petition, for which approval was requested through September 25, 2012. The uncertainty surrounding the future projects and work assignments of the beneficiary renders it impossible to find that the proffered position is a specialty occupation, since no specific description of the duties the beneficiary will perform is included in the record.

The petitioner is responsible for assigning staff to various client projects as needed. As discussed previously, details are not provided about the beneficiary's specific role in the Incepture, Inc. project, nor is there a contractual agreement demonstrating that a current project with Incepture, Inc. actually exists beyond the initial December 31, 2008 expiration. On appeal, counsel for the petitioner provides no documentary evidence to clarify the beneficiary's duties and his project assignments. However, counsel does submit a "Confirmation of Independent Consultant" agreement with [REDACTED] dated October 10, 2009, indicating that the beneficiary will work on a project [REDACTED] through its contractual agreement with Incepture, Inc.

The petitioner, however, was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). Also, the regulations at 8 C.F.R. §§ 103.2(b)(8), (b)(10), and (b)(14) preclude the AAO from considering

evidence within the scope of an RFE but not provided in a timely RFE response. The appeal will be adjudicated based on the record of proceeding before the director.

The petitioner is responsible for assigning staff to various client projects as needed. As discussed previously, details are not provided about the beneficiary's specific role in the Incepture, Inc. project. The brief description of duties in the petitioner's support letter is generic and fails to specifically describe the nature of the services required by the beneficiary on the project in question. Moreover, the fact that the petitioner acknowledges that the beneficiary's assignments will fluctuate throughout the validity period confirms that his duties and responsibilities are subject to change in accordance with client requirements. Therefore, absent evidence of contracts or statements of work describing the duties the beneficiary would perform and for whom throughout the entire validity period, the petitioner fails to establish that the duties that the beneficiary would perform are those of a specialty occupation. Again, simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

USCIS routinely looks to *Defensor v. Meissner*, 201 F.3d 384, which highlights the requirement for an examination of the ultimate employment of the beneficiary to determine whether the position constitutes a specialty occupation. The petitioner in *Defensor*, Vintage Health Resources (Vintage) is 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. *Id.* The *Defensor* court held 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.*

Despite counsel's contentions to the contrary on appeal, it is unclear 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, indicate that the beneficiary will be working on different projects throughout the duration of the petition. Despite the director's specific request for documentation to establish the ultimate location(s) of the beneficiary's employment, the petitioner failed to comply. The petitioner's failure to provide evidence of valid work orders or employment contracts prior to adjudication, which identify the beneficiary as personnel and outline the nature of his duties, renders it impossible to conclude for whom the beneficiary will ultimately provide services, and exactly what those services would entail. Although the temporary staffing agreement with Incepture, Inc. is contained in the record, this document neither identifies the beneficiary as personnel, nor does it demonstrate that the agreement has been extended beyond the initial expiration date of December 31, 2008. The AAO, therefore,

cannot analyze whether his duties would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation.

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

Accordingly, the petitioner has not established that the proposed position qualifies as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) or that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii).

Beyond the decision of the director, the petitioner has not established that it meets the regulatory definition of an intending United States employer. See 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, 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).

¹ It is noted that, even if the proffered position were established as being that of a programmer analyst, a review of the U.S. Department of Labor's *Occupational Outlook Handbook* does not indicate that such a position qualifies as a specialty occupation in that the *Handbook* does not state a normal minimum requirement of a U.S. bachelor's or higher degree in a specific specialty or its equivalent for entry into the occupation of programmer analyst. See Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook*, 2010-11 Edition, "Computer Systems Analysts," <<http://www.bls.gov/oco/ocos287.htm>> and "Computer Software Engineers and Computer Programmers," <<http://www.bls.gov/oco/ocos303.htm>> (accessed February 14, 2011). As such, absent evidence that the petitioner's proffered position of programmer analyst qualifies as a specialty occupation under one of the alternative criteria available under 8 C.F.R. § 214.2(h)(4)(iii)(A), the instant petition could not be approved for this additional reason.

"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 any of its clients will have an employer-employee relationship with the beneficiary.

Although "United States employer" is defined in the regulations, it is noted that "employee," "employed," "employment," and "employer-employee relationship" are not defined for purposes of the H-1B visa classification even though these terms are used repeatedly in both the Act and the regulations, including within the definition of "United States employer" at 8 C.F.R. § 214.2(h)(4)(ii). Section 101(a)(15)(H)(i)(b) of the Act indicates that an alien coming to the United States to perform services in a specialty occupation will have an "intending employer" who will file a labor condition application with the Secretary of Labor pursuant to section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). The intending employer is described as offering full-time or part-time "employment" to the H-1B "employee." Sections 212(n)(1)(A)(i) and 212(n)(2)(C)(vii) of the Act, 8 U.S.C. §§ 1182(n)(1)(A)(i) and 1182(n)(2)(C)(vii). Further, the regulations indicate that "United States employers" must file Form I-129 in order to classify aliens as H-1B temporary "employees." 8 C.F.R. §§ 214.2(h)(1) and 214.2(h)(2)(i)(A). Finally, the definition of "United States employer" indicates in its second prong that the petitioner must have an "employer-employee relationship" with the "employees under this part," i.e., the H-1B beneficiary, and that this relationship be evidenced by the employer's ability to "hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer"). Accordingly, neither the legacy Immigration and Naturalization Service (INS) nor U.S. Citizenship and Immigration Services (USCIS) has defined the terms "employee," "employed," "employment," or "employer-employee relationship" by regulation for purposes of the H-1B visa classification, even though the law describes H-1B beneficiaries as being "employees" who must have an "employer-employee relationship" with a "United States employer."² Therefore, for purposes of the H-1B visa classification, these terms are undefined.

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

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

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

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

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.

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 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

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 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

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).

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."

In response to the director's RFE, in which contracts and/or work orders between the petitioner and end clients were requested, the petitioner claimed that the beneficiary would work on a project for Incepture, Inc., and submitted a copy of a temporary staffing agreement valid from April 21, 2008 until December 31, 2008.

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 indicates that the petitioner has an Internal Revenue Service Tax Identification Number. While the petitioner's letter of support and the employment agreement indicate the petitioner's intent to engage the beneficiary to work in the United States, no specific agreement or contract was submitted demonstrating an employer-employee relationship between the petitioner and the beneficiary. Therefore, the documentation submitted by the petitioner is insufficient to establish that an employer-employee relationship exists.

Although the petitioner submitted evidence such as the agreements discussed above, the petitioner did not submit any document which outlined in detail the nature and scope of the beneficiary's employment. Therefore, the key element in this matter, which is who exercises ultimate control over the beneficiary, has not been substantiated.

The petitioner contends that it will assign the beneficiary to various client projects as needed, and claimed in its support letters to have clients in a wide array of industries throughout the country. Additionally, in response to the RFE, the petitioner's employment itinerary for the beneficiary's time in the United States was vague and failed to specifically outline the location and duration on the claimed project for Incepture, Inc. or any other project. The petitioner noted on the employment itinerary that the "contracted software development" could be extended until September 15, 2012, yet provided no evidence pertaining to the nature of the project, the terms and conditions of the project, or the ultimate end client(s). Moreover, the initial temporary staffing agreement with Incepture, Inc. appears to have terminated on December 31, 2008, and no evidence that the agreement was renewed or extended was submitted.

The documentation submitted into the record, therefore, sheds little light on the beneficiary's proposed position. Most importantly, the documents submitted do not identify the client or clients for whom the beneficiary will render services, and the self-serving statement by the petitioner's president claiming that a project exists with Incepture, Inc. is not supported by corroborating evidence.

As such, in determining who will control an alien beneficiary, incidents of the relationship such as who will oversee and direct the work of the beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary's employer. Without full disclosure of all of the relevant factors, the AAO is unable to find that the requisite employer-employee relationship will exist between the petitioner and the beneficiary.

The evidence, therefore, is insufficient to establish that the petitioner qualifies as a United States employer, as defined by 8 C.F.R. § 214.2(h)(4)(ii). Merely claiming in its letters that the petitioner exercises complete control over the beneficiary, without evidence supporting the claim, does not establish eligibility in this matter. The evidence of record prior to adjudication did not establish that the petitioner would act as the beneficiary's employer in that it will hire, pay, fire, or otherwise control the work of the beneficiary. Despite the director's specific request for evidence such as employment contracts or agreements to corroborate its claim, the petitioner failed to submit such evidence.⁴

The evidence, therefore, is insufficient to establish that the petitioner qualifies as a United States employer, as defined by 8 C.F.R. § 214.2(h)(4)(ii). Merely claiming in its letters that the petitioner exercises complete control over the beneficiary, without evidence supporting the claim, does not establish eligibility in this matter. The evidence of record prior to adjudication did not establish that the petitioner would act as the beneficiary's employer in that it will hire, pay, fire, or otherwise control the work of the beneficiary. Despite the director's specific request for evidence such as employment contracts or agreements to corroborate its claim, the petitioner failed to submit such evidence.

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

Likewise, the petitioner is not an agent as defined by the regulations. The definition of agent at 8 C.F.R. § 214.2(h)(2)(i)(F) provides for two types of agents: (1) "an agent performing the function of an employer"; and (2) "a company in the business as an agent involving multiple employers as the representative of both the employers and the beneficiary." Absent documentation such as work orders or contracts between the ultimate end clients and the beneficiary, the petitioner cannot be considered an agent in this matter. As stated above, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

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).

⁴ As discussed previously, the "Confirmation of Independent Consultant" Agreement with Blue Cross Blue Shield of Florida submitted for the first time on appeal will not be considered by the AAO. Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.*

Page 16

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.