

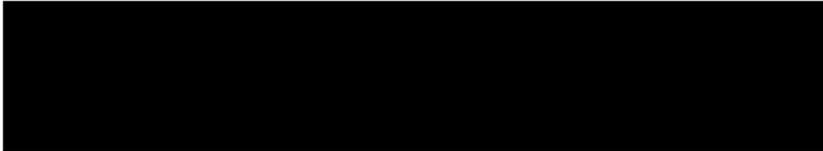
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



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

PUBLIC COPY



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Date: **MAY 02 2011** Office: VERMONT SERVICE CENTER

FILE:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

Thank you,

Perry Rhew

Chief, Administrative Appeals Office

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

The petitioner is an information technology consulting business. It seeks to employ the beneficiary as a programmer analyst pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The director denied the petition, concluding that the petitioner failed to establish that the petitioner is an employer or agent, that the proffered position is a specialty occupation, and that the petitioner submitted a valid Labor Condition Application (LCA) for all work locations.

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

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

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

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

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

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

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

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

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

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

- Convert project specifications and statements of problems and procedures to

- detailed logical flow charts for coding into computer language;
- Develop and write computer programs to store, locate, and retrieve specific documents, data, and information;
- Program websites; and
- Exercise limited judgment/decision for non-complex tasks.

In the support letter, the petitioner goes on to state, “[i]n order to perform the duties of a Programmer Analyst the incumbent must have a minimum of a Bachelor’s degree in Science, Engineering, Computers or related discipline and experience in computer programming. . . .”

The Form I-129 stated that the beneficiary would work in both [REDACTED] and [REDACTED] at an annual salary of \$60,000 per year and the requested validity dates for the petitioner are February 9, 2009 to February 9, 2012.

The submitted Labor Condition Application (LCA) was filed for a programmer analyst to work in [REDACTED] and [REDACTED].

The petitioner submitted copies of the beneficiary’s foreign education documents along with a credential evaluation finding that he has the equivalent of a U.S. Master’s degree in Computer Science.

On March 23, 2009, the director issued an RFE advising the petitioner to submit copies of federal tax returns as well as the petitioner’s contracts for work and other evidence demonstrating that the proffered position is a specialty occupation. The RFE also requested that the petitioner provide an itinerary for locations where the beneficiary will perform his services.

In response to the RFE, the petitioner stated that: 30% of the beneficiary’s time would be spent converting project specifications and statements of problems and procedures; 30% of his time would be spent consulting with personnel to clarify program intent, identify problems, and suggest changes; 20% of his time would be spent investigating whether networks, workstations, the central processing unit, and equipment are responding to a program’s instructions; 15% of his time would be spent developing and writing computer programs; and 5% of his time would be spent programming websites. In addition to the fields previously listed, the petitioner also added a Bachelor’s degree in Business as an acceptable minimum requirement for the position.

The petitioner stated that the beneficiary is:

currently working on a project for *our* client [REDACTED] in [REDACTED] [The beneficiary] will be traveling to the client site in [REDACTED] as and when required by the client. Please note that both our office location and the client location are within the same metropolitan area and county, which is [REDACTED] county.

As per the work order submitted, [the beneficiary’s] assignment with Microsoft ends on January 17, 2010. After this date, [the beneficiary] will transfer to our headquarters in [REDACTED] [The petitioner] has several on-going

software applications development projects for various reputable clients. . . . The beneficiary will work [on one] of these projects based on the requirements of the task and his skills.

(Emphasis added.)

The work order to which the petitioner refers is not actually a work order, but is a computer printout of an assignment. The printout states that the beneficiary will work as a "Software Design Engineer 3" in [REDACTED] from February 9, 2009 to January 17, 2010. According to an Addendum to Service Agreement submitted by the petitioner, the office that the petitioner states it has in [REDACTED] is for a virtual office in [REDACTED], a location not listed on the Form I-129.

The petitioner also provided a copy of its offer letter to the beneficiary, dated February 3, 2009, which states that the beneficiary will work as a "Software Design Engineer 3" at an annual salary of \$92,000 per year. The offer letter states, "[e]mployee hereby accepts the consulting agreement procured by [the petitioner] starting on 2/9/2009 at Microsoft-Ags ("Client") at its [REDACTED] location ("Client Site")."

The 2006 U.S. Corporate Income Tax Return submitted by the petitioner indicates that the petitioner is a computer consulting business.

The petitioner did not provide copies of any client contracts in response to the RFE.

The director denied the petition on July 13, 2009.

On appeal, counsel argues as follows:

Please note that [the petitioner] is a computer-consulting firm and is not involved in "job contracting." While some employees, such as the beneficiary, may perform part of their analysis, development and implementation duties at client sites, [the petitioner] is the only actual employer. Each assignment, all day-to-day activities, and discretionary decision-making, such as hiring and firing and performance evaluations are made and controlled by [the petitioner]. . . .

* * *

The petitioner has a direct contract with [REDACTED] and [REDACTED]. Please note that AGS and Microsoft are parties to a Master Service Agreement pursuant to which [REDACTED] has agreed to provide management services to Microsoft in connection with its use of [REDACTED] and to supply such [REDACTED] to provide services for Microsoft. As per this agreement, the beneficiary was to perform services on a project for Microsoft Corp. located in [REDACTED]. . . . Please note that the beneficiary was to perform work on this project from the branch

office location of [the petitioner] in the state of [REDACTED] . . . Beneficiary will be traveling to the client site in [REDACTED] as and when required by the client. Please note that both our office location of [the petitioner] and the client location are within the same metropolitan area and county, which is [REDACTED] county.

* * *

The USCIS claims that since there is no end client letter from Microsoft they cannot determine the minimum requirements for the beneficiary's position. The Petitioner is not able to submit a client letter as the client has refused to provide any such letters. Petitioner does not have control over such situations. In lieu of a client letter, petitioner has submitted a contract and work order that shows that beneficiary's services are required at Microsoft. . . .

For the first time on appeal, the petitioner submitted a copy of a Temporary Agency Agreement between itself and [REDACTED] pursuant to which the petitioner will supply temporary workers to be assigned by [REDACTED] to Microsoft. The Agreement contains, in pertinent part, the following provisions:

[The petitioner] will fill requisitions with [REDACTED] qualified to perform the tasks specified by Microsoft. Before assigning an [REDACTED] to [REDACTED] [the petitioner] will submit, through the System, a resume and skills inventory of the [REDACTED] identified for the assignment, and any other information requested about the [REDACTED], such as customer feedback from previous assignments, that may be reasonably and lawfully provided. AGS and Microsoft reserve the right to reject the [petitioner's] assignment of any [REDACTED] if [REDACTED] or [REDACTED] finds the [REDACTED]'s availability, report date, billing rate, or qualifications unacceptable.

[The petitioner] acknowledges [REDACTED]'s rights to end an [REDACTED]'s assignment, at the request of Microsoft, at any time and to request the immediate removal from [REDACTED] premises of any [REDACTED] or other [REDACTED] personnel. . . .

[The petitioner] acknowledges and understands that Microsoft may hire [REDACTED] at any time. . . .

* * *

[REDACTED] expects to provide [REDACTED] an assignment onsite at [REDACTED] with the hardware or other equipment necessary to perform the assignment. . . .

* * *

[The petitioner] acknowledges and agrees that all [redacted] requests for [redacted] services and any related matters will be exclusively directed to and handled by [redacted]. [The petitioner] shall receive all [redacted] requirements directly from the System, and [the petitioner] shall submit all candidates through the System. [The petitioner] may contact [redacted] hiring managers to obtain clarifying information regarding requests received by [the petitioner] through the System. Otherwise, unless otherwise directed by [redacted] [the petitioner] will deal directly and exclusively with [redacted] with respect to the services and any related matters. . . .

* * *

[redacted] shall pay [redacted], who will in turn pay [the petitioner] those fees described in each SOW

Attached to the Agreement is Exhibit A, which states the benefits that the petitioner is required to provide to its employees on assignment at [redacted]. In other words, the petitioner does not determine the minimum benefits it provides to temporary workers pursuant to this Agreement.

A printout regarding the beneficiary's assignment from the System referred to in the Agreement is also submitted on appeal. This assignment notice states that the beneficiary will work as a Software Design Engineer 3 and will perform the following duties:

Develop software programs of a complex nature, including operating systems, applications and/or network products for external use. Develop project plans, functional specifications and schedules for these products. Designs and performs analysis on complex programs and systems. Assist in determining product requirements and enhancements.

Additionally, the printout states that at least a Bachelor's degree in Engineering, Computer Science, or a related technical field is required for the proffered position.

The petitioner originally filed the petition for a Programmer Analyst to convert project specifications and develop and write computer programs while exercising limited decisions on non-complex tasks at a proffered salary of \$60,000 per year. In response to the RFE, the evidence indicated that the proffered salary would be \$92,000 and that the position title changed from Programmer Analyst to Software Design Engineer 3. On appeal, the duties provided for the Software Design Engineer 3 differ substantially from those originally provided.

On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, or the associated job responsibilities. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). Moreover, a visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. at 248; *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an

effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). As discussed previously, the petitioner has attempted to change the proffered position of an entry-level Programmer Analyst to a Software Design Engineer 3 who is paid a substantially higher salary and whose job description entails developing complex software programs. If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. Therefore, the analysis of this criterion will be based on the job description submitted with the initial petition.

Additionally, although the petitioner has provided evidence that the beneficiary's assignment to the project for Microsoft will end on January 17, 2010, the petitioner has not demonstrated that it has another assignment to which it will assign the beneficiary. Even though the petitioner stated that it has other contracts pursuant to which the beneficiary will work, the petitioner has not indicated to which specific project the beneficiary will be assigned so that the AAO can determine in part whether the duties to be performed for additional clients meet a level of skill and complexity requiring the services of someone with at least a bachelor's degree or the equivalent in a specific specialty.

All this evidence indicates that it is unlikely that the proffered position is a specialty occupation, that the petitioner has sufficient work for the beneficiary covering the requested period in the petition, and that the petitioner will assign the beneficiary to work in the position and at the locations listed in the Form I-129 and LCA for the duration of the petition.

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

The AAO notes that, as recognized by the court in *Defensor v. Meissner*, 201 F.3d at 387, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. The court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work. The record of proceeding lacks such substantive evidence from any end-user entities that may generate work for the beneficiary and whose business needs would ultimately determine what the beneficiary would actually do on a day-to-day basis. As discussed *supra*, the documentation regarding the position description and minimum requirements printed out from the System with [REDACTED] will not be considered because it is for a substantially different title and job description than the one provided previously. Moreover, the minimum requirements provided on appeal also differ from

those originally stated by the petitioner. Additionally, the project with Microsoft ends on January 17, 2010 and the petitioner has not indicated any specific projects to which it intends to assign the beneficiary after this date, even though the requested duration of the petition is from February 9, 2009 to February 9, 2012.

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.

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

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

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

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

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

NLRB v. United Ins. Co. of America, 390 U.S. 254, 258 (1968)).¹

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*

¹ 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 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).

Restatement (Second) of Agency § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. See *Clackamas*, 538 U.S. at 448-449; cf. *New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1), (EEOC 2006) (adopting a materially identical test and indicating that said test was based on the *Darden* decision).

It is important to note that the factors listed in *Darden* and *Clackamas* are not exhaustive and must be evaluated on a case-by-case basis. Other aspects of the relationship between the parties may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met; however, the fact finder must weigh 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).²

Applying the *Darden* test to this matter, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." First, under *Defensor*, it was determined that hospitals, as the recipients of beneficiaries' services, are the "true employers" of H-1B nurses under 8 C.F.R. § 214.2(h), even though a medical contract service agency is the actual petitioner, because the hospitals ultimately hire, pay, fire, supervise, or otherwise control the work of the beneficiaries. See *Defensor v. Meissner*, 201 F.3d at 388.

The petitioner asserts that it will be the employer of the beneficiary. However, the documentation submitted when reviewed in its entirety does not support this conclusion. As discussed previously, according to the Agreement submitted by the petitioner, [REDACTED] and [REDACTED] have the right to reject or end the assignment of the petitioner's [REDACTED]. [REDACTED] has the right to hire the petitioner's workers at any time, (contrary to the petitioner's statement that work would be at its branch office) the work will be onsite at [REDACTED] will provide the hardware and equipment to be used by the petitioner's [REDACTED], and the petitioner does not have the right to contact [REDACTED] directly except to clarify information regarding requests.

Other than putting the beneficiary on its payroll and providing benefits, it is unclear what role the petitioner has in the beneficiary's assignment. No independent evidence was provided to

² It is noted that an employer-employee relationship hinges on the overarching right to control the manner and means by which the product is accomplished. When examining the factors relevant to this inquiry, USCIS must assess and weigh the actual factor itself as it exists or will exist and not the claimed employer's right to influence or change that factor, unless specifically provided for by the common-law test. See *Darden*, 503 U.S. at 323-324. For example, while the assignment of additional projects is dependent on who has the right to assign them, it is the actual source of the instrumentalities and tools that must be examined, not who has the right to provide the tools required to complete an assigned project. See *id.* at 323.

indicate that the petitioner would control whether there is any work to be performed or that the petitioner would even oversee the beneficiary's work. Therefore, it must be concluded that AGS, Microsoft, or any other company to which the beneficiary may be contracted would oversee any work the beneficiary performs.

In view of the above, it appears that the beneficiary will not be an "employee" having an "employer-employee relationship" with the petitioner or even with a "United States employer" represented by the petitioner in an established agent relationship. It has not been established that the beneficiary will be "controlled" by the petitioner or that the termination of the beneficiary's employment is the ultimate decision of the petitioner. To the contrary, it appears that [REDACTED] will ultimately control the beneficiary's employment. Moreover, given that the assignment to [REDACTED] through [REDACTED] is the only one specifically listed by the petitioner, whether there is any work to be performed by the beneficiary as well as the nature of that work is controlled completely by [REDACTED] and [REDACTED]. Therefore, based on the tests outlined above, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii).

The AAO therefore affirms the director's finding that the petitioner does not qualify as a United States employer as it also failed to establish that it has sufficient work and resources for the beneficiary. Moreover, the petitioner has not provided sufficient documentation to establish that it is the entity with ultimate control over the beneficiary's work.

Finally, the AAO also finds that the petitioner failed to establish that the LCA corresponds to the petition by encompassing all of the work locations and related wage requirements for the beneficiary's full employment period. For this additional reason, the petition cannot be approved.

In pertinent part, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B) states:

The petitioner shall submit the following with an H-1B petition involving a specialty occupation: (1) A certification from the Secretary of Labor that the petitioner has filed a labor condition application

The regulation at 8 C.F.R. § 103.2(b)(1) states, in pertinent part:

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.

In addition, the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1), states, as part of the general requirements for petitions involving a specialty occupation, that:

Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it

has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

Further, the regulation at 8 C.F.R. § 214.2(h)(2)(E), which states:

Amended or new petition. The petitioner shall file an amended or new petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition. An amended or new H-1C, H-1B, H-2A, or H-2B petition must be accompanied by a current or new Department of Labor determination. In the case of an H-1B petition, this requirement includes a new labor condition application.

It is self-evident that a change in the location of a beneficiary's work to a geographical area not covered by the LCA filed with the Form I-129 is a material change in the terms and conditions of employment. Because work location is critical to the petitioner's wage rate obligations, the change deprives the petition of an LCA supporting the period of work to be performed at the new location as of the time the petition was filed with USCIS.³

³ To ascertain the intent of a petitioner, USCIS must look to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. If a petitioner's intent changes with regard to a material term and condition of employment or the beneficiary's eligibility, an amended or new petition must be filed. To allow a petition to be amended in any other way would be contrary to the regulations. Taken to the extreme, a petitioner could then simply claim to offer what is essentially speculative employment when filing the petition only to "change its intent" after the fact, either before or after the H-1B petition has been adjudicated. The agency made clear long ago that speculative employment is not permitted in the H-1B program. A 1998 proposed rule documented this position as follows:

Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. See section 214(i) of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998). While a petitioner is certainly permitted to change its intent with regard to non-speculative employment, e.g., a change in duties or job location, it must nonetheless document such a material change in intent through an amended petition in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E).

Moreover, while DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part:

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

[Italics added].

The LCA and Form I-129 in this matter, which indicate the proffered position as being for a Programmer Analyst do not correspond with the information provided on appeal, which indicates that the beneficiary will work as a Software Design Engineer 3. Additionally, the assignment in [REDACTED] terminates January 17, 2010. Although the petitioner stated that at the end of the assignment, the beneficiary will work at its office in [REDACTED] the petitioner has not provided evidence that it has a specific project for which it intends to assign the beneficiary in that location. 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)). In light of the fact that the record of proceeding indicates that the beneficiary will likely work in a different position and at locations not identified in the Form I-129 and the LCA filed with it, USCIS cannot conclude that this LCA actually supports and fully corresponds to the H-1B petition. 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. at 248.

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.