

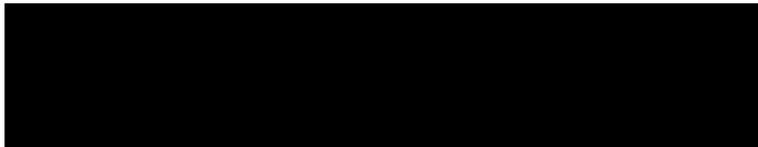
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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090

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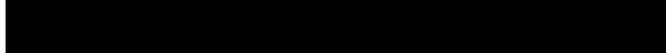
DATE: MAY 02 2011

Office: VERMONT SERVICE CENTER

FILE: 

IN RE:

Petitioner: 

Beneficiary: 

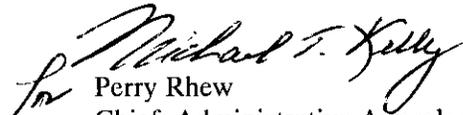
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the  
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

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

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

Thank you,

  
Perry Rhew  
Chief, Administrative Appeals Office

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

The petitioner is engaged in information technology consulting services. It seeks to employ the beneficiary as a software engineer and to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner failed to: (1) submit an itinerary for all work locations of the beneficiary; (2) submit a valid Labor Condition Application (LCA) for all work locations of the beneficiary; and (3) establish that the proposed position qualifies for classification as a specialty occupation. On appeal, the petitioner submits a letter in support of the contention that it has met all regulatory requirements.

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

In the letter of support dated March 31, 2009, the petitioner claimed that it is "a premier IT services company specializing in providing system integration and consulting services to a wide variety of clients." It further stated that its employees collaborate with and help clients to realize their requirements. With regard to the beneficiary, it claimed that she would be employed as a software engineer, and would work in developing software and applications for a range of industries. As evidence of this relationship, the petitioner submitted an offer of employment letter dated March 31, 2009, which indicated that the beneficiary's annual salary would be \$62,629.00.

The director found the initial evidence insufficient to establish eligibility, and thus issued an RFE on May 18, 2009. The petitioner was asked to submit an itinerary for the beneficiary, outlining all work locations and the duration of all assignments, as well as further information on the project(s) on which the beneficiary would be assigned. The director requested documentary evidence such as contracts with or letters from clients describing the nature of any projects on which the beneficiary would work.

In a response dated June 15, 2009, the petitioner addressed the director's queries. The petitioner explained that it employs numerous high-end technology professionals that are used by high-profile business entities. It further explained that it had a well-defined business relationship with iGate, a service provider SwissRe, an insurance company. The petitioner claimed that it has entered into a master service agreement with iGate in which the petitioner agreed to provide technology professionals to provide technology support in the area of SAP to both iGate and SwissRe. The petitioner concluded by stating that it intended to use the beneficiary's services on the iGate/SwissRe project in the near future.

Regarding the director's request for an itinerary, the petitioner indicated that no itinerary existed for the beneficiary's services. Instead, the petitioner relied on its master service agreement with iGate as well as its numerous other contracts with vendors which were included in the response to the RFE. The petitioner

concluded that this evidence was sufficient to demonstrate that the beneficiary would be employed in a specialty occupation during the duration of the validity period based on the number of existing contracts the petitioner maintained, since they demonstrated the availability of specialty work for the beneficiary. In support of this contention, the petitioner submitted approximately 23 contracts as well as numerous work orders from additional vendors. However, as noted by the director, none of these agreements identified the beneficiary as a contractor or indicated that the beneficiary would be assigned to these projects.

As noted above, the petition was denied on July 31, 2009 based on the petitioner's failure to submit an itinerary, an LCA encompassing all the locations where the beneficiary would work, and evidence establishing that the proffered position was a specialty occupation. On appeal, the petitioner contends that the director failed to account for "business realities" and argues that it has met its burden of proof. In support of this contention, the petitioner resubmits the evidence previously submitted in response to the RFE.

The AAO will jointly address the questions of whether the petitioner submitted an itinerary and valid LCA with the petition, and thus established filing eligibility at the time the Form I-129 was received by U.S. Citizenship and Immigration Services (USCIS).

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

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

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

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

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 Department of Labor (DOL) in the occupational specialty in which the H-1B worker will be employed. *See* 8 C.F.R. § 214.2(h)(4)(i)(B). The instructions that accompany the Form I-129 also specify that an H-1B petitioner must document the filing of an LCA with the DOL when submitting the Form I-129.

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

*Service or training in more than one location.* A petition which requires services to be performed or training to be received in more than one location must include an itinerary with

the dates and locations of the services or training and must be filed with the Service office which has jurisdiction over I-129H petitions in the area where the petitioner is located. The address which the petitioner specifies as its location on the I-129H petition shall be where the petitioner is located for purposes of this paragraph.

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

The petitioner alleges on the Form I-129 that the beneficiary will work in Edison, New Jersey, which is the location of the petitioner's office. However, no documentation in the record, such as a formal employment agreement or a contract/work order with a vendor, supports this contention. In the letter of support, response to the RFE, and on appeal, the petitioner indicates that the beneficiary will most likely be assigned to the iGate/SwissRe project, but is unable to confirm this contention. It is further noted that the petitioner submitted more than 20 contracts with vendors and clients as a representative sample of the specialized work it had available for the beneficiary.

On appeal, the petitioner argues that "there is no requirement which states that unless there is an itinerary, an approval cannot be issued." According to the regulation at 8 C.F.R. § 214.2(h)(2)(i)(B), however, a petition which requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training. While the petitioner contends that the beneficiary will work on software development projects as needed, there is no contract, work order, or vendor agreement to support this contention. Moreover, the petitioner openly acknowledges that it has no current project for the beneficiary but speculates that she will be assigned to the iGate/SwissRe project. The petitioner further claims that it has no way of knowing at the current time where the beneficiary would be placed should she not be assigned to the iGate/SwissRe project. For purposes of establishing eligibility in this matter, this contention is unacceptable. Again, 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. 248 (reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner failed to provide a concise itinerary covering all work locations for the beneficiary during the requested validity period. For this additional reason, the petition may not be approved.

Therefore, based on the limited evidence submitted pertaining to the assignment(s) of the beneficiary for the duration of the requested validity period, the petitioner has failed to submit the itinerary required by 8 C.F.R. § 214.2(h)(2)(i)(B). No supporting documentation, such as contracts or work orders identifying the actual end client and definitively stating where and for whom the beneficiary will work, has been submitted. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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

As already noted in this decision, 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 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). Again, the instructions that accompany the Form I-129 also specify that an H-1B petitioner must document the filing of an LCA with the DOL when submitting the Form I-129.

In the instant case, the petitioner filed a certified LCA with USCIS along with the initial petition. As noted above, on the Form I-129, the petitioner indicated that the beneficiary would work in Edison, New Jersey. The certified LCA submitted with the petition identified this location as the worksite for the beneficiary. However, there is no employment contract in the record evidencing that the beneficiary will work onsite at the petitioner's offices in Edison, New Jersey, nor is there any other contractual agreement for the beneficiary's services at an end-client site located in Edison, New Jersey. In response to the director's RFE, the petitioner indicated that it most likely would assign the beneficiary to work on the iGate/SwissRe project. It is noted, however, that the documentation in the record demonstrates that iGate is based in Fremont, California, whereas SwissRe is based in Overland Park, Kansas.

The Form I-129 filing requirements imposed by regulation require that the petitioner submit evidence of a certified LCA at the time of filing. Title 20 C.F.R. § 655.705(b) further indicates that an LCA must correspond to the petition with which it is submitted. The LCA submitted with the petition is certified for Edison, New Jersey. If the petitioner anticipates assigning the beneficiary to work onsite at either of the clients discussed above, or any of the more than twenty other clients represented in the contracts and vendor agreements submitted in response to the RFE, it is clear that the LCA will not correspond to the instant petition. The record clearly indicates that the beneficiary will be tasked to various client sites as needed. Since the petitioner indicates in its supporting documentation that it has a diverse client base, it is clear that the potential work locations for the beneficiary could vary widely based on client needs during the course of the requested validity period. A petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248. The petitioner failed to comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B). For this additional reason, the petition may not be approved.

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

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

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

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

*Specialty occupation* means an occupation which requires [1] 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 [2] the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

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

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5<sup>th</sup> Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

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

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

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

The March 31, 2009 support letter submitted by the petitioner describes the proffered position as follows:

- [The beneficiary] will work in developing software and applications for a range of industries. The beneficiary shall be required to analyze business data, gather technical requirements and then analyze the data and technical requirements to come up with an integrated software and application development approach. Thereafter, she will be responsible for outlining technical product/process development requirements. She will further assess and identify the technical tools and software and ascertain those that are most suitable for the project or process, as the case may be. She will be responsible for identifying the programming languages, operating systems, networks, web and database applications needed to achieve the desired software functionality. She must work in a broad as well as in a specialized manner as [she] must keep in mind the broader client needs without losing focus to develop specialized applications that may be required. The software products and applications will be designed with issues and considerations pertaining to scalability, security, transaction ease and speed and user efficiency and friendliness in mind. The beneficiary’s responsibilities will also include development of product/application specification, data validation rules and business logic in accordance with client and business needs and requirements.

In response to the RFE, which requested more specific information regarding each project upon which the beneficiary would work, the petitioner indicated that the beneficiary would most likely be assigned to the iGate/SwissRe project, which required the services in the area of SAP technology and process. No additional description of duties was submitted, and, as discussed in detail above, no contracts or work orders outlining the beneficiary’s proposed duties for this project was submitted.

The statement of duties set forth in the March 31, 2009 letter of support is generic and vague, and fails to specifically discuss the duties of the beneficiary on any particular project. In fact, the description indicates that certain tasks, such as the development of software, would be performed in accordance to client needs and specifications. Therefore, it is evident that the end client on a particular project determines the exact nature of the beneficiary’s duties.

The petitioner claims that the exact nature of the beneficiary's assignments throughout the validity period will vary based on client needs during the duration of the petition, for which approval was requested through September 27, 2012. The uncertainty surrounding the future projects and work assignments of the beneficiary renders it impossible to find that the proffered position is a specialty occupation, since no specific description of the duties the beneficiary will actually perform is included in the record.

The petitioner is responsible for assigning staff to various client projects as needed. As discussed previously, no documentation confirming that the beneficiary will work on the iGate/SwissRe project is submitted, nor are there details with regard to the specific role she would perform on the project.

On appeal, the petitioner provides no documentary evidence to clarify the beneficiary's duties or her project assignments, and instead resubmits the evidence previously submitted prior to adjudication.

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

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

The court in *Defensor* held that for the purpose of determining whether a proffered position is a specialty occupation, the petitioner acting as an employment contractor is merely a "token employer," while the entity for which the services are to be performed is the "more relevant employer." *Id.* at 388. The *Defensor* court recognized that evidence of the client companies' job requirements is critical where the work is to be performed for entities other than the petitioner. *Id.* The *Defensor* court held 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 that evidence of the client companies' job requirements is critical if the work is to be performed for entities other than the petitioner. *Id.*

In this matter, it is unclear whether the petitioner will be an employer or will act as an employment contractor. The job description provided by the petitioner, as well as various statements from the petitioner both prior to adjudication and on appeal, indicate that the beneficiary will be working on different projects throughout the

duration of the petition. Despite the director's specific request for documentation to establish the ultimate location(s) of the beneficiary's employment, the petitioner failed to comply. The petitioner's failure to provide evidence of valid work orders or employment contracts between the petitioner and clients, which identify the beneficiary as personnel and outline the nature of her duties, 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 his duties would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation.

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

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

Beyond the decision of the director, the petitioner has not established that it meets the regulatory definition of an intending United States employer. § 101(a)(15)(H)(i)(b) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). Specifically, the AAO must determine whether the petitioner has established that it will have "an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii)(2).

Section 101(a)(15)(H)(i)(b) of the Act, defines an H-1B nonimmigrant as an alien:

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

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

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

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

The record is not persuasive in establishing that the petitioner or any of its clients will have an employer-employee relationship with the beneficiary.

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

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<sup>1</sup> Under 8 C.F.R. §§ 214.2(h)(2)(i)(F), it is possible for an "agent" who will not be the actual "employer" of a beneficiary to file an H petition on behalf of the actual employer and the alien. While an employment agency may petition for the H-1B visa, the ultimate end-user of the alien's services is the "true employer" for H-1B visa purposes, since the end-user will "hire, pay, fire, supervise, or otherwise control the work" of the beneficiary "at the root level." *Defensor v. Meissner*, 201 F.3d 384, 387-388. Accordingly, despite the 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. 318, 322-323 (1992) (hereinafter "*Darden*") (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). That definition is as follows:

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

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

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<sup>2</sup> 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 (2<sup>nd</sup> 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, 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

Therefore, in considering whether or not one is an "employee" in an "employer-employee relationship" with a "United States employer" for purposes of H-1B nonimmigrant petitions, USCIS will focus on the common-law touchstone of control. *Clackamas*, 538 U.S. at 450. Factors indicating that a worker is an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. 503 U.S. at 323-324; *see also Restatement (Second) of Agency* § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. *See Clackamas*, 538 U.S. at 448-449; *cf. New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1), (EEOC 2006) (adopting a materially identical test and indicating that said test was based on the *Darden* decision); *see also Defensor v. Meissner*, 201 F.3d at 388 (determining that hospitals, as the recipients of beneficiaries' services, are the true "employers" of H-1B nurses under 8 C.F.R. § 214.2(h), even though a medical contract service agency is the actual petitioner, because the hospitals ultimately hire, pay, fire, supervise, or otherwise control the work of the beneficiaries).

It is important to note that the factors listed in *Darden* and *Clackamas* are not exhaustive and must be evaluated on a case-by-case basis. Other aspects of the relationship between the parties may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met; however, the fact finder must weigh and compare a combination of the factors in analyzing the facts of each individual case. The determination must be based on all of the circumstances in the relationship between the parties, regardless of whether the parties refer to it as an employee or as an independent contractor relationship. *See Clackamas*, 538 U.S. at 448-449; *New Compliance Manual* at § 2-III(A)(1).

Likewise, the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450. "Rather, as was true in applying common-law rules to the independent-contractor-versus-employee issue confronted in *Darden*, the answer to whether a shareholder-director is an employee depends on 'all of the incidents of the relationship . . . with no 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."

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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).

In response to the director's RFE, in which contracts and/or work orders between the petitioner and end clients were requested, the petitioner claimed that the beneficiary would most likely work for on the iGate/SwissRe project, and submitted generic letters from each company outlining their basic needs. Additionally, the petitioner submitted a copy of its vendor services agreement with iGate executed on November 12, 2008.

To qualify as a United States employer, all three criteria at 8 C.F.R. § 214.2(h)(4)(ii) must be met. The Form I-129 and tax documents submitted by the petitioner indicate that the petitioner has an Internal Revenue Service Tax Identification Number. While the petitioner's letter of support and its offer of employment letter, both dated March 31, 2009, indicate its intent to engage the beneficiary to work in the United States, no specific agreement or contract was submitted demonstrating an employer-employee relationship between the petitioner and the beneficiary. Therefore, the documentation submitted by the petitioner is insufficient to establish that an employer-employee relationship exists.

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

The petitioner contends that it will assign personnel to various client projects as needed, and claimed in its initial support letter to have clients throughout the United States. Additionally, in response to the RFE, the petitioner stated that it could not provide an itinerary for the beneficiary's time in the United States, since the nature of the petitioner's business does not permit the accurate prediction of where the beneficiary could potentially be located for the duration of the petition. Noting that this uncertainty was a part of the petitioner's business operations, it concluded that it was unable to provide an itinerary and complete overview of the work assignments the beneficiary would hold during the course of her employment.

The contracts and vendor agreements with various clients shed little light on the beneficiary's proposed position, since these documents make no mention of the beneficiary. Moreover, the petitioner does not even know where the beneficiary will be employed after the approval of the petition and for the duration of the validity period.

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

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

the director's specific request for evidence such as employment contracts or agreements to corroborate its claim, the petitioner failed to submit such evidence.

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

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

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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.