

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

PUBLIC COPY

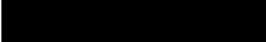
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

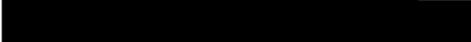


**U.S. Citizenship
and Immigration
Services**

D2



Date: **SEP 12 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: 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,

for Michael T. Kelly

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner describes itself as an engineering and information technology consulting services firm that seeks to employ the beneficiary as a Programmer Analyst. The petitioner, therefore, endeavors to classify the beneficiary 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 because the petitioner failed to establish (1) that the petitioner qualifies as a U.S. employer or agent or (2) that the proffered position qualifies as specialty occupation.

On October 6, 2009, the petitioner submitted a Form I-290B (Notice of Appeal) without a brief or evidence. The petitioner entered a check mark at the box at section 2 of the Form I-290B which indicates that the petitioner would send a brief and/or evidence within 30 days. On November 9, 2009, the petitioner submitted an additional Form I-290B together with a new support letter dated November 4, 2009 that does not address the issues raised by the director. Instead, the new support letter states that the beneficiary will work in a new location for a different salary and duration of time than was originally proffered in the petition. The petitioner has also submitted a second Form I-290B as a Motion to Reopen without an additional filing fee. It appears that the petitioner considers this second Form I-290B to be part of the additional evidence that it indicated it would submit within 30 days of filing the first Form I-290B. Therefore, the second Form I-290B will not be treated as a request for a Motion to Reopen. Rather, it will be considered as part of this appeal.¹

The petitioner filed the H-1B petition on the beneficiary's behalf on August 19, 2009 requesting that he work as a programmer analyst at the petitioner's offices located at [REDACTED]. The petitioner's Labor Condition Application (LCA) was filed for a programmer analyst to work in Schaumburg, IL and Novi, MI. According to the Form I-129, the proffered wage is \$60,320 per year. The LCA indicates that the prevailing wage for a programmer analyst in Schaumburg, IL is \$57,075 per year and in Novi, MI it is \$55,578 per year.

The petitioner's support letter dated August 18, 2009, stated that the beneficiary would add new functionalities to the petitioner's CRM software called CRADLEi. The petitioner stated that the beneficiary will either work at the petitioner's office in Novi, MI or at the petitioner's office in Schaumburg, IL. The petitioner stated that programmer analyst positions generally require a

¹ The petitioner's submissions in support of the appeal were, for no apparent reason, submitted as attachments to a second I-290B, which was completed as a Motion to Reopen. As the time submission of a motion had passed, and as the second I-290B was not filed with the service center with the requisite fee, the second I-290B with its attached documents would be rejected by the AAO if it were treated as a motion. However, the AAO will consider the comments entered on the second I-290B and its attached documents as a brief and additional evidence supplementing the petitioner's appeal, pursuant to the initial and properly filed I-290B.

U.S. bachelor's degree or higher, but did not specify any academic major or concentration. The petitioner's letter further stated:

[The petitioner] is a known consultant in the area of Information Technology and Engineering Solutions. . . .

* * *

We specialize in recruiting Information System Professionals and Engineering Professionals, who not only have the technological base to drive the flow of work but also have excellent communication skills, and team working ability. . . .

The petitioner stated that the beneficiary has eight years of experience and a foreign degree in textile engineering, but did not submit copies of any of the beneficiary's education documents or evidence documenting his experience. Further, the petitioner did not submit a credential evaluation finding that the beneficiary has the U.S. equivalent of at least a bachelor's degree in any field. 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, the petitioner did not explain how the coursework obtained towards a degree in textile engineering is relevant to the duties of the proffered position.

On August 22, 2009, the director issued an RFE requesting additional documentation regarding its contracts with clients and the beneficiary and a complete itinerary of services. The director noted that the evidence must show specialty occupation work for the beneficiary with the actual end-client company where the work will ultimately be performed and that a clear contractual path must be shown from the petitioner to the ultimate end-client.

In its response to the RFE, the petitioner stated that the petitioner has decided to upgrade CRADLEi. The petitioner stated that the project would last three years and that the beneficiary would:

- Develop and participate in the review of business and functional requirements;
- Develop data forms, menus, and objects using Visual Basic, ASP, and .NET;
- Participate in weekly meetings with the management team;
- Be involved in weekly walkthroughs and inspection meetings;
- Work with the development team to resolve technical issues;
- Generate daily reports of execution status and defect summary; and
- Develop automated tests in Winrunner to handle the most repetitive regression testing tasks.

The petitioner further stated in response to the RFE that all the work would be performed at the petitioner's office in Schaumburg, IL and that he will report to a Technical Lead.

Additionally, the petitioner stated that CRADLEi was developed by a different company that the petitioner's President previously partially owned. This other company split up and the petitioner then acquired CRADLEi.

The petitioner presented a copy of an offer letter from it to the beneficiary, dated August 17, 2009. This letter states that the beneficiary was offered a position with the petitioner as a programmer/analyst. It further states:

Because of the importance of our consulting services to client projects, you agree to give us a minimum of 15 days notice in writing if you decide to terminate your employment. . . .

The director denied the petition on September 4, 2009.

On appeal, the petitioner states that the beneficiary is going to implement CRADLEi for its client, Millennium Training, located in Richmond, VA. The petitioner further states that the beneficiary is going to work mainly from the petitioner's office in Naperville, IL, rather than Schaumburg, IL as was stated in the petition, and will travel to Richmond, VA as necessary. The petitioner included a copy of its client letter, dated June 23, 2009, which simply states that the petitioner and Millennium Training have agreed to have a series of meetings regarding the pilot implementation of CRADLEi. Although the letter is dated June 23, 2009, it states, "[a]s agreed, meetings will be held every second Tuesday from 9:00 a.m. until noon, and the location will alternate between our two offices, the first one to be convened here at Inter-Office on July 14, 2005." The petitioner does not explain why the letter, which is dated June 23, 2009, refers to future meetings that will start on July 14, 2005. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Further, the letter does not mention the beneficiary by name, does not state the location where the beneficiary will work, and does not provide the duties the beneficiary will perform or the minimum requirements to perform those duties. Therefore, the petitioner has failed to demonstrate that it knew where the beneficiary would be assigned or the duties the beneficiary would perform at the time the petition was filed.

The petitioner has also stated on appeal that the beneficiary will work as a Computer Systems Analyst at a salary of \$56,000, which is a lower salary than the one proffered in the petition and than the prevailing wage stated in the LCA for a programmer analyst in Schaumburg, IL.

First, the AAO finds that the petitioner failed to demonstrate that the proffered position is a specialty occupation.

The AAO will now discuss why it finds that the evidence submitted with regard to the proffered position does not satisfy any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

To the extent that the proposed duties are described in the record of proceeding, it is not evident that their actual performance would require the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty.

In this regard, the AAO finds that the duties are described in terms of generic and generalized

functions – for example, develop and participate in the review of business and functional requirements; develop data forms, menus, and objects using Visual Basic, ASP, and .NET; and participate in weekly meetings with the management team - that convey neither the substantive nature of the work that the beneficiary would actually perform nor a need for a particular level of education, or educational equivalency, in a specific specialty in order to perform that work. Further, as reflected in this decision's earlier comments with regard to the inconsistent and insubstantial evidence with regard to what the petitioner would do and where, the petitioner has not even established the nature of the work that the beneficiary would actually perform. Consequently, the record of proceeding lacks an evidentiary foundation that would satisfy any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). This decisive determination will now be discussed in terms of the separate components of this regulation.

The petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which provides specialty-occupation status to a position for which the petitioner has established that 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.

At the outset, into its analysis of this criterion, the AAO adopts and here incorporates its comments and finding with regard to the failure of the evidence of record to establish the substantive nature of the duties that the beneficiary would actually perform.

However, even if the petitioner had demonstrated that the beneficiary would work as a programmer analyst at the petitioner's offices for the duration of the petition, the 2010-11 online edition of the U.S. Department of Labor's *Occupational Outlook Handbook's (Handbook)* information on computer systems analysts indicates that this an occupational classification does not categorically require at least a bachelor's degree, or the equivalent, in a specific specialty. In pertinent part, the *Handbook's* chapter "Computer Systems Analysts" states:

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. . . .

Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2010-11 ed., available at <http://www.bls.gov/oco/ocos287.htm> (last accessed August 31, 2011).

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 wider spectrum of educational backgrounds, including less than a bachelor's degree, or the equivalent, in a specific specialty. This is in accordance with the petitioner's own stated requirements for the proffered position that at least a bachelor's degree is required without indicating that the degree must be in a *specific specialty*.

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, insufficient evidence was provided regarding the particular position here proffered to demonstrate requirements for the theoretical and practical application of such a level of highly specialized computer-related knowledge.

For emphasis sake, the AAO repeats its finding with regard to the insufficiency of the evidence to establish what the beneficiary would do and the educational, or education-equivalent, attainment required for the work that the beneficiary would actually perform. Again, the proposed duties are described in terms of generic and generalized functions that convey neither the substantive nature of the work that the beneficiary would actually perform nor a need for a particular level of education, or educational equivalency, in a specific specialty in order to perform that work. Further, as reflected in this decision's earlier comments with regard to the inconsistent and insubstantial evidence with regard to what the petitioner would do and where, the petitioner has not even established the nature of the work that the beneficiary would actually perform. Consequently, the record of proceeding lacks an evidentiary foundation that would satisfy any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Therefore, even if the petitioner could demonstrate that it has sufficient work for the beneficiary to be employed as a programmer analyst for the duration of the petition, the petitioner would still have to submit additional evidence to prove that the proffered position is a specialty occupation in accordance with the discussion above.

In sum, because the evidence in the record of proceeding does not substantiate that the proffered position is one for which there is normally a minimum requirement for a bachelor's degree, or the equivalent, in a specific specialty, the petitioner has not satisfied the criterion at 8 C.F.R.

§ 214.2(h)(4)(iii)(A)(1).

Next, as the petitioner has not established the substantive nature of the proffered position - and therefore has not provided a basis for establishing more than superficial similarity with other positions - there is no basis in this record of proceeding for establishing positions as parallel to the proffered position. This precludes a finding that the degree-requirement specified by the petitioner is a common industry practice for the proffered position, so as to satisfy the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Next, neither the generalized and generic descriptions of the proffered position and its duties nor any other evidence in the record of proceeding develops the proffered position in terms of complexity or uniqueness. Accordingly, the petitioner has not satisfied the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which requires a showing that the petitioner's particular position is so complex or unique that it can be performed only by a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

Additionally, the AAO also finds that the petitioner has not satisfied the elements of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3). That is, it has not established a history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, and that such history was generated by the position's actual performance requirements.²

As already reflected in this decision's comments about the petitioner's dependence upon generalized and generic descriptions of the duties of the proffered position, the record of proceeding does not present the duties with sufficient specificity to establish their substantive nature, and, thereby, whatever degree of specialization and complexity may reside in them. Therefore, the petitioner has also failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), by not developing the proposed duties to an extent establishing their nature as so specialized and complex that their performance would require knowledge usually associated with the attainment of at least a bachelor's degree, or the equivalent, in a specific specialty.

At this stage it is also worth noting that, as discussed previously, the proposed duties as

² A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. See generally *Cf. Defensor v. Meissner*, 201 F.3d 384, 387-388 (5th Cir. 2000). In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. See *id.* at 388.

described in the petitioner's support letter entail allegedly performing work on behalf of the petitioner's client(s).

The AAO notes that, as recognized by the court in *Defensor v. Meissner*, 201 F.3d at 384, 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 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.* 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. *Id.* Therefore, the petitioner would have to provide additional documentation regarding the work the beneficiary would perform on behalf of other entities covering the duration of the petition, which could include copies of contracts, statements of work, etc. The petitioner did not provide such documentation.

For the reasons discussed above, the AAO finds that the petitioner has not established a specialty-occupation position. Accordingly, the AAO will not disturb the director's determination to deny the petition for failure to establish a specialty occupation.

Next, the AAO finds that the petitioner has failed to establish that it will be the beneficiary's United States employer or agent. For this reason also, the appeal will be dismissed and the petition will be denied.

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)).³

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)).

³ While the *Darden* court considered only the definition of "employee" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(6), and did not address the definition of "employer," courts have generally refused to extend the common law agency definition to ERISA's use of employer because "the definition of 'employer' in ERISA, unlike the definition of 'employee,' clearly indicates legislative intent to extend the definition beyond the traditional common law definition." *See, e.g., Bowers v. Andrew Weir Shipping, Ltd.*, 810 F. Supp. 522 (S.D.N.Y. 1992), *aff'd*, 27 F.3d 800 (2nd Cir. 1994), *cert. denied*, 513 U.S. 1000 (1994). However, in this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. Instead, in the context of the H-1B visa classification, the term "United States employer" was defined in the regulations to be even more restrictive than the common law agency definition. A federal agency's interpretation of a statute whose administration is entrusted to it is to be accepted unless Congress has spoken directly on the issue. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984).

The regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to employ persons in the United States, *and* to have an "employer-employee relationship" with the 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).

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).

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).⁴

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 documentation submitted when reviewed in its entirety does not demonstrate that the petitioner will be the beneficiary's employer or agent. The petitioner is an IT and engineering consultancy firm that provides services to its clients. The petitioner did not demonstrate at the time the petition was filed that it knew where and on what project the beneficiary would work. The client letter from Millennium Training submitted by the petitioner does not mention the beneficiary by name, does not discuss the project on which the beneficiary would work or the minimum requirements to perform the duties of that project, and refers to meetings that began years before the present petition was filed. It is not even clear that Millennium Training is the end-client firm.

⁴ 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.

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 Millennium Training, or any other company to which the beneficiary may be contracted, 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. 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 or agent 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.

Beyond the decision of the director, the AAO finds additional grounds for denying the petition, which will be identified below. For those reasons also, the petition must be denied. 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 these additional grounds for denying the petition.

First, the petitioner did not submit sufficient documentation to show that the beneficiary qualifies to perform services in any specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C).

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

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

higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), for purposes of paragraph (h)(4)(iii)(C)(4) of this section, equivalence to completion of a United States baccalaureate or higher degree shall mean achievement of a level of knowledge, competence, and practice in the specialty occupation that has been determined to be equal to that of an individual who has a baccalaureate or higher degree in the specialty and shall be determined by one or more of the following:

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

In accordance with 8 C.F.R. § 214.2(h)(4)(iii)(D)(5):

For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. . . . It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;
- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

The petitioner did not submit any documentation demonstrating that the beneficiary has the equivalent of a U.S. bachelor's degree in any field and so did not show that the beneficiary qualifies to perform the duties of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C).

Also beyond the decision of the director, the AAO 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.⁵

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

⁵ 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).

immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part:

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

[Italics added].

The LCA and Form I-129 in this matter, which indicate the proffered position as being for a Programmer Analyst who will earn \$60,320 per year, do not correspond with the information provided on appeal, which indicates that the beneficiary will earn \$56,000 per year, an amount that is below the prevailing wage listed in the LCA. In light of the fact that the record of proceeding indicates that the beneficiary will likely work at a lower salary than the one stated 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.

Further, because it is not clear that the petitioner had confirmed the project to which the beneficiary would be assigned at the time the petition was filed, the AAO finds that the petitioner did not establish eligibility at the time the petition was filed. The petitioner cannot assert that it will pay the beneficiary the prevailing wage for the occupation and geographical area where the beneficiary will be employed as listed in the submitted LCA if the petitioner does not yet know what the beneficiary's duties will be or where the beneficiary will perform the work at the time the petition was filed. As such, the petitioner cannot establish that it has complied or will comply with the requirements of § 212(n)(1)(A)(i) of the Act, 8 U.S.C. § 1182(n)(1)(A)(i), as of the time the petition was filed. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 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 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.

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