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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

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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,

for Michael T. Kelly
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 AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary in the position of assistant project manager as an H-1B nonimmigrant 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 petitioner describes itself as an e-business and applications outsourcer providing software development and application management services and indicates that it currently employs over 31,000 persons worldwide.

In denying the petition, the director determined that the beneficiary was not qualified to perform the duties of a specialty occupation. Specifically, the director found that there was no nexus between the beneficiary's degree and the proffered position. On appeal, counsel contends that the director's conclusion was erroneous, and asserts that by treating all pieces of evidence individually instead of examining their relationship individually resulted in legal and factual error. Counsel contends that the beneficiary, by virtue of his extensive experience in the industry, is in fact qualified to perform the duties of the proffered position.

As a preliminary issue, the AAO will examine the record to determine whether the proffered position is that of a specialty occupation. Most directors should, and will, first determine whether a job is a specialty occupation before deciding whether the individual is qualified for the claimed specialty occupation. A beneficiary's credentials to perform a particular job, therefore, are relevant only when the job is found to be a specialty occupation. In this matter, however, the director did not analyze the proffered position to determine whether it met the definition of a specialty occupation. As discussed below, the petitioner has not established the proffered position as a specialty occupation, as the record of proceeding fails to establish that actual performance of the proffered position requires the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. The AAO conducts appellate review on a *de novo* basis (*See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)), and it was in the exercise of this function that the AAO identified this additional ground for denying the petition.

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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii):

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, the position must also meet one of the following criteria:

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d at 387. 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 contains insufficient evidence as to where and for whom the beneficiary would be performing his services, and whether his services would be that of an assistant project manager.

When filing the I-129 petition, the petitioner averred in its December 30, 2008 letter of support that it is a "leading e-business and applications outsourcer providing software development and application management services to Fortune 1,000 companies." It further claimed that approximately 100 of its customers and business technology partners are Fortune 500 companies. With regard to the beneficiary's proposed position of assistant project manager, the petitioner stated that it seeks to directly employ the beneficiary as an assistant project manager on a worksite in New York, New York. Regarding the beneficiary's position, the petitioner stated:

As an Assistant Project Manager of [the petitioner], [the beneficiary] will continue to serve as a team lead for project modules. The responsibilities of the position will continue to include the delivery of assigned project modules, components, phases, and the management of up to 20 [of the petitioner's] Programmers, Programmer Analysts, Systems Analysts, and/or Senior Systems Analysts. Other duties will continue to include status reporting; guiding a development team; estimation, planning and execution with specific focus on requirement analysis and design; knowledge transfer and meeting deadlines; resolving technical problems; and setting goals and providing performance feedback for subordinates. As an Assistant Project Manager of [the petitioner], [the beneficiary] will continue to report to [the petitioner's] managers and directors.

The petitioner also included a description of these duties in chart form, which outlined the percentage of time the beneficiary would devote to each area. In addition, the petitioner provided some additional details regarding the nature of each stated duty. The petitioner also stated that it would compensate the beneficiary with an annual salary of \$85,500.

No independent documentation, such as agreements with end clients or contracts for the beneficiary to work on specific projects such as the one in New York, New York, was submitted. The petitioner, by its own admission, is engaged in an industry that typically outsources its personnel to client sites to work on particular projects. Moreover, the petitioner claims that the beneficiary would work for the petitioner's client, [REDACTED]. However, no specific claim or contractual agreement was submitted to support this contention, and the record contains no evidence that outlines for whom the beneficiary would render services and what his duties would include at this worksite.

It is further noted that the petitioner claims in its December 30, 2008 letter of support that it is not a placement company. However, as discussed above, it maintains that the beneficiary will work onsite for [REDACTED] in New York. These contentions are contradictory and remain unclear. 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).

Finally, the petitioner claims in the December 30, 2008 letter that in addition to managing the petitioner's relationship with [REDACTED] the beneficiary also oversees several of the petitioner's projects at multiple U.S. worksites. Noting that the petitioner claimed that its clients are located throughout North America and the world, the AAO concludes that worksite changes during a beneficiary's tenure with the petitioner are not uncommon.

Despite the petitioner's claims that it is the beneficiary's employer and that it will control and oversee the beneficiary's work, the petitioner is not the entity for whom the beneficiary will perform his duties. Based on the overview of its business as outlined in the letter of support, it appears that the end-user utilizing the services of the beneficiary actually determines the job duties to be performed at a given worksite.

Contractual agreements between the petitioner and its clients, in the form of service agreements, work orders, or letters from authorized officials of clients companies, are necessary in order to determine the exact nature of the duties the beneficiary would undertake, which is a critical factor in evaluating whether he would be employed in a specialty occupation position. Absent these agreements, it was impossible to determine the project to which the beneficiary will be assigned; that the duties to be performed are those of a specialty occupation; and that specialty occupation work will be available to the beneficiary during his employment with the petitioner.

The petitioner's letter dated December 30, 2008 provides a generic summary of the duties of an assistant project manager. Moreover, the chart with a breakdown of the percentage of time the beneficiary would devote to each of the duties of the proffered position failed to provide any additional or specific details with regard to the exact nature of the projects upon which the beneficiary would work. While the petitioner claims that the beneficiary will work on projects designed and developed by the petitioner, the record reflects that the petitioner generally outsources personnel to work at client sites on specific client-mandated projects. No details regarding the project(s) on which the beneficiary would work were provided.

Based on this evidence, it is clear that the beneficiary's duties could potentially vary widely based on the requirements of a client at any given time. Once again, this renders it necessary to examine the ultimate end-clients of the petitioner to determine the exact nature and scope of the beneficiary's duties for each client, since it is logical to conclude that the services provided to one client may differ vastly from the services provided to another.

Although the petitioner submits a detailed letter of support, it has failed to substantiate its claims with contracts, work orders, or other documents. 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)).

Without evidence of contracts, work orders, or statements of work describing the duties the beneficiary would perform and for whom, the petitioner fails to establish that the duties that the beneficiary would perform are those of a specialty occupation. Providing a generic job description that speculates what the beneficiary may or may not do at each worksite is insufficient. Moreover, providing such a generic job description, then contending that the beneficiary will not in fact work to design systems for clients but rather will work only on

projects designed and built by the petitioner only contradicts the basic nature of the petitioner's described business operations structure. As previously stated, 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. at 591-92.

In support of this analysis, USCIS routinely cites *Defensor v. Meissner*, 201 F.3d 384, in which an examination of the ultimate employment of the beneficiary was deemed necessary to determine whether the position constitutes a specialty occupation. The petitioner in *Defensor*, Vintage Health Resources (Vintage), was a medical contract service agency that brought foreign nurses into the United States and located jobs for them at hospitals as registered nurses. The court in *Defensor* found that Vintage had "token degree requirements," to "mask the fact that nursing in general is not a specialty occupation." *Id.* at 387.

The court in *Defensor* held that for the purpose of determining whether a proffered position is a specialty occupation, the petitioner acting as an employment contractor is merely a "token employer," while the entity for which the services are to be performed is the "more relevant employer." *Id.* at 388. The *Defensor* court recognized that evidence of the client companies' job requirements is critical where the work is to be performed for entities other than the petitioner. The *Defensor* court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. *Id.* In *Defensor*, the court found that evidence of the client companies' job requirements is critical if the work is to be performed for entities other than the petitioner. *Id.*

Despite the petitioner's claims that it will serve as the beneficiary's employer, the AAO finds that it remains unclear from the record whether the petitioner will in fact be an employer or will act as an employment contractor. Moreover, the petitioner's failure to provide specific documentation outlining the nature of the beneficiary's employment renders it impossible to conclude for whom the beneficiary will ultimately provide services and exactly what those services would entail. The AAO, therefore, cannot analyze whether the beneficiary's duties in-house or at each worksite would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation, 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. 8 C.F.R. § 214.2(h)(4)(iii)(A). 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 pursuant to 8 C.F.R. § 214.2(h)(1)(B)(1).

As will now be discussed, the AAO also finds an additional aspect of the record of proceeding that precludes approval of this petition, namely, the range of majors or academic concentrations that the petitioner finds acceptable for the proffered position.

The petitioner claimed that the minimum requirements for entry into the specialty occupation position of assistant project manager are a Bachelor's degree in Computer Science, Computer Information Systems, Mechanical Engineering, Engineering, Business, a closely related science field, or an equivalent thereof, and work experience.¹ Such a wide range of acceptable majors or academic concentrations is not indicative of a position requiring the theoretical and practical application of a distinct body of highly specialized knowledge in a specific specialty, as required by section 214(i)(1) of the Act and its implementing regulation at 8 C.F.R. § 214.2(h).

A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration or engineering, without further specification, does not establish the position as a specialty occupation. *See Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988). To prove that a job requires the theoretical and practical application of a body of specialized knowledge as required by Section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study. As explained above, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. USCIS has consistently stated that, although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).

For the reasons discussed above, the petitioner has failed to establish that the beneficiary would be performing the duties of a specialty occupation. For this reason, the petitioner must be denied.

While the beneficiary's qualifications are no longer at issue in these proceedings, the AAO will nevertheless examine this issue, as it was raised on appeal.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess full state licensure to practice in the occupation, if such licensure is required to practice in the occupation, and completion of the degree in the specialty that the occupation requires. If the alien does not possess the required degree, the petitioner must demonstrate that the alien has experience in the specialty equivalent to the completion of such degree, and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

¹ The petitioner asserted that the beneficiary held the equivalent of a U.S. Bachelor of Science degree in Computer Information Systems, in addition to experience in the information technology industry.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, an alien must meet one of the following criteria:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), to succeed in equating the beneficiary's credentials to a United States baccalaureate or higher degree under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), the beneficiary would have to present one or more of the following:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

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

As will now be discussed, the AAO finds that the director's decision to deny the petition for the petitioner's failure to establish that the beneficiary was qualified to perform services in the asserted specialty occupation position was correct. Accordingly, the appeal must be dismissed and the petition must be denied.

The director found that the beneficiary was not qualified for the proffered position because the beneficiary's degree in manufacturing engineering did not appear to qualify him for the position of project manager at the petitioner's company. On appeal, counsel contends that the director erred by not examining all of the evidence collectively submitting in reaching a determination with regard to the beneficiary's qualification.

At the outset, the AAO finds that the director was correct in his determination, evident in the body of his decision denying the petition, that the petitioner asserted the defining aspect of the proffered position as a specialty occupation as being its focus on, and requirement for knowledge in, computer technology and information technology. However, as will now be discussed, the AAO finds that the evidence in the record of proceeding fails to establish that the beneficiary had obtained a bachelor's degree, or the equivalent, in either or both areas.

To establish the beneficiary's qualifications, the petitioner relied in material part upon the evaluations of education and experience that were produced for the petitioner by three separate sources, namely, (1) the Foundation for [REDACTED]; (2) a [REDACTED], a [REDACTED], and (3) a [REDACTED] of the Department of Statistics and Computer Information Systems at Baruch College/CUNY School for Business.

The AAO finds that, as its statements regarding the beneficiary's formal education are corroborated by satisfactory documentation of record and as the evaluating entity is qualified under the pertinent USCIS regulations to evaluate foreign education by virtue of its being an agency specializing in the evaluation of foreign educational credentials, the segment of the FIS evaluation that deals with the beneficiary's foreign education is sufficient to establish that he holds the equivalent of a U.S. bachelor's and master's degree in manufacturing engineering. However, the AAO also finds that the FIS attempt to establish the equivalency of the beneficiary's training and/or experience has no evidentiary value, as the record of proceeding does not establish that the FIS evaluator is "an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience," as required for evaluations of training and/or experience by 8 C.F.R. § 214.2(h)(4)(iii)(C)(4)(1).

The AAO also finds that the portion of [REDACTED] evaluation that purports to evaluate the beneficiary's experience has no evidentiary value, as the evidence of record does not establish that, at the date of his evaluation, he was "an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience," as required for evaluations of training and/or

experience by 8 C.F.R. § 214.2(h)(4)(iii)(C)(4)(1). In this regard the AAO notes that, as wordy and circuitous as it is, the letter endorsing the professor's status neither still neither addresses nor satisfies all of the requisite elements of 8 C.F.R. § 214.2(h)(4)(iii)(C)(4)(1). Moreover, the AAO accords no evidentiary value to the letter of endorsement as it is dated July 12, 2004 – almost five years before the professor's evaluation.

Likewise, the record of proceeding fails to establish that [REDACTED] is an official within the meaning of 8 C.F.R. § 214.2(h)(4)(iii)(C)(4)(1). The letter of endorsement is of no evidentiary value. First, as it is dated "8/02/04," it predates [REDACTED] October 14, 2008 evaluation by more than four years. Therefore, as with the letter endorsing [REDACTED], its relevance is not established, for it is not apparent that it reflects circumstances at the time of the evaluation, or, for that matter, that the letter's author was even alive, let alone employed by the relevant educational institution, on the date of the evaluation. Further, while the endorsing letter speaks of the professor's qualifications, it fails to state that the professor is an authorized official within the meaning of 8 C.F.R. § 214.2(h)(4)(iii)(C)(4)(1).

As a consequence of the petitioner's failure to produce an evaluation of the beneficiary's experience that complies with the regulatory requirements for such, the record of proceeding establishes that the beneficiary has attained only the foreign-degree equivalents of a U.S. bachelor's degree in Manufacturing Engineering and a U.S. master's degree in Engineering Management. However, based upon its review of the record of proceeding, and, in particular, the evidence therein of the beneficiary's coursework, the AAO finds that the petitioner has not established that either or both degrees are in a computer or information technology specialty, as would be required if the proffered position were the type of specialty occupation position that the petitioner asserts it to be – which, as previously discussed, it is not.

Beyond the decision of the director, the AAO questions whether the petitioner has established that it meets the regulatory definition of an intending United States employer. Section 101(a)(15)(H)(i)(b) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). Specifically, the AAO must determine whether the petitioner has established that it will have "an employee-employer relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii)(2).

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), defines an H-1B nonimmigrant as an alien:

(i) who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 1184(i)(1) . . . , who meets the requirements of the occupation specified in section 1184(i)(2) . . . , and with respect to whom the Secretary of Labor determines . . . that the intending employer has filed with the Secretary an application under 1182(n)(1).

"United States employer" is defined in the Code of Federal Regulations at 8 C.F.R. § 214.2(h)(4)(ii) as follows:

United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
- (3) Has an Internal Revenue Service Tax identification number.

Upon review, the AAO finds that the record is not persuasive in establishing that the petitioner or 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 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.

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

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, 387-8 (5th Cir. 2000). Accordingly, despite the intermediary position of the employment agency, the ultimate employer must still satisfy the requirements of the statute and regulations: "To interpret the regulations any other way would lead to an absurd result." *Id.* at 388.

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*").³ 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)).⁴

³ It is noted that counsel for the petitioner argues on appeal that the controlling Supreme Court case to be followed in assessing whether an employment relationship exists is *NLRB v. United Ins. Co. of America*, 390 U.S. 254 (1968) (hereinafter "*NLRB*"). The AAO respectfully disagrees. While *NLRB* is still applicable, the common law test was not specifically stated, and the *NLRB* court instead laid out a test based on the common law that fit the specific facts in that case. As such, the test as developed in the Supreme Court's later decisions of *Darden* and *Clackamas* is more representative of the general test to be applied and is, therefore, better suited to be applied in cases, such as this one, in which the facts do not mirror those in *NLRB*.

⁴ 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

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 (5th Cir. 2000) (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

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."

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 indicates its engagement of the beneficiary to work in the United States, this documentation alone provides no details regarding the nature of the job offered or the location(s) where the services will be performed. Therefore, the petitioner has failed to establish that an employer-employee relationship exists.

As stated previously, the petitioner averred in its December 30, 2008 letter of support that it is a "leading e-business and applications outsourcer providing software development and application management services to Fortune 1,000 companies." It further claimed that approximately 100 of its customers and business technology partners are Fortune 500 companies. Regarding its business model, the petitioner stated as follows:

[The petitioner] designs, engineers, and implements business solutions on a project basis for companies that are not in the IT sector. All of our employees work directly for [the petitioner] on projects designed and built by our company, and under the supervision of one or more [Project Managers for the petitioner]. All projects are completely managed by [the petitioner]. Accordingly, the petitioner is not a placement company, nor an agent that arranges short-term employment.

[The petitioner's] relationship with clients is that of independent contractor, and no other relationship exists, including employment, joint venture, or agency. [The petitioner] enters into a master service contract with its clients to set forth this contractual relationship. [The petitioner] is at all times fully responsible for the actions and omission of all its employees, whether or not such employees are working on site at a client facility.

The petitioner further contended that it maintained an employer-employee relationship with the beneficiary. Regarding the employment of the beneficiary and its other employees, the petitioner claimed:

[The petitioner] will have a direct employer-employee relationship with [the beneficiary]. In the course of the employer-employee relationship, [the petitioner] will exclusively and directly hire, pay, fire, supervise, and otherwise control [the beneficiary's] work activities, including all of his job duties and responsibilities.

As discussed above, no independent corroborating documentation was submitted to support the petitioner's claims, e.g., agreements with end clients or contracts for the beneficiary to work on specific projects such as the one in New York, New York. The record contains simply the letter of support and the response to the request for evidence, both of which contend that the beneficiary, as well as other employees of the petitioner,

work on client projects as mandated by business or client needs. The petitioner claims that it enters into master service agreements with all of its clients; however, it failed to submit copies of such agreements citing confidentiality provisions.

As discussed above, the AAO finds that contractual agreements between the petitioner and its clients, in the form of service agreements, work orders, or letters from authorized officials of clients companies are necessary in order to determine the exact nature of the duties the beneficiary would undertake in order to evaluate whether he would be employed in a specialty occupation position. Instead, the petitioner maintained that the beneficiary would work solely on projects designed and built by the petitioner.

The minimal information contained in the record is insufficient to show that a valid employment agreement or credible offer of employment existed between the petitioner and the beneficiary at the time the petition was filed. The petitioner did not submit an employment contract or any other document describing the beneficiary's claimed employment relationship with the petitioner, nor did it submit any corroborating documentary evidence to support the claims that the beneficiary would work on a specific worksite in New York and be supervised by another employee of the petitioner. This is particularly relevant since the petitioner is a corporation based in New Jersey. Therefore, it has not been established that the beneficiary will be "controlled" by the petitioner in that relevant factors material to that inquiry cannot be determined based on the evidence of record as currently constituted, e.g., (1) who will oversee and direct the work of the beneficiary; (2) who will provide the instrumentalities and tools; (3) where will the work be located; (4) who has the right or ability to affect the projects to which the alien beneficiary is or will be assigned; and (5) who has the authority to terminate the beneficiary from a project. Without full disclosure of all of the relevant factors, the AAO is unable to properly assess whether the requisite employer-employee relationship will exist between the petitioner and the beneficiary. As such, absent evidence pertaining specifically to the requested validity period of this petition, the AAO is prohibited from concluding that the petitioner would be the beneficiary's employer. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

Therefore, 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).

In addition, the petitioner has not established that will be an agent under 8 C.F.R. § 214.2(h)(2)(i)(F), which 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. Once again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

A final issue not addressed by the director is whether the petitioner submitted a valid Labor Condition Application (LCA) for all work locations, as required by 8 C.F.R. § 214.2(h)(2)(i)(B).

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):

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.

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

With regard to Labor Condition Applications, section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A), requires in pertinent part the following (with emphasis added):

The employer—

(i) is offering and will offer . . . nonimmigrant wages that are at least—

* * *

(II) the prevailing wage level for the occupational classification *in the area of employment*

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

Based on a review of the statutory and regulatory provisions cited above, 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.

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.*

(Emphasis added).

The LCA submitted with the petition lists New York, New York as the beneficiary's work location. In reviewing the petition's supporting documentation, however, the AAO finds that the actual work location(s) for the beneficiary cannot be determined with any reasonable certainty. The December 30, 2008 letter of support indicates that at a minimum, the petitioner's clients are based throughout the United States and possibly globally. For example, while the petitioner failed to disclose the names of all of its clients, it repeatedly states that many of its clients are Fortune 500 companies, which presumably are based throughout North America and the world.

Absent end-agreements with clients, the duration and location of work sites to which the beneficiary will be sent during the course of his employment cannot be determined. The beneficiary's claimed work location of New York, New York has not been established, due to the absence of evidence demonstrating an ongoing agreement for the beneficiary's services for the entire validity period at that location.

The Form I-129 filing requirements imposed by regulation require that the petitioner submit evidence of a certified LCA at the time of filing. There is no evidence to negate a finding that the beneficiary would ultimately be outsourced to additional client sites as deemed necessary during the 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).

Absent documentary evidence in the form of a concise itinerary, contracts, or work orders outlining the duration and scope of the beneficiary's employment in the United States, the AAO cannot conclude that the LCA submitted encompasses all of the beneficiary's intended work locations, including even the New York, New York location. The petitioner, therefore, 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.

Again, as earlier discussed at length, beyond the decision of the director the AAO also finds that the petition must also be denied because the record of proceeding does not establish the proffered position as a specialty occupation. The AAO conducts appellate review on a *de novo* basis (*See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)), and it was in the exercise of this function that the AAO identified this additional ground for denying the petition.

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 director's decision is affirmed. The petition is denied.