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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



D2

Date: **OCT 14 2011** Office: VERMONT SERVICE CENTER FILE:

IN RE: Petitioner:   
Beneficiary:

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

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

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

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

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

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

The petitioner is a software development and consulting company. It seeks to employ the beneficiary as a "system administrator" and 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 director denied the petition on the grounds that: (1) the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation; (2) the petitioner failed to provide the requested itinerary; and (3) the petitioner failed to submit an appropriate and valid Labor Condition Application (LCA).

The record of proceeding before the AAO contains: (1) Form I-129, Petition for a Nonimmigrant Worker, and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) Form I-290B, Notice of Appeal or Motion, with the petitioner's letter and documentation in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

On the Form I-129, the petitioner indicated it was established in 1996, had 193 plus employees, and a gross annual income of \$30,343,697. The petitioner also stated on the Form I-129 that it wished to employ the beneficiary as a system administrator from October 1, 2009 to April 30, 2011 at an annual salary of \$62,000. The LCA accompanying the petition was certified July 29, 2009 for a period from October 1, 2009 until September 30, 2012 and included two locations as the beneficiary's places of employment, [REDACTED]

In the August 4, 2009 letter in support of the petition, the petitioner noted that it wanted to extend the status of the beneficiary to work as a system administrator. The petitioner stated that its clientele included large and medium-sized U.S. companies throughout the United States and that although a beneficiary "may be temporarily located at a project site, no contractual or employment relationship exists between the client and the consultant." The petitioner described the proposed job duties as:

- Configure and manage physically distributed computer networks and network operation systems.
- Implement[,] manage, and monitor multiple Websphere environments at FISA.
- Configure, fine-tune servers using networking technologies and topologies.
- Evaluate client's hardware to establish physical database characteristics appropriate for each client's needs.
- Design and Install Websphere application Server, Deployment Enterprise applications[.]
- Install and configure new application, configure or modify application content, proactively monitor the health of applications.
- Establish physical database parameters and develop database backup and recovery procedures.

- Achieve connectivity of the work stations utilizing various networking topologies [a]nd networking technologies.

The petitioner also noted the job duties included on-site maintenance support on various issues including but not limited to debugging, modifications, fine tuning, code organization and performance tuning. The petitioner stated the position required a minimum of a U.S. baccalaureate degree or its equivalent in computer science/engineering or a related field.

The petitioner provided a document labeled itinerary that listed the beneficiary's work locations as in [REDACTED] with a possible extension, and at the petitioner's office from July 1, 2010 until April 30, 2011. The petitioner included a June 30, 2009 letter from [REDACTED] indicating that it relied on companies like the petitioner to staff its client projects in a timely manner but that it could not provide the contract with its client [REDACTED] due to confidentiality and policy reasons. [REDACTED] noted that the beneficiary in this matter would be assigned to work in [REDACTED] and provided a copy of a work order with a time frame ending in December 2007. An exhibit to the work order provided a description of the job duties of a websphere administrator that corresponded generally to the petitioner's description of the proposed position's duties. The exhibit also listed the successful candidate's preferred skills but did not require that the successful candidate have a bachelor's degree or higher as a qualification. The initial record also included a May 2005 contract between the petitioner and [REDACTED].

On September 1, 2009, the director issued an RFE noting that it appeared the beneficiary would work in two locations and requested an itinerary that listed the dates and locations the services would be performed and a copy of the contract with the end client that detailed the duties of the proposed position.

In response to the RFE, the petitioner referenced the previous information submitted and resubmitted the "itinerary." The petitioner provided a September 14, 2009 letter from [REDACTED] Company confirming it could not provide a letter from the end client that would be using the beneficiary's services but confirmed that the beneficiary would work as an independent contractor for its client. The petitioner also provided several advertisements for positions as websphere administrator that indicated the companies hiring required either a bachelor's degree or a bachelor's degree in a technical field such as computer science, information services or a related field.

On October 6, 2009, the director denied the petition.

On appeal, the petitioner submits for the first time: a letter from the end-client confirming that [REDACTED] had deployed the beneficiary to [REDACTED] to perform consulting services under a work order that expires May 2010; a work order between [REDACTED] and [REDACTED] listing the beneficiary as a websphere administrator and stating the anticipated time frame as approximately January 1, 2008 and ending no later than May 31, 2010; and a contract between [REDACTED]. The petitioner requested that if the deployment of the beneficiary beyond the May 31, 2010 date was of concern, that the petition be approved only to May 31, 2010.

Preliminarily, the AAO observes that the director specifically requested evidence to establish the ultimate end user of the beneficiary's services, as well as a detailed description of the beneficiary's job duties for the end user of the beneficiary's services and the petitioner failed to provide the requested information. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* In this matter, the work order and contract submitted for the first time on appeal will not be considered. In addition, the petitioner's request to change the initial petition regarding the duration of the beneficiary's H-1B classification on appeal to correspond with the new work order submitted is not allowed. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to United States Citizenship and Immigration Services (USCIS) requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

We find that the petitioner has not established that the proffered position is a specialty occupation. Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

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

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

*Specialty occupation* means an occupation which [(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 [(2)] 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, a proposed position must also meet one of the following criteria:

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

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

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

The AAO notes that, as recognized by the court in *Defensor v. Meissner*, 201 F.3d at 387, where the work is to be performed for entities other than the petitioner, evidence of the client companies’ job requirements is critical. The court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the

basis of the requirements imposed by the entities using the beneficiary's services. *Id.* at 387-388. Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work. The petitioner in this matter failed to provide substantive evidence from any end-user entities that may generate work for the beneficiary and whose business needs would ultimately determine what the beneficiary would actually do on a day-to-day basis. In short, the petitioner has failed to establish the existence of H-1B caliber work for the beneficiary.

Other than providing the beneficiary's services to [REDACTED] to assign to a third party company, [REDACTED] it is not clear what role, if any, the petitioner has in the beneficiary's employment. No evidence was submitted that the beneficiary will be supervised by someone employed by the petitioner or that the beneficiary will use the tools or products of the petitioner. Further, the evidence in the record shows that the beneficiary's assignment to [REDACTED] is not expected to last the duration of the petition. Further, even if the petitioner were to demonstrate, which it did not do, that the beneficiary will work as a system administrator for [REDACTED] for the duration of the petition, the petitioner has failed to demonstrate that the proffered position is a specialty occupation. The AAO recognizes the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>1</sup>

The Systems Administrator occupational category is addressed in the *Handbook* (2010-11 online edition) - "Computer Network, Systems, and Database Administrators."

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

*Network and computer systems administrators* design, install, and support an organization's computer systems. They are responsible for LANs, WANs, network segments, and Internet and intranet systems. They work in a variety of environments, including large corporations, small businesses, and government organizations. They install and maintain network hardware and software, analyze problems, and monitor networks to ensure their availability to users. These workers gather data to evaluate a system's performance, identify user needs, and determine system and network requirements.

Systems administrators are responsible for maintaining system efficiency. They ensure that the design of an organization's computer system allows all of the components, including computers, the network, and software, to work properly together. Administrators also troubleshoot problems reported by users and by automated network monitoring systems and make recommendations for future system upgrades. Many of these workers are also responsible for maintaining network and system security.

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<sup>1</sup> The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2010 – 2011 edition available online.

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*Webmasters* or *Web administrators* are responsible for maintaining Web sites. They oversee issues such as availability to users and speed of access, and are responsible for approving the content of the site. Webmasters also collect and analyze data on Web activity, traffic patterns, and other metrics, as well as monitor and respond to user feedback.

The *Handbook* provides in pertinent part:

***Education and training.*** Network and computer systems administrators often are required to have a bachelor's degree, although an associate degree or professional certification, along with related work experience, may be adequate for some positions. Most of these workers begin as computer support specialists before advancing into network or systems administration positions. (Computer support specialists are covered elsewhere in the *Handbook*.) Common majors for network and systems administrators are computer science, information science, and management information systems (MIS), but a degree in any field, supplemented with computer courses and experience, may be adequate. A bachelor's degree in a computer-related field generally takes 4 years to complete and includes courses in computer science, computer programming, computer engineering, mathematics, and statistics. Most programs also include general education courses such as English and communications. MIS programs usually are part of the business school or college and contain courses such as finance, marketing, accounting, and management, as well as systems design, networking, database management, and systems security.

\* \* \*

For Webmasters, an associate degree or certification is sufficient although more advanced positions might require a computer-related bachelor's degree. For telecommunications specialists, employers prefer applicants with an associate degree in electronics or a related field, but for some positions, experience may substitute for formal education. Applicants for security specialist and Web developer positions generally need a bachelor's degree in a computer-related field, but for some positions, related experience and certification may be adequate.

As evident in the excerpts above, the *Handbook's* information on educational requirements in the systems administrator/webmaster 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 wider spectrum of educational credentials. Additionally, while the *Handbook* indicates that a bachelor's degree level of education in a specific specialty may be preferred for particular positions, the generically described position duties in the record of proceeding do not demonstrate a requirement for the theoretical and practical application of highly specialized computer-related knowledge.

As the 2010-2011 *Handbook* indicates no specific degree requirement for employment as a systems administrator, and as it is not self-evident that, as described in the record of proceeding, the proposed duties comprise a position for which the normal entry requirement would be at least a bachelor's degree, or its equivalent, in a specific specialty, the AAO concludes that the performance of the proffered position's duties does not require the beneficiary to hold a baccalaureate or higher degree in a specific specialty. Accordingly, the AAO finds that the petitioner has not established its proffered position as a specialty occupation under the requirements of the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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.

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 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

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. The advertisements submitted for positions claimed to be similar to the petitioner's proffered position are not persuasive, as the record in this matter does not provide an actual description of the beneficiary's proposed duties for the ultimate end client. Moreover, the companies advertising for positions with a similar title to that of the proposed position are not from organizations that are similar to the petitioner's consulting business.

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 a bachelor's degree is not required in a specific specialty. The record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than systems administrator positions that can be performed by persons without a specialty degree or its equivalent.

The petitioner does not claim and the record does not support a determination that the petitioner only hires individuals with a bachelor's or higher degree for the proffered position. 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)). Moreover, as discussed above, the standard is not whether or not the petitioner employs individuals with a bachelor's degree in the proffered position, but whether it only employs individuals with a bachelor's degree in a specific specialty. No evidence was provided that the

petitioner has a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty. Therefore, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of its position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. The AAO finds that the evidence in the record of proceeding does not support the proposition that the performance of the proposed duties requires a higher degree of IT/computer knowledge than would normally be required of system administrators not equipped with at least a bachelor's degree, or its equivalent, in a specific specialty. The AAO, therefore, concludes that the proffered position has not been established as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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).

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

Next the AAO addresses the petitioner's failure to provide an itinerary although requested to do so by the director. The regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) states, in pertinent part:

*Service or training in more than one location.* A petition which requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with the Service office which has jurisdiction over I-129H petitions in the area where the petitioner is located. The address which the petitioner specifies as its location on the I-129H petition shall be where the petitioner is located for purposes of this paragraph.

The itinerary language at 8 C.F.R. § 214.2(h)(2)(i)(B), with its use of the mandatory "must" and its inclusion in the subsection "Filing of petitions," establishes that the itinerary as there defined is a material and necessary document for an H-1B petition involving employment at multiple locations, and that such a petition may not be approved for any employment period for which there is not submitted at least the employment dates and locations. The nature of the petitioner's business is to provide consulting services to other companies. The petitioner acknowledged that its clientele included large and medium-sized U.S. companies throughout the United States. The petitioner also stated that although the beneficiary "may be temporarily located at a project site, no contractual or employment relationship exists between the client and the consultant." The AAO finds that, in the context of the record of proceedings as it existed at the time the RFE was issued, the RFE request for itinerary evidence was appropriate under the above cited regulations, not only on the basis that it was required initial evidence, but also on the basis that it addressed the petitioner's failure to submit documentary evidence substantiating the petitioner's claim that

it had H-1B caliber work for the beneficiary for the period of employment requested in the petition.

Although the petitioner provided a response to the director's RFE, as noted above, the petitioner did not provide an itinerary with documentation addressing the beneficiary's employment for the duration of the requested H-1B classification. The purpose of the itinerary is not to substantiate that the petitioner will just "employ" the beneficiary but to establish that the beneficiary will be employed in H-1B caliber work throughout the duration of the visa classification.

Next the AAO addresses the issue of whether 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.

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.

As the director determined, the record of proceeding does not include the necessary evidence establishing where and for whom the beneficiary would work and the length of time the beneficiary would work in the two locations listed on the purported itinerary. The evidence does not demonstrate conclusively that the beneficiary will work in [REDACTED] [REDACTED] for the entire duration of the petition. In light of the fact that the record of proceeding is insufficient to establish the beneficiary's work location for the duration of the classification, USCIS cannot conclude that this LCA actually supports and fully corresponds to the H-1B petition. As observed above, 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.

Beyond the decision of the director, the AAO finds that the petitioner has failed to establish that it will be the beneficiary's employer or agent. Although the petitioner claims that it has an established employer-employee relationship with the beneficiary, the petitioner has not provided the supporting documentation establishing the necessary "control" of the beneficiary's employment. We observe the petitioner's statement that there is no contractual or employment relationship between the third party client and the beneficiary; however, the petitioner's statement and the record of proceeding do not establish that the petitioner has the necessary employer-employee relationship with the beneficiary.

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)).

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. Therefore, it must be concluded that the end party client(s) 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 a documented 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. Accordingly, 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).

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

The appeal will be dismissed and the petition denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. In this matter, the petitioner has not sustained its burden.

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