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U. S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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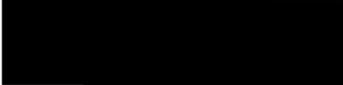
**U.S. Citizenship
and Immigration
Services**



D2

Date: **OCT 03 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.


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director 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.

On the Form I-129 visa petition the petitioner stated that it is a technology and consulting firm. To employ the beneficiary in a position it designates as a programmer analyst position, the petitioner endeavors to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The labor condition application (LCA) submitted to support the visa petition states that the beneficiary would work in Hoffman Estates, Illinois or Smithville, Tennessee.

The appeal is filed to contest each of the three independent grounds upon which the director denied this petition, specifically, the director's separate determinations that the petitioner failed to establish: (1) that the petitioner would employ the beneficiary in a specialty occupation position, (2) that the LCA in this case is valid for the location or locations where the beneficiary would work, and (3) that the petitioner has standing to file the visa petition as the beneficiary's prospective United States employer within the meaning of the regulation at 8 C.F.R. § 214.2(h)(4)(ii) or an agent within the meaning of the regulation at 8 C.F.R. § 214.2(h)(2)(i)(F).

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

Based upon its review of the entire record of proceeding, as supplemented by this appeal, the AAO finds that the director was correct to deny the petition on each of the three independent grounds that she cited in her decision.

The AAO will first address the specialty occupation issue.

The AAO analyzes the specialty occupation issue according to the statutory and regulatory framework below.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation.

Section 214(i)(1) of 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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

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

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation "which [(1)] 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 [(2)] 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.

The regulation at 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 a particular position 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) (hereinafter referred to as *Defensor*). 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.

With the visa petition, counsel submitted a letter, dated March 10, 2009, from the petitioner’s president. The petitioner’s president stated that the proffered position is a programmer analyst position, and further stated:

As with any Programmer Analyst position, the usual minimum requirement for performance of the job duties is a bachelor’s degree, or equivalent, in computers, engineering, or a related field.

The AAO observes that “computers, engineering, or a related field” does not delineate a specific specialty. In any event, the wide divergence of core subject matter suggested by the spectrum of acceptable degrees specified by the president is not indicative of a body of highly specialized knowledge at a bachelor’s degree or higher level, that must be theoretically and practically applied in the performance of the proffered position, as is the case with the specialty occupation definition at section 214(i)(1) of the Act.

Further, even if the position required an otherwise unspecified degree in engineering, without any alternatives, that would be insufficient to mark the proffered position as a specialty occupation position. This is because the field of engineering is a very broad category that covers numerous and various disciplines, some of which are only related through the basic principles of science and

mathematics, e.g., petroleum engineering and aerospace engineering. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration or engineering, without further specification, does not establish the position as a specialty occupation. *See Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988).

Again, to prove that a job requires the theoretical and practical application of a body of specialized knowledge as required by Section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study. As explained above, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. USCIS has consistently stated that, although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).

The petitioner's president's assertion that the educational requirements of the proffered position may be satisfied by an otherwise undifferentiated degree in engineering is tantamount to an admission that it does not require a minimum of a bachelor's degree or the equivalent in a specific specialty and does not qualify as a specialty occupation position. This is sufficient reason, in itself, to dismiss the appeal and deny the visa petition. Nevertheless, the AAO will continue its analysis of the specialty occupation issue in order to identify other evidentiary deficiencies that preclude the AAO's concluding that the proffered position is a specialty occupation position.

The petitioner's president provided the following description of the proffered position's duties:

Specifically, as a Programmer Analyst, the beneficiary will analyze computer and business problems of existing and proposed systems as well as initiate and enable specific technologies that will maximize our company's ability to deliver more efficient and effective technological and computer related solutions to our business clients. The beneficiary will gather information from users to define the exact nature of system problems and then design a system of computer programs and procedures to resolve these problems. As a Programmer Analyst, the beneficiary will plan and develop new computer systems and devise ways to apply the IT industry's already existing technological resources to additional operations that will streamline our clients' business processes. This process of developing new computer systems will include the design or addition of hardware or software applications that will better harness the power and usefulness of our clients' computer systems. In this position, the beneficiary will employ a combination of techniques including, structured analyst, data modeling, information engineering, mathematical model building, sampling and cost accounting to plan systems and procedures to resolve computer problems. As a part of the duties of a Programmer Analyst, the beneficiary will also analyze subject-matter operations to be automated, specify the number and type of records, files, and

documents to be used as well as format the output to meet user's needs. As a Programmer Analyst, the beneficiary is also required to develop complete specifications and structure charts that will enable computer users to prepare required programs. Most importantly, once the systems have been instituted, the beneficiary will coordinate tests of the systems, participate in trial runs of new and revised systems and recommend computer equipment changes to obtain more effective operations.

Because the evidence submitted was insufficient to show that the visa petition is approvable, the service center, on April 24, 2009, issued an RFE in this matter. The service center requested, *inter alia*, additional evidence to show that the petitioner would employ the beneficiary in a specialty occupation position. That RFE also questioned whether the petitioner has standing to file the visa petition as the petitioner's prospective employer or agent, and whether the LCA submitted to support the visa petition is valid for all of the locations where the beneficiary would work.

In response, counsel submitted a letter, dated June 4, 2009, from the petitioner's president.

The petitioner's president stated, "The beneficiary will perform some work for clients outside the Petitioner's work site," but further stated:

While the Beneficiary will be providing consulting services on behalf of the Petitioner to clients at an outside location, the Petitioner, via its home site in Hoffman Estates, IL, retains all supervisory control over the Beneficiary and is responsible for directing the manner in which the Beneficiary's work will be accomplished.

The petitioner's president also stated that the petitioner will be the beneficiary's employer and explicitly disclaimed an agency relationship. The petitioner's president stated that although the beneficiary would work at a remote location the petitioner retains supervisory control. The petitioner's president did not, however, indicate that any supervisory employee of the petitioner would accompany the beneficiary to his remote work location.

As further evidence of the employer/employee relationship between the petitioner and the beneficiary, the petitioner's president stated, "[The beneficiary's employment] contract explains that the Petitioner has the right to determine where the beneficiary will work." Counsel provided a copy of that employment contract. Although the AAO is unable to locate the clause of that contract to which the petitioner's president referred, the petitioner's president's statement makes clear his understanding that the petitioner is permitted to relocate the beneficiary to a different work place.

Finally, the petitioner's president discussed a contract with [REDACTED] and stated, "The [REDACTED] is expected to employ the Beneficiary for his full visa period. However, if it is complete earlier than expected, he will be reassigned to another client through Petitioner's office in Hoffman Estates, IL pursuant to his [LCA]."

Counsel provided a document labeled "Itinerary of [the Beneficiary]." That document states that the beneficiary would work for [REDACTED] for three years ending March 10, 2012, which covers the entire period of requested employment.

Counsel also provided a March 2, 2009 document denominated "Service Agreement" between the petitioner and [REDACTED], and a work order assigning the beneficiary to work under the auspices of the Service Agreement.

The Service Agreement states, ". . . [REDACTED] is in the business of providing information systems services to its client (s)" This suggests that the beneficiary would not be working on an in-house project for [REDACTED] but that he would be working on a project for an unidentified client of [REDACTED]. The contract does not reveal where duties pursuant to it would be performed. The contract states that it is for a one-year term, rather than for three years, as the itinerary stated. It contains no provision for renewal and no other indication that Aravind expects the project that is the subject matter of that agreement to continue beyond that single year.

The work order, entitled "Attachment to Service Agreement," indicates that [REDACTED] is located at [REDACTED]. No evidence was provided to corroborate that Aravind has offices at that location or has any work to perform there. The work order indicates that the estimated duration of the project that the beneficiary would work on is one year, not three. On appeal, counsel attributed the inclusion of the name of [REDACTED] on the work order to a typographical error. This may be the case, as is suggested by the content of the rest of the document, and the AAO will attach no significance to the error.

Further, although the petitioner asserts that the beneficiary will likely work for [REDACTED] for the entire three-year period of requested employment, all of the corroborating evidence indicates that the petitioner had only a one-year agreement to provide the beneficiary to [REDACTED].

The submission of the work order that states an estimated project duration of that is materially less than that asserted by the petitioner is, however, significant. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The AAO further finds that the combination of the Service Agreement and its attached work order fails to establish the specific nature of the work to which the beneficiary would be assigned and also fails to establish the substantive nature of that work and, by extension, the minimum education, or

¹ The petitioner claims that it would assign the beneficiary to work for [REDACTED], who would use him on a client project. Both the petitioner and [REDACTED] have asserted that, nevertheless, the petitioner would assign the beneficiary's duties and supervise his performance of them. However, neither contractual party provides a satisfactory explanation and/or documentation demonstrating that the petitioner would directly control the actual work that the beneficiary would perform for Aravind.

educational equivalency, requirements for that work. In this regard, the AAO observes that the Service Agreement itself identifies work to be performed by the petitioner in only these general terms: “. . . the Contractor [REDACTED] wishes to engage the Sub-Contractor [(i.e., the petitioner) to provide information system services to the Contractor’s client(s).” Further, while the Services Agreement indicates that specific work to be performed under the Service Agreement would be included in the attached work order (see the third paragraph of the Services Agreement), the work order contains no such details, but rather refers back to the Service Agreement, stating that it “provides the details of an engagement to provide services to Contractor’s client.” In fact, the Service Agreement contains no details of any such engagement, and it identifies no particular client or specific work to be performed for one. As such, the AAO finds that the Service Agreement and its work order are not probative evidence of any particular work that the beneficiary would perform if this petition were approved.

The AAO also accords no significant evidentiary weight to the May 15, 2009 “To Whom It May Concern” letter from [REDACTED]. First, the letter’s description of “responsibilities” consists of generalized and generic functions which does not relate any specific work that the beneficiary has actually performed. Second, this HR manager does not document the extent of her knowledge of the work that the beneficiary has actually performed, which likely would be a matter recorded in the business records of Aravind. Third, neither the HR Manager’s letter nor any other documentation in the record of proceeding accounts for the failure of the presumed guiding contract in this record of proceeding – that is, the Service Agreement and its work order – to specify the specific work which the beneficiary was to perform. Fourth, the AAO finds that the HR Manger’s letter is not adequate evidence of whatever contractual specifications may govern the work that the beneficiary would perform.

The director denied the visa petition on June 30, 2009 finding, as was noted above, that the petitioner had failed to demonstrate that it would employ the beneficiary in a specialty occupation position, that the LCA in this case is valid for the location or locations where the beneficiary would work, and that the petitioner has standing to file the visa petition.

On appeal, counsel reiterated the claim that the beneficiary would work on the [REDACTED] throughout the three-year period of requested employment. Counsel further stated, “In the unlikely event that the project is completed earlier than expected, the Beneficiary will instead be assigned to one of the Petitioner’s many other client projects through its home office in Hoffman Estates, Illinois.” Counsel further asserted that the evidence submitted is sufficient in all respects to demonstrate that the visa petition should be approved. The AAO accords no weight to counsel’s assertions, as they are not supported by documentary evidence in the record of proceeding.

Counsel did not address the evidence that Aravind has contracted with the petitioner for only one year and that Aravind has agreed to retain the services of the beneficiary for only one year, which evidence strongly suggests that [REDACTED] has no expectation of the project lasting beyond that year. Counsel did not identify any of the other clients for whom the beneficiary would work, their locations, the projects upon which the beneficiary would work, or the duties that would be required of the beneficiary while working on those unidentified projects for those unidentified end-users.

Evidence in the instant case shows that the petitioner intends to provide the beneficiary to other companies to work for them, and to charge those other companies for the beneficiary's services.

Because the petitioner will not, itself, be assigning the beneficiary's duties, the petitioner is obliged, in order to demonstrate that the proffered position is a position in a specialty occupation within the meaning of section 214(i)(1) of the Act, to provide a comprehensive description of the beneficiary's proposed duties from an authorized representative of the client, or the clients' clients, of the petitioner who will be the end user of the beneficiary's services. As indicated above, the HR Manager's letter does not succeed in this regard.

Further, the evidence submitted, even if believed fully, only supports that the beneficiary will work on projects of Aravind for one year within the three-year period of requested employment.

Qualification as a specialty occupation is not determined by the position's title or how closely a petitioner's descriptions of the position approximates the narrative about an occupational category in the Department of Labor's *Occupational Outlook Handbook (Handbook)*² or any other reference material.³ Rather, specialty occupation classification is dependent upon the extent and quality of the evidence of record about the actual work to be performed, the associated performance requirements, and the nature and educational level of specialized knowledge in a specific specialty necessary for or usually associated with such performance requirements. Thus, where, as here, the substantive nature of the work to be performed is determined not by the petitioner but by its clients, or its client's clients, the AAO focuses on whatever documentary evidence the client entities generating the work have issued or endorsed about the work, such as specifications, performance timelines, contract amendments, work orders, and correspondence about performance expectations, to name a few examples. As already noted, the AAO finds no persuasive evidence of this type in this record of proceeding.

In support of this approach, USCIS routinely cites *Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000), in which an examination of the ultimate employment of the beneficiary was deemed necessary to determine whether the position constitutes a specialty occupation. The petitioner in *Defensor*, Vintage Health Resources (Vintage), was a medical contract service agency that brought foreign nurses into the United States and located jobs for them at hospitals as registered nurses. The court in *Defensor* found that Vintage had "token degree requirements," to "mask the fact that nursing in general is not a specialty occupation." *Id.* at 387.

The court in *Defensor* held that for the purpose of determining whether a proffered position is a specialty occupation, the petitioner acting as an employment contractor is merely a "token

² The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations which it addresses.

³ Unlike the *Handbook*, which indicates an employer preference for persons with at least a bachelor's degree in a specific specialty, the *O*NET Online* does not specify an exact level of education or a specialty degree in its treatment of the Programmer Analyst occupation.

employer,” while the entity for which the services are to be performed is the “more relevant employer.” *Id.* at 388. The *Defensor* court recognized that evidence of the client companies’ job requirements is critical where the work is to be performed for entities other than the petitioner. The *Defensor* court held that the legacy Immigration and Naturalization Service (INS) 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.*

Thus, without providing the identities of all of the end users of the beneficiary’s services, and without such comprehensive descriptions from the end-user entities of the specific duties that the beneficiary would perform for them in the context of their particular business operations, the petitioner has not demonstrated that the beneficiary will perform work at the external job sites in a specialty occupation. Further, the record lacks credible evidence that when the petitioner filed the petition, the petitioner had secured work of any type for the beneficiary to perform during the requested period of employment. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

The petitioner’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.

Because the petitioner did not demonstrate that it would employ the beneficiary in a specialty occupation, the petition was correctly denied. That basis has not been overcome on appeal, and the appeal will be dismissed and the petition denied for that reason.

Next, the AAO will discuss its determination that the director was also correct in denying the petition because the petitioner failed to establish its standing to file this petition as either a United States employer as defined at 8 C.F.R. § 214.2(h)(4)(ii), or (b) a U.S. agent, in accordance with the regulation at 8 C.F.R. § 214.2(h)(2)(i)(F).

The issue is 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).

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

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

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

Upon review, the AAO finds that the record is not persuasive in establishing that the petitioner or its clients will have an employer-employee relationship with the beneficiary.

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

⁴ 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

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

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

Darden, 503 U.S. at 323-324 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. at 751-752); see also *Restatement (Second) of Agency* § 220(2) (1958); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) (hereinafter "*Clackamas*").⁵ 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)).⁶

beneficiary "at the root level." *Defensor v. Meissner*, 201 F.3d 384, 387-8 (5th Cir. 2000). Accordingly, despite the intermediary position of the employment agency, the ultimate employer must still satisfy the requirements of the statute and regulations: "To interpret the regulations any other way would lead to an absurd result." *Id.* at 388.

⁵ While *NLRB* is still applicable, the common law test was not specifically stated, and the *NLRB* court instead laid out a test based on the common law that fit the specific facts in that case. As such, the test as developed in the Supreme Court's later decisions of *Darden* and *Clackamas* is more representative of the general test to be applied and is, therefore, better suited to be applied in cases, such as this one, in which the facts do not mirror those in *NLRB*.

⁶ While the *Darden* court considered only the definition of "employee" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(6), and did not address the definition of "employer," courts have generally refused to extend the common law agency definition to ERISA's use of employer because "the definition of 'employer' in ERISA, unlike the definition of 'employee,' clearly indicates legislative intent to extend the definition beyond the traditional common law definition." See, e.g., *Bowers v. Andrew Weir Shipping, Ltd.*, 810 F. Supp. 522 (S.D.N.Y. 1992), *aff'd*, 27 F.3d 800 (2nd Cir. 1994), *cert. denied*, 513 U.S. 1000 (1994). However, in this matter, the Act does not exhibit a legislative intent to

Therefore, in considering whether or not one is an "employee" in an "employer-employee relationship" with a "United States employer" for purposes of H-1B nonimmigrant petitions, USCIS will focus on the common-law touchstone of control. *Clackamas*, 538 U.S. at 450. Factors indicating that a worker is an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. 503 U.S. at 323-324; *see also Restatement (Second) of Agency* § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. *See Clackamas*, 538 U.S. at 448-449; *cf. New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1), (EEOC 2006) (adopting a materially identical test and indicating that said test was based on the *Darden* decision); *see also Defensor v. Meissner*, 201 F.3d at 388 (5th Cir. 2000) (determining that hospitals, as the recipients of beneficiaries' services, are the true "employers" of H-1B nurses under 8 C.F.R. § 214.2(h), even though a medical contract service agency is the actual petitioner, because the hospitals ultimately hire, pay, fire, supervise, or otherwise control the work of the beneficiaries).

It is important to note that the factors listed in *Darden* and *Clackamas* are not exhaustive and must be evaluated on a case-by-case basis. Other aspects of the relationship between the parties may affect the determination of whether an employer-employee relationship exists. Furthermore, not all

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 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).

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 has an “employer-employee relationship” with the beneficiary and is his prospective “United States employer.”

To qualify as a United States employer, all three criteria at 8 C.F.R. § 214.2(h)(4)(ii) must be met. The Form I-129 indicates that the petitioner has an Internal Revenue Service Tax Identification Number. The petitioner has asserted that it will be the beneficiary’s employer, but the evidence submitted does not support the proposition that it will assign his duties and supervise his performance.

While social security contributions, worker’s compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary’s employer. Absent full disclosure of all of the relevant factors, the AAO is unable to properly assess whether the requisite employer-employee relationship will exist between the petitioner and the beneficiary.

As reflected in this decision’s earlier comments with regard to the evidentiary deficiencies of this petition, the record of proceeding fails to establish the particular work that the beneficiary would perform, the specific end-user entities for which the work would be performed, who exactly would supervise and directly control the actual day-to-day work that the beneficiary would perform, and exactly where the work would be performed. Further, the AAO observes that, contrary to the view expressed by counsel and, arguably, suggested by some language in the director’s decision, a right to exert control over the beneficiary is not determinative. When examining the factors relevant to determining control, USCIS must assess and weigh each 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.

The AAO finds that the petitioner has not demonstrated that it is the beneficiary's prospective employer and has not, therefore, demonstrated that it has standing to file the instant visa petition. The appeal will be dismissed and the visa petition will be denied on this additional basis.

Next, the AAO will address its conclusion that the director's determination to deny the petition for failure to establish that the submitted LCA corresponds to all of the locations where the beneficiary would serve is also correct.

As reflected in this decision's earlier comments regarding the evidentiary deficiencies and inconsistencies, this record of proceeding does not establish the worksites where the beneficiary would perform his services for the period requested in this petition. Consequently, the AAO will not disturb the director's determination to also deny the petition on the LCA issue specified in the director's decision.

The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) stipulates the following:

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.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(1) states that, when filing an H-1B petition, the petitioner must submit with the petition "[a] certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary." Thus, in order for a petition to be approvable, the LCA must have been certified before the H-1B petition was filed. The submission of an LCA certified subsequent to the filing of the petition satisfies neither 8 C.F.R. § 214.2(h)(4)(i)(B)(1) nor 8 C.F.R. § 214.2(h)(4)(iii)(B)(1). USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1).

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

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion*

model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification. . . .

Beyond the decision of the director, the AAO finds that the petition must also be denied because the record of proceeding does not establish that the beneficiary satisfies the statutory and regulatory requirements for qualification to serve in the asserted specialty occupation. The AAO conducts appellate review on a *de novo* basis (*See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004), and it was in the exercise of this function that the AAO identified this additional ground for denying the petition.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C) (i) experience in the specialty equivalent to the completion of such degree, and
 - (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

In implementing section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C) states that an alien must also meet one of the following criteria in order to qualify to perform services in a specialty occupation:

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

In the instant case, the record contains evidence to demonstrate that the beneficiary has a three-year bachelor's degree in mathematics, with minors in physics and chemistry; a master's degree in business administration, and a master's degree in mathematics. An evaluation submitted states that the beneficiary's education is equivalent to a master's degree level of education completed in the United States, but does not state what specific specialty that resultant master's degree would be in. That evaluation is insufficient to show that the beneficiary has a minimum of a bachelor's degree or the equivalent in a specific specialty directly related to the proffered position.

Pursuant to the instant visa category, however, a beneficiary's credentials to perform a particular job are relevant only when the job is found to qualify as a specialty occupation. As discussed in this decision, the proffered position has not been shown to require a baccalaureate or higher degree, or its equivalent, in a specific specialty and has not, therefore, been shown to qualify as a position in a specialty occupation. Because the finding that the petitioner failed to demonstrate that the proffered position qualifies as a specialty occupation position is dispositive, the AAO need not further address the issue of the beneficiary's qualifications. The AAO observes, however, that if the proffered position had been shown to qualify as a position in a specialty occupation by virtue of requiring a minimum of a bachelor's degree or the equivalent in a specific specialty, then the petitioner would have been obliged to demonstrate that the beneficiary has a minimum of a bachelor's degree or the equivalent *in that specific specialty*. Given that the proffered position is alleged to be a position for a computer systems analyst, it is not evident that a degree in mathematics or business administration is such a degree.

The petition will be denied and the appeal dismissed 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. The appeal will be dismissed and the petition denied.

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