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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: CALIFORNIA 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 California Service Center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a software consultancy firm. It seeks to employ the beneficiary as a programmer analyst pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on the following grounds: (1) the petitioner does not qualify as a United States employer or agent; (2) the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation; and (3) the petitioner is required to submit a valid Labor Condition Application (LCA) for all work locations.

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

In the petition submitted on October 14, 2009, the petitioner stated it has 16 employees and a gross annual income of \$1.7 million. The petitioner indicated that it wished to employ the beneficiary as a programmer analyst from October 15, 2009 through September 30, 2012 at an annual salary of \$60,000.

The support letter states that the beneficiary will work on a software development project at the petitioner's client site in Indianapolis, IN and will participate in the software development life cycle, including analysis, estimation, coding, testing and support, including the following functions:

- Perform impact analysis on the enhancements to the existing application;
- Analyze the requirements of the work request and provide an estimate;
- Perform design, documentation of test scripts and plans;
- Code and unit testing, regression testing, and user acceptance testing;
- Provide support after implementation;
- Code and documentation review;
- Resolution of defects;
- Work closely with the client to understand and deliver the requirements;
- Comply with the quality procedures of the client; and
- Prepare functional test plan, technical specification and sign off package.

The petitioner states the proffered position requires at least a Bachelor's degree in Engineering, Computer Science, Computer Information Systems, Management Information Systems, Math or a directly related field, or the equivalent.

The Form I-129 indicates that the beneficiary will work at the petitioner's client site in Indianapolis, IN for the duration of the petition. The submitted LCA was filed for the

beneficiary to work in Indianapolis, IN from October 1, 2009 to September 30, 2012.

The petitioner submitted the beneficiary's education documents, resume, and reference letters, indicating that she has a foreign degree and experience. Her foreign education has been evaluated as equivalent to a U.S. Master's degree in Computer Science.

On October 20, 2009, the director issued an RFE stating, in part, that the evidence of record is not sufficient to demonstrate that a specialty occupation exists. The petitioner was advised to submit documentation clarifying the petitioner's relationship with the beneficiary, which could include an itinerary of definite employment, listing the names of the employers and locations where the beneficiary would provide services, as well as copies of its contractual agreements with its clients. The petitioner was also advised to submit documentation containing a more detailed description of the proffered position and additional evidence that the proffered position is a specialty occupation. The RFE specifically noted that "[t]he evidence must show specialty occupation work for the beneficiary with the actual end-client company where the work will ultimately be performed. . . ." The director also requested evidence regarding the petitioner's business.

The petitioner responded that the beneficiary will work at the offices of the petitioner's client, RCR Technology Corporation, in Indianapolis, IN on a project for the State of Indiana. The petitioner stated that:

The existing legacy system based solution at the State of Indiana is out-dated and needs to be replaced with a more robust and technically advanced solution that can cater to the full spectrum of requirements. The business processes behind the existing legacy solution have been primarily paper-based with the support of a mainframe based solution for data entry and processing. The processing of applications using these legacy systems was inefficient, time consuming, labor intensive and costly. Non-availability of on-line history data and on-line documents is a major drawback in the current legacy solution. . . .

State of Indiana Eligibility Modernization has large amount of data stored in the mainframe, pSeries, windows with millions of records in existence for many years. The new eligibility modernization project will not only improve the quality of services but also will have ability to process many requests per day or hour to determine the eligibility of a client. The solution developed and implemented will help in collection of vital data from applicants, provide an online repository for document storage and speedy retrieval, determine eligibility and assist in efficient and accurate decision making. The beneficiary will be required to work as a team member as a Programmer Analyst on this modernization project, in developing and analyzing software components of the system currently underway at RCR Technology Corporation. In particular, [the beneficiary] will be participating in implementation of this project. She will also provide ongoing technical support. She will work with business analysts in collecting and studying the requirements and preparing specifications; work in teams to modify, implement and test the system applications.

Petitioner will remain her employer throughout the time period requested. This apart, the petitioner will compensate the beneficiary as mandated by the LCA petition filed with the Department of Labor. We have not entered into any cont[r]act with the beneficiary at this time. However, if the current petition is approved, we will sign a standard employment contract with the beneficiary, which will include a non-compete clause, and other standard clauses e.g. that she will be paid annual salary as indicated in our petition, etc. The beneficiary would be required to work 40 hours per week, under the supervision of Team Leader. She will not supervise any employees. . . .

The petitioner included a copy of its Master Agreement with [REDACTED] along with a Statement of Work (SOW) pertaining to the beneficiary. The SOW is dated October 5, 2009 and indicates the beneficiary will provide programming services for the State of Indiana client eligibility modernization project from January 18, 2010 to July 11, 2011, a shorter period of time than the period of H-1B status requested in the petition.

The director denied the petition on December 31, 2009.

On appeal, the petitioner provides a letter from [REDACTED], dated January 20, 2010, which states as follows:

[REDACTED] has signed an agreement with [the petitioner] for obtaining services of skilled IT professionals for above referred State of Indiana Client Eligibility Modernization Project, and [the petitioner] has selected [the beneficiary] to provide the needed services. As a Programmer Analyst, [the beneficiary] will be responsible to participate in various functions of software development life cycle. Her work will include performing impact analysis on the enhancements to the existing application, analyzing the requirements of work requests, performing design, documentation of test scripts and plans, coding and unit testing, code review, documentation reviews, resolution of defects complying with our quality procedures, and providing support after implementation.

The work to be performed is that of a professional. We require that in order to satisfactorily perform above duties, the candidates working on this project should have at least a bachelor's degree or its equivalent in computer science or a closely related field. . . .

[REDACTED] is the end client for this project. Though the project is for the benefit of State of Indiana, the work will not be performed at the offices of State of Indiana. As explained above, [REDACTED] has been providing these services since 2006. The work will be performed at offices of [REDACTED] [in Indianapolis, IN]. This is a long term on-going project and we require the services of [the beneficiary] for at least three years with the possibility of extension thereafter.

Please also note that [the petitioner] will supervise and have the complete right to control the work of [the beneficiary]. Under the agreement, [the petitioner] is responsible to provide services of an efficient and qualified candidate in terms of education and experience. We have every reason to believe that [the beneficiary] is an ideal candidate for this project. [The beneficiary] will report to her manager from [the petitioner], who will be responsible for the overall direction of her work. . . .

It therefore appears that the petitioner is responsible for assigning other people in addition to the beneficiary to the State of Indiana Client Eligibility Modernization Project at [REDACTED]. However, details are not provided about the nature of the project or the beneficiary's specific role in that project. It is not clear why [REDACTED] has contracted with the petitioner to provide resources for the project. Although the evidence demonstrates that the beneficiary would not be the only programmer analyst who will work on this project, no information was provided about other programmer analysts, their qualifications, and how their roles are similar or different from the beneficiary's. 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)).

Although the petitioner stated in response to the RFE that it had not signed a contract with the beneficiary, on appeal the petitioner has submitted an offer letter dated July 7, 2009, which is signed by both the petitioner and the beneficiary. This letter states that the beneficiary will work as a Programmer Analyst on the Indiana Client Eligibility System Modernization Project in Indianapolis, ND and will report to the petitioner's Program Manager, who is listed by name.

On appeal, the petitioner states that it provides both onsite and offsite consulting services and develops its own products. The petitioner further states that some of its employees work on the petitioner's in-house projects while others are assigned off-site, including the project to which the petitioner intends to assign the beneficiary.

The petitioner argues that [REDACTED] and not the State of Indiana, is the petitioner's end client as the project is independent and belongs entirely to [REDACTED]. The petitioner further states that the beneficiary will not work at the offices of the State of Indiana and will report to her manager, who is also the petitioner's employee, and moreover, that the beneficiary's work will not be controlled by [REDACTED]. The petitioner states that [REDACTED] has agreed that it is the petitioner who has control in dictating the kind of services and duties to be performed by the beneficiary and that the beneficiary will only work on the one project with [REDACTED] in Indianapolis, IN for the duration of the petition.

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

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

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

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

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

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

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but

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

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

In this matter, the petitioner seeks the beneficiary’s services as a Programmer Analyst.

To make its determination whether the employment described qualifies as a specialty occupation, the AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Factors considered by the AAO when determining these criteria include: whether the Department of Labor’s *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry’s professional association has made a degree in a specific specialty a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms “routinely employ and recruit only degreed individuals.” *See Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

Upon review, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which assigns specialty-occupation status to a position for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position’s duties.

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses. The Programmer Analyst occupational category is encompassed in two sections of the *Handbook* (2010-11 online edition) – “Computer Software Engineers and Computer Programmers” and “Computer Systems Analysts.”

The Computer Software Engineers and Computer Programmers section describes computer programmers as follows:

[C]omputer programmers write programs. After computer software engineers and systems analysts design software programs, the programmer converts that design into a logical series of instructions that the computer can follow (A section on computer systems analysts appears elsewhere in the Handbook.). The programmer codes these instructions in any of a number of programming languages, depending on the need. The most common languages are C++ and Python.

Computer programmers also update, repair, modify, and expand existing programs. Some, especially those working on large projects that involve many programmers, use computer-assisted software engineering (CASE) tools to automate much of the coding process. These tools enable a programmer to concentrate on writing the unique parts of a program. Programmers working on smaller projects often use “programmer environments,” applications that increase productivity by combining compiling, code walk-through, code generation, test data generation, and debugging functions. Programmers also use libraries of basic code that can be modified or customized for a specific application. This approach yields more reliable and consistent programs and increases programmers' productivity by eliminating some routine steps.

As software design has continued to advance, and some programming functions have become automated, programmers have begun to assume some of the responsibilities that were once performed only by software engineers. As a result, some computer programmers now assist software engineers in identifying user needs and designing certain parts of computer programs, as well as other functions. . . .

* * *

[M]any programmers require a bachelor's degree, but a 2-year degree or certificate may be adequate for some positions. Some computer programmers hold a college degree in computer science, mathematics, or information systems, whereas others have taken special courses in computer programming to supplement their degree in a field such as accounting, finance, or another area of business. . . .

The *Handbook's* section on computer systems analysts reads, in pertinent part:

In some organizations, programmer-analysts design and update the software that runs a computer. They also create custom applications tailored to their organization's tasks. Because they are responsible for both programming and systems analysis, these workers must be proficient in both areas. (A separate

section on computer software engineers and computer programmers appears elsewhere in the Handbook.) As this dual proficiency becomes more common, analysts are increasingly working with databases, object-oriented programming languages, client-server applications, and multimedia and Internet technology.

* * *

[W]hen hiring computer systems analysts, employers usually prefer applicants who have at least a bachelor's degree. For more technically complex jobs, people with graduate degrees are preferred. For jobs in a technical or scientific environment, employers often seek applicants who have at least a bachelor's degree in a technical field, such as computer science, information science, applied mathematics, engineering, or the physical sciences. For jobs in a business environment, employers often seek applicants with at least a bachelor's degree in a business-related field such as management information systems (MIS). Increasingly, employers are seeking individuals who have a master's degree in business administration (MBA) with a concentration in information systems.

Despite the preference for technical degrees, however, people who have degrees in other areas may find employment as systems analysts if they also have technical skills. Courses in computer science or related subjects combined with practical experience can qualify people for some jobs in the occupation. . . .

Therefore, the *Handbook's* information on educational requirements in the programmer-analyst occupation indicates that a bachelor's or higher degree, or the equivalent, in a specific specialty is not a normal minimum entry requirement for this occupational category. Rather, the occupation accommodates a wide spectrum of educational credentials.

As evident above, the information in the *Handbook* does not indicate that programmer-analyst positions normally require at least a bachelor's degree in a specific specialty. While the *Handbook* indicates that a bachelor's degree level of education in a specific specialty may be preferred for particular positions, the evidence of record on the particular position here proffered does not demonstrate requirements for the theoretical and practical application of such a level of highly specialized computer-related knowledge.

The AAO rejects as unsubstantiated the petitioner's declaration that the proffered position requires an individual with a bachelor's degree in Engineering, Computer Science, Computer Information Systems, Management Information Systems, Math or a directly related field. 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 Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Further, the AAO notes that the petitioner's own requirement of a bachelor's degree in a wide range of fields for the proffered position is in

accordance with the *Handbook's* information that the occupation of programmer analyst accommodates a wide spectrum of educational credentials.

As the evidence of record does not indicate that this petition's particular position is one that normally requires at least a bachelor's degree, or the equivalent, in a specific specialty, the petitioner has not satisfied the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively requires a petitioner to establish that a bachelor's degree, in a specific specialty, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

Again, in determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d at 1165 (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. at 1102).

As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. Also, there are no submissions from professional associations, individuals, or firms in the petitioner's industry.

The petitioner also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "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." The evidence of record does not refute the *Handbook's* information to the effect that there is a wide spectrum of degrees acceptable for programmer analyst positions, including degrees not in a specific specialty. The record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than programmer analyst positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent. The petitioner states that the beneficiary will work as one member of a team on the project with RCR Technology Corporation. No evidence was submitted that her role on that team entails duties that are more complex than those that would normally be performed by programmer analysts generally, or even than those performed by other programmer analysts on the team, whose credentials were not provided.

Next, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). The record has not established a prior history of hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty. The petitioner did not provide any information about its other programmer analysts.

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their

performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. The evidence of record indicates no specialization and complexity beyond the generic duties of a programmer analyst and, as reflected in this decision's discussion of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), the *Handbook* does not indicate that the attainment of at least a bachelor's degree in a specific specialty is usually associated with programmer analysts in general.

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

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

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

Darden, 503 U.S. at 323-324 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. at 751-752); see also *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. at 440 (hereinafter "*Clackamas*"). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).¹

¹ While the *Darden* court considered only the definition of "employee" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(6), and did not address the definition of "employer," courts have generally refused to extend the common law agency definition to ERISA's use of employer because "the definition of 'employer' in ERISA, unlike the definition of 'employee,' clearly indicates legislative intent to extend the definition beyond the traditional common law definition." See, e.g., *Bowers v. Andrew Weir Shipping, Ltd.*, 810 F. Supp. 522 (S.D.N.Y. 1992), *aff'd*, 27 F.3d 800 (2nd

Therefore, in considering whether or not one is an "employee" in an "employer-employee relationship" with a "United States employer" for purposes of H-1B nonimmigrant petitions, USCIS must focus on the common-law touchstone of "control." *Clackamas*, 538 U.S. at 450; *see also* 8 C.F.R. § 214.2(h)(4)(ii)(2) (defining a "United States employer" as one who "has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise *control* the work of any such employee" (emphasis added)).

Factors indicating that a worker is or will be an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. 503 U.S. at 323-324; *see also* *Restatement (Second) of Agency* § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. *See Clackamas*, 538 U.S. at 448-449; *cf. New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1), (EEOC 2006) (adopting a materially identical test and indicating that said test was based on the *Darden* decision).

Cir. 1994), *cert. denied*, 513 U.S. 1000 (1994). However, in this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. Instead, in the context of the H-1B visa classification, the term "United States employer" was defined in the regulations to be even more restrictive than the common law agency definition. A federal agency's interpretation of a statute whose administration is entrusted to it is to be accepted unless Congress has spoken directly on the issue. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984).

The regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to employ persons in the United States, *and* to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee," "employed," "employment" or "employer-employee relationship" indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition." Therefore, in the absence of an intent to impose broader definitions by either Congress or USCIS, the "conventional master-servant relationship as understood by common-law agency doctrine," and the *Darden* construction test, apply to the terms "employee," "employer-employee relationship," "employed," and "employment" as used in section 101(a)(15)(H)(i)(b) of the Act, section 212(n) of the Act, and 8 C.F.R. § 214.2(h). That being said, there are instances in the Act where Congress may have intended a broader application of the term "employer" than what is encompassed in the conventional master-servant relationship. *See, e.g.*, section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F) (referring to "unaffiliated employers" supervising and controlling L-1B intracompany transferees having specialized knowledge); section 274A of the Act, 8 U.S.C. § 1324a (referring to the employment of unauthorized aliens).

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

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

The petitioner asserts that it will be the employer of the beneficiary. However, the documentation submitted when reviewed in its entirety does not support this conclusion. Although the petitioner states that the beneficiary will report directly to the petitioner's Program Manager, the petitioner did not submit evidence that its Program Manager will work onsite at the offices of [REDACTED]. Additionally, the petitioner did not submit evidence that the beneficiary would use the petitioner's tools or technologies in implementing the proffered duties at the offices of the petitioner's client.

Other than putting the beneficiary on its payroll and providing benefits, it is unclear what role the petitioner has in the beneficiary's assignment. No independent evidence was provided to indicate that the petitioner would control whether there is any work to be performed or that the petitioner would even oversee the beneficiary's work product. Therefore, it must be concluded that [REDACTED] would oversee any work the beneficiary performs.

In view of the above, it appears that the beneficiary will not be an "employee" having an "employer-employee relationship" with the petitioner or even with a "United States employer" represented by the petitioner in an established agent relationship. It has not been established that the beneficiary will be "controlled" by the petitioner or that the termination of the beneficiary's employment is the ultimate decision of the petitioner. To the contrary, it appears that [REDACTED]

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

██████████ will ultimately control the beneficiary's employment. Moreover, as discussed previously, the SOW for the beneficiary's assignment to ██████████ is not valid for the duration of the petition. The petitioner never states to which project the beneficiary will be assigned once the project with ██████████ is complete. Therefore, based on the tests outlined above, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii).

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

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

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

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

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

An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. All required application or petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form's instructions.

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

Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

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

Amended or new petition. The petitioner shall file an amended or new petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original

approved petition. An amended or new H-1C, H-1B, H-2A, or H-2B petition must be accompanied by a current or new Department of Labor determination. In the case of an H-1B petition, this requirement includes a new labor condition application.

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

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*

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

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

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

petition is supported by an LCA which corresponds with the petition, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

[Italics added].

As discussed previously, the SOW with RCR Technology Corporation ends on July 11, 2011, even though the petitioner has requested that the H-1B petition be valid through September 30, 2012. In light of the fact that the record of proceeding indicates that the beneficiary will likely work in a different position and at locations not identified in the Form I-129 and the LCA filed with it, USCIS cannot conclude that this LCA actually supports and fully corresponds to the H-1B petition. A petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. at 248.

The appeal will be dismissed and the petition denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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