



U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY



D2

DATE: **APR 05 2012** 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 Director of the California Service Center denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary in the position of programmer analyst as an H-1B nonimmigrant 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 petitioner describes itself as a software consulting and staffing company and indicates that it currently employs eight persons.

The director denied the petition, finding that the petitioner failed to establish that it had complied with the terms and conditions of employment. On appeal, counsel for the petitioner submits a brief and additional evidence and contends that the director's findings were erroneous.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued a request for evidence (RFE) on June 9, 2009. In the request, the director asked the petitioner to submit evidence demonstrating that it was a bona fide business, including but not limited to evidence of its annual income and its current number of employees. In a response dated July 10, 2009, the petitioner addressed the director's queries and submitted a quarterly wage report for the first quarter of 2008 as well as bank statements and additional tax documents.

On July 30, 2009, the director denied the petition. The director found that based on a review of the documents submitted, the petitioner had failed to employ its H-1B beneficiaries in accordance with the terms and conditions of the petitions. Specifically, the director noted that many of the claimed employees appeared to work only on a part-time basis, thereby undermining the petitioner's claim to pay the proffered wages to these employees in accordance with the terms of the petition. The director based the denial in large part on the state quarterly tax returns submitted by the petitioner, which showed significant gaps in employment, as well as the total amount of wages paid to its employees during 2008.

On appeal, counsel addresses the director's bases for the denial and provides additional documentary evidence in support of the petitioner's compliance with the terms and conditions of employment.

Upon review, the AAO concurs with the director's findings.

The director notes that the petitioner has failed to compensate its other H-1B employees as claimed. The director found discrepancies between the petitioner's payroll records and the actual wages paid and hours worked by these employees. Specifically, the director notes that, while the petitioner claimed a gross annual income of \$1.4 million, its 2008 Form 1120S, U.S. Income Tax Return for an S Corporation, indicated a gross income of only \$480,009. The director also notes that the 2008 Form 1120S demonstrated that the petitioner only paid \$280,589 in wages and salaries to eight employees, thereby resulting in annual salaries much less than the wages proffered on the LCAs of other H-1B employees. Finally, a review of the quarterly wage reports

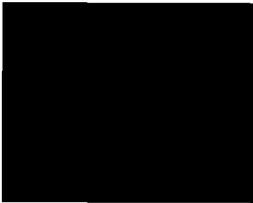
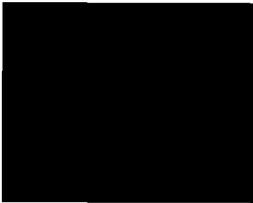
submitted for 2008 in comparison to the claimed rates of pay in the other approved I-129 petitions and LCAs indicates discrepancies with regard to wages paid and hours worked.

On appeal, counsel addresses each of the director's bases for denial. First, counsel discusses the discrepancy between the petitioner's gross annual income of \$1.4 million, as claimed on Form I-129, and its actual gross annual income of \$480,009, as confirmed on its Form 1120S for 2008. Counsel contends that the petitioner's actual gross revenues for 2008 were \$1,694,350, but \$1,214,341 of these revenues were paid to "subcontractors who may or may not have been within the same city." As a result, it claimed that the petitioner's reported gross income was \$480,009. Counsel contends that, since "the City" charges business tax based on receipts, "the subcontracting expenses were reduced from the gross revenues for the purpose of all tax returns in order to avoid double taxation." In support of this contention, counsel submitted a letter from Jack Iyer of Austral Financial Services attesting to these calculations, as well as a spreadsheet listing these subcontractors and alleged payments made to these contractors.

The AAO, however, finds these claims unpersuasive. Although counsel states on appeal that the petitioner has contractual employees, the petitioner has neither presented evidence to document the existence of these employees nor identified the services these individuals provide. Despite providing a spreadsheet identifying contractors by name, payment date and amount, and check number, the petitioner has failed to provide corroborating documentary evidence, such as bank statements, cancelled checks, invoices, or statements of work evidencing that services were rendered and payments were tendered as claimed. Without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998).

With regard to the discrepancies noted in the wages paid to its H-1B employees, counsel contends that all employees have either been paid the proffered wage or higher. Counsel addresses each employee's payment history and advises the AAO that the petitioner's quarters for payment purposes are calculated differently than the traditional method of three months per quarter.

In the petitioner's letter dated July 10, 2009 submitted in response to the RFE, the petitioner submitted as Exhibit 4 a list of its current H-1B employees. According to this document, the employment status for the five individuals listed was as follows:

Name	Date Employment Began	Date Employment Terminated
	6/1/2007	5/1/2008
	8/1/2008	Currently Employed
	6/5/2008	Currently Employed
	9/1/2006	Currently Employed
	4/1/2007	5/21/2008

However, when the claimed start dates of employment for these individuals as set forth on Exhibit 4 is compared to the approval dates of their respective petitions, significant discrepancies arise.

According to USCIS records, the above beneficiaries were approved for employment as follows:

Name	Petitioner	Valid From
[REDACTED]	[REDACTED]	10/01/2007 to 08/30/2010
[REDACTED]	[REDACTED]	10/01/2008 to 09/24/2011
[REDACTED]	[REDACTED]	10/01/2007 to 03/28/2010
[REDACTED]	[REDACTED]	01/03/2007 to 05/11/2008 ¹
[REDACTED]	[REDACTED]	05/12/2008 to 05/10/2009
[REDACTED]	[REDACTED]	10/01/2007 to 09/27/2010

According to the petitioner's claims on Exhibit 4 in the response to the RFE, all five of its H-1B employees commenced employment either prior to approval of their respective petitions or, in the case of [REDACTED], several months after approval. While commencement of employment after the approval of a petition is common, there is no explanation as to why the petitioner would claim that its other four employees commenced employment with the petitioner prior to the approval date of their petitions. 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).

In addition to these unexplained discrepancies, the AAO finds contradictions with regard to the proffered wages as claimed on the respective petitions and LCAs when compared to the actual wages paid to these employees. The AAO will address each H-1B employee's records individually.

The AAO will first address the claim that the petitioner does not abide by traditional reporting methods for quarterly tax returns. Specifically, counsel stated that the petitioner's quarters are divided as follows:

- 1st Quarter: Jan., Feb.
- 2nd Quarter: March, April, May
- 3rd Quarter: June July, August
- 4th Quarter: Sept., Oct., Nov., Dec.

¹ Although USCIS electronic records indicate that [REDACTED] may have ported his H-1B employment to the petitioner, he would still only have been authorized to commence employment on October 2, 2006, the date the petition was filed. See section 214(n) of the Act, 8 U.S.C. § 1184(n).

The instructions accompanying IRS Form 941, Employer's Quarterly Federal Tax Return, require an employer to report wages paid for each quarter in three month intervals. There is no provision in IRS regulations allowing for an employer to elect to report wages in different increments, thus affecting the actual taxes paid in a given period. It is noted that, for the first time on appeal, counsel asserts that the petitioner's quarters are organized differently than required by the IRS, which leads the AAO to question the reasoning behind such a statement. Since the organization of quarters in a way that favors the petitioner can help the petitioner overcome the wage discrepancies noted by the director, the AAO will carefully scrutinize the claims of counsel to this effect. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). If USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

As will be discussed below, even if the petitioner's system of quarters is accepted as legitimate, there still remain unresolved discrepancies with regard to the wages paid to the petitioner's H-1B employees.

██████████ was approved for H-1B employment with the petitioner from October 1, 2007 to August 30, 2010. According to the petitioner's claim on Exhibit 4, ██████████ commenced employment with the petitioner on June 1, 2007, four months prior to the petition's approval, and his employment terminated on May 1, 2008. However, the petitioner's quarterly wage reports for 2008 indicate that ██████████ received no wages at all for the first quarter of 2008 and received only \$1,910 for the second quarter of 2008. Moreover, no prior approval for the beneficiary to work for the petitioner as of June 1, 2007 is noted in USCIS records. Finally, despite the petitioner's claim that his employment terminated on May 1, 2008, ██████████ continued to earn wages in both the third and fourth quarters of 2008. In addition to these numerous discrepancies, ██████████ total wages for 2008 were \$20,513.49, which is \$22,486.51 less than the proffered wage.

On appeal, counsel claims that, contrary to the claims set forth on Exhibit 4 of the response to the RFE, Mr. Bakshi commenced his employment with the petitioner in the middle of May 2008 and his employment terminated on October 5, 2008. These claims are supported by the petitioner's quarterly tax returns for 2008 and pay stubs submitted on appeal, yet directly contradict the dates set forth by the petitioner in Exhibit 4 submitted in response to the RFE, and neither the petitioner nor counsel offer an explanation for these discrepancies. While counsel's assertions provide a reasonable explanation for the discrepancies noted above, these assertions are not supported by independent evidence pointing to where the truth lies and simply offer an acceptable alternative explanation for the inconsistencies contained in the record. Specifically, while the evidence included on appeal supports counsel's assertions that ██████████ worked from May to October 2008, there is nothing in the record to disprove the petitioner's claim that ██████████ commenced his employment with the petitioner on June 1, 2007 but was involuntarily benched by the petitioner during 2007. Benching or otherwise not paying wages to

beneficiaries in and of itself constitutes a violation of the terms and conditions of employment. Again, any attempt to explain or reconcile inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92.

Amitra Oberoi was approved for H-1B employment with the petitioner from October 1, 2008 to September 24, 2011. According to the petitioner's claim on Exhibit 4, ██████████ commenced employment with the petitioner on August 1, 2008, two months prior to the petition's approval, and he is currently employed with the petitioner. However, the petitioner's quarterly wage reports for 2008 indicate that ██████████ worked only during the fourth quarter of 2008, as well as the first quarter of 2009. Like ██████████ there is nothing in USCIS records to suggest that ██████████ had approval to work for the petitioner as of August 1, 2008, as the petitioner claims in Exhibit 4 of its response to the RFE.

More importantly, however, is the fact that ██████████'s wages for the fourth quarter of 2008 and the first quarter of 2009, when calculated on a quarterly or monthly basis, are lower than the proffered annual wage of \$54,000. While the AAO notes the petitioner's questionable claim that its first quarter contains only two months and its fourth quarter contains four months, dividing the proffered wages on a monthly basis still results in less than the proffered wage. For example, ██████████ earned \$7,000 in the first quarter of 2009. Since, according to the petitioner, this quarter has only two months, it can be assumed that ██████████ earned \$3,500 per month. Multiplied by 12 months, it appears that ██████████ would only earn \$42,000 annually, which is \$12,000 less than the proffered wage.²

On appeal, counsel claims that, like ██████████ did not commence her employment with the petitioner until November 22, 2008, a date later than that claimed by the petitioner. As an explanation for the discrepancy in wage amounts discussed above, counsel claims that (1) she only worked in 2008 in December and for a few days in November; and (2) she took 10 days of leave without pay in the first quarter of 2009; and (3) she received raises in both May and June 2009, which increased her salary to \$66,000, well above the proffered wage on the LCA and petition.

These assertions do little to explain the discrepancies noted above. First, there is no independent evidence which supports the petitioner's claim that the beneficiary was in non-pay status for the first quarter of 2009, nor is there evidence to demonstrate that the non-pay status was permissible. While the Department of Labor regulations at 20 C.F.R. § 655.731(c)(7)(ii) may permit the non-payment of wages by an H-1B employer "due to conditions unrelated to employment which take the nonimmigrant away from his/her duties at his/her voluntary request and convenience," this has no bearing on a Department of Homeland Security (DHS)

² However, under the traditional calculations of a three month quarter, ██████████ would earn only \$28,000 annually, a wage well below that claimed on the petition and corresponding LCA. Moreover, please note that, since discrepancies exist with regard to ██████████ start date in 2008, the AAO focused its examination on the wages paid in the first quarter of 2009 since it is presumed that as of the first quarter of 2009 ██████████ was working full-time for the petitioner.

determination regarding an alien's maintenance of status in the United States and a petitioner's compliance with DHS H-1B program requirements. In general, except in situations in which the Family and Medical Leave Act (29 U.S.C. § 2601 et seq.) or the Americans with Disabilities Act (42 U.S.C. § 12101 et seq.) may apply, DHS generally requires that the failure to carry on the specific activities for which the H-1B status was obtained constitutes a failure to maintain status and renders the alien immediately deportable and the employer in non-compliance with the H-1B program requirements.

Consequently, absent additional evidence demonstrating the basis for her claimed non-pay status, and absent evidence clarifying the correct start date of the beneficiary, the AAO concludes that the petitioner did not comply with the terms and conditions of employment with regard to Ms. Oberoi.

██████████ was approved for H-1B employment with the petitioner from October 1, 2007 to March 28, 2010. According to the petitioner's claim on Exhibit 4, ██████████ commenced employment with the petitioner on June 5, 2008, eight months after approval, and he is currently employed with the petitioner. The petitioner's quarterly wage reports for 2008 indicate that Mr. ██████████ began earning wages with the petitioner in the third quarter of 2008, which conveniently corroborates the petitioner's claims since the petitioner's third quarter, according to its own reporting purposes, begins in June. Adding the total wages earned for 2008 and dividing them by the seven months contained in the two quarters of the petitioner's system indicates that, had ██████████ been compensated at the same rate of pay for all four quarters of 2008, he would have earned the proffered wage claimed in his approved petition and LCA. However, under the traditional reporting method, the third taxable quarter commences in July. Under this method of review, the petitioner's claimed start date of June 2008 for the beneficiary is contradicted. Regardless, calculations indicate that had ██████████ been compensated at the same rate of pay for all quarters of 2008 his salary would be in excess of \$56,000, significantly more than the proffered annual salary of \$43,000.

██████████ was approved for H-1B employment with the petitioner from October 1, 2007 to September 27, 2010. According to the petitioner's claim on Exhibit 4, ██████████ commenced employment with the petitioner on April 1, 2007, six months prior to the petition's approval, and his employment with the petitioner terminated on May 1, 2008. The petitioner's quarterly wage reports for 2008 support the petitioner's claim that ██████████ employment terminated in May 2008, since wages are only reported for the first two quarters of 2008, with a significant drop in wages in the second quarter which includes the month of May. However, dividing the total wages paid to ██████████ in 2008 by four months (from January 2008 to April 2008, assuming his employment terminated as claimed on May 1, 2008), it would appear that ██████████ was being compensated at an annual salary of \$43,743, which is \$11,257 less than the proffered annual wage of \$55,000.

Counsel, however, claims that ██████████ commenced employment with the petitioner on January 1, 2008 and remained in employment status for three and a half months. Counsel claims that Mr. ██████████ received his full salary for the time he was employed with the petitioner minus a 10% incentive of \$5,500 that he would have received had he remained with the petitioner for six

months. However, allowing for a 10% decrease in the proffered annual salary still results in a wage significantly less than the proffered wage, since the calculations as shown above still demonstrate that the beneficiary would have been paid 43,743. Moreover, there is no evidence in the record to support counsel's contention that 10% of the proffered annual salary was an incentive payable only upon completion of six months of employment with the petitioner. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Finally, there is no evidence in the record clarifying the discrepancy between the petitioner's claimed start date of employment (April 1, 2007) with that claimed by counsel (January 1, 2008).

Finally [REDACTED] was approved for H-1B employment with the petitioner from January 3, 2007 to May 11, 2008, and again from May 12, 2008 to May 10, 2009. According to the petitioner's claim on Exhibit 4, [REDACTED] commenced employment with the petitioner on September 1, 2006, four months prior to the first petition's approval, and continues to be employed with the petitioner today.³ The petitioner's quarterly wage reports for 2008 indicate that [REDACTED] total wages for 2008 were \$68,732.28, which is \$6,732.28 more than the proffered wage of \$62,000 under the first petition. However, in calculating the monthly wages earned in the third and fourth quarters of 2008 (i.e., adding the total wages from quarter three (\$18,742.98) with the total wages from quarter four (\$21,073) and dividing the total wages (\$39,815.98) by the seven months contained in those quarters according to the petitioner (June to December)), it is evident that [REDACTED] would only earn \$5,688 per month, or approximately \$68,256 annually, during the validity period of the second petition, at which time the proffered annual wage was claimed to be \$81,452.80.⁴

On appeal, counsel contends that [REDACTED] salary was always \$5,816 per month, and that he also receives overtime pay and contributions by the petitioner to his insurance premium which amount to approximately \$572.00 per month. Counsel concludes that this combination of compensation results in an annual salary of close to \$80,000, which is "very close" to the proffered annual wage on his most recent LCA. As discussed previously, however, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. No independent objective evidence to support counsel's assertions has been submitted and, even if it had been, it would not change the fact that the petitioner did not fully comply with the terms and conditions of Mr. Sihra's employment given counsel's admission that the annual salary was below that attested to in the approved petition even when considering all of Mr.

³ As noted above, while [REDACTED] may have been authorized to begin working for the petitioner on October 2, 2006, there is no explanation or evidence to indicate that he was authorized to work for the petitioner from September 1, 2006.

⁴ It is noted that, if these wages were calculated using a traditional three-month quarter for the third and fourth quarters of 2008, the annual wage would be \$79,631.96, a more legitimate figure given the proffered wage for this period is claimed to be \$81,452.80.

alleged compensation. Finally, as noted with the other employees discussed herein, no explanation with regard to the petitioner's claim that commenced his employment on September 1, 2006 has been submitted.

For the reasons discussed above, the explanations provided by counsel are insufficient. The unexplained discrepancies with regard to the employment start dates for its H-1B employees, and counsel's failure to address these glaring inconsistencies, raises questions regarding the validity of the claims in the petition. Absent a more in-depth explanation and corroborating evidence, the AAO is left to conclude that this petitioner is either benching employees, or not employing the claimed employees at all. Either way, the director's concerns regarding the petitioner's non-compliance with the terms and conditions of its alien workforce are justified and, as such, shall not be disturbed.

Beyond the decision of the director, the petitioner failed to establish that: (1) it meets the regulatory definition of an intending United States employer as defined at 8 C.F.R. § 214.2(h)(4)(ii); (2) it meets the definition of "agent" at 8 C.F.R. § 214.2(h)(2)(i)(F); (3) the submitted labor condition application (LCA) is valid for the beneficiary's intended work location(s); and (4) the proffered position is a specialty occupation.

When filing the I-129 petition, the petitioner averred in its March 30, 2009 letter of support that it "helps companies and businesses succeed by executing/managing software projects and by providing consultants that are the best in the industry." It further claimed that it had "an excellent group of professionals who have worked at and or provided consulting to the top-most companies in the United States. . . ." Finally, it claimed that it required the services of the beneficiary as a programmer analyst to participate in several of the application development projects it was performing.

Also included with the initial filing was a copy of the petitioner's offer of employment to the beneficiary dated March 18, 2009, which indicated that the beneficiary would earn an annual salary of \$53,000, and a certified LCA, indicating that the beneficiary would work in Fremont, California.

Beyond the decision of the director, the first issue that must be addressed in the present matter is whether the petitioner has established that it meets the regulatory definition of an intending United States employer. Section 101(a)(15)(H)(i)(b) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). Specifically, the AAO must determine whether the petitioner has established that it will have "an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii)(2).

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

subject to section 212(j)(2), who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 214(i)(1)

. . . , who meets the requirements for the occupation specified in section 214(i)(2) . . . , and with respect to whom the Secretary of Labor determines and certifies to the [Secretary of Homeland Security] that the intending employer has filed with the Secretary [of Labor] an application under section 212(n)(1) .

...

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

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

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

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

Although "United States employer" is defined in the regulations at 8 C.F.R. § 214.2(h)(4)(ii), it is noted that the terms "employee" and "employer-employee relationship" are not defined for purposes of the H-1B visa classification. 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) (2012). The intending employer is described as offering full-time or part-time "employment" to the H-1B "employee." Subsections 212(n)(1)(A)(i) and 212(n)(2)(C)(vii) of the Act, 8 U.S.C. § 1182(n)(1)(A)(i), (2)(C)(vii) (2012). Further, the regulations indicate that "United States employers" must file a Petition for a Nonimmigrant Worker (Form I-129) in order to classify aliens as H-1B temporary "employees." 8 C.F.R. § 214.2(h)(1), (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").

Neither the legacy Immigration and Naturalization Service ("INS") nor U.S. Citizenship and Immigration Services ("USCIS") defined the terms "employee" or "employer-employee relationship" by regulation for purposes of the H-1B visa classification, even though the regulation describes H-1B beneficiaries as being "employees" who must have an "employer-employee relationship" with a "United States employer." *Id.* Therefore, for purposes of the H-1B visa classification, these terms are undefined.

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." *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)). 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)).

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. See generally 136 Cong. Rec. S17106 (daily ed. Oct. 26, 1990); 136 Cong. Rec. H12358 (daily ed. Oct. 27, 1990). On the contrary, in the context of the H-1B visa classification, the regulations define the term "United States employer" to be even more restrictive than the common law agency definition.⁵

⁵ 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.), *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

Specifically, the regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to engage a person to work within 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" or "employer-employee relationship" combined with the agency's otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition" or, more importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. *Cf. Darden*, 503 U.S. at 318-319.⁶

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, 844-845 (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).

⁶ To the extent the regulations are ambiguous with regard to the terms "employee" or "employer-employee relationship," the agency's interpretation of these terms should be found to be controlling unless "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359, 109 S.Ct. 1835, 1850, 104 L.Ed.2d 351 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945))).

Therefore, in the absence of an express congressional intent to impose broader definitions, both the "conventional master-servant relationship as understood by common-law agency doctrine" and the *Darden* construction test apply to the terms "employee" and "employer-employee relationship" 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).⁷

Therefore, in considering whether or not one will be 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) (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)).

The factors indicating that a worker is or will be an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. *Darden*, 503 U.S. at 323-324; *Clackamas*, 538 U.S. at 445; *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 445; *see also* *New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1) (adopting a materially identical test and indicating that said test was based on the *Darden* decision); *see also* *Defensor v. Meissner*, 201 F.3d 384, 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, however, 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 relevant to control 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).

Furthermore, 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

⁷ That 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).

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.

Applying the *Darden* and *Clackamas* tests 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."

Upon review, 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 U.S. Citizenship and Immigration Services (USCIS) has defined the terms "employee," "employed," "employment," or "employer-employee relationship" by regulation for purposes of the H-1B visa classification, even though the law describes H-1B beneficiaries as being "employees" who must have an "employer-employee relationship" with a "United States employer."⁸ Therefore, for purposes of the H-1B visa classification, these terms are undefined.

⁸ Under 8 C.F.R. §§ 214.2(h)(2)(i)(F), it is possible for an "agent" who will not be the actual "employer" of a beneficiary to file an H petition on behalf of the actual employer and the alien. While an employment agency may petition for the H-1B visa, the ultimate end-user of the alien's services is the "true employer" for H-1B visa purposes, since the end-user will "hire, pay, fire, supervise, or otherwise control the work" of the beneficiary "at the root level." *Defensor v. Meissner*, 201 F.3d 384, 387-8 (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.

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; see also *Restatement (Second) of Agency* § 220(2) (1958); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) (hereinafter "*Clackamas*"). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).⁹

⁹ 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

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

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

Likewise, the "mere existence of a document styled 'employment agreement'" shall not lead

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).

inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450. "Rather, as was true in applying common-law rules to the independent-contractor-versus-employee issue confronted in *Darden*, the answer to whether a shareholder-director is an employee depends on 'all of the incidents of the relationship . . . with no one factor being decisive.'" *Id.* at 451 (quoting *Darden*, 503 U.S. at 324).

Applying the *Darden* and *Clackamas* tests to this matter, the petitioner has not established that it or any of its clients will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee."

To qualify as a United States employer, all three criteria at 8 C.F.R. § 214.2(h)(4)(ii) must be met. The Form I-129 and the petitioner's tax documents contained in the record indicate that the petitioner has an Internal Revenue Service Tax Identification Number. While the petitioner's letter of support and the offer of employment letter indicate its engagement of the beneficiary to work in the United States, this documentation alone provides insufficient and somewhat conflicting information regarding the nature of the job offered and the location(s) where the services will be performed. Therefore, the petitioner has failed to establish that an employer-employee relationship exists or will exist.

The job offer letter dated March 18, 2009 merely indicates the petitioner's intention to employ the beneficiary at an annual salary of \$53,000. The petitioner failed to provide contracts between the petitioner and the beneficiary, or between the petitioner and its end clients, which identify the beneficiary by name and outline the specific nature of his employment and associated duties. Although the petitioner submitted written agreements with Hobsons United States, SanDisk Corporation, and Dataguise, these documents are general agreements and do not identify the beneficiary as a contractor nor do they outline projects upon which he will work or the specific duties he will perform. None of the evidence contained in the record establishes the exact terms and provisions of the beneficiary's employment.

Although the petitioner submitted an employment agreement dated July 1, 2009 in response to the RFE, this document is insufficient for two reasons. First, the agreement is executed by the petitioner and beneficiary over two months after the filing of the petition. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

Second, the agreement merely provides a vague description of duties and provides no explanation or discussion of the nature and duration of the beneficiary's assignments during the requested validity period. Since the petitioner identifies itself as an information technology consulting and staffing company, it is apparent that the beneficiary will be outsourced to client sites as necessary. The petitioner, however, has not provided copies of contracts or agreements with clients which outline the nature of the beneficiary's services, nor has it provided an overview of any in-house or proprietary projects on which the beneficiary would work. Although it contends in response to the RFE that the beneficiary will work onsite at its offices,

insufficient evidence to support this contention has been submitted. Absent such evidence, the petitioner has not established that the beneficiary will be "controlled" by the petitioner or that the beneficiary's employment could be terminated. Absent evidence pertaining to his duties during the requested validity period of this petition, the AAO is prohibited from concluding that the petitioner would be the beneficiary's employer. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

While social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are still 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. Without full disclosure of all of the relevant factors, the AAO is unable to find that the requisite employer-employee relationship will exist between the petitioner and the beneficiary.

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

Nor has the petitioner established that it is an agent. The definition of agent at 8 C.F.R. § 214.2(h)(2)(i)(F) provides for two types of agents: (1) "an agent performing the function of an employer"; and (2) "a company in the business as an agent involving multiple employers as the representative of both the employers and the beneficiary." Absent documentation such as work orders or contracts between the ultimate end clients and the beneficiary, the petitioner could neither be considered an agent in this matter. As stated above, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

Furthermore, the AAO will enter an additional basis for denial, i.e., the petitioner's failure to comply with the itinerary requirement at 8 C.F.R. § 214.2(h)(2)(i)(B).

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. Here, given the indications in the record that the beneficiary would work at multiple locations at some point during the requested period of employment and as the petitioner failed to provide this initial required evidence when it filed the Form I-129 in this matter, the petition must also be denied on this additional basis.

Moreover, the AAO questions whether the petitioner submitted a valid LCA for all work locations, as required by 8 C.F.R. § 214.2(h)(2)(i)(B). The LCA lists the beneficiary's work location as Fremont, California, where the petitioner's offices are located. In reviewing the petitioner's supporting documentation, however, the AAO finds that the actual work location(s) for the beneficiary cannot be determined. The March 30, 2009 letter of support indicates that the petitioner's clients include companies such as Hewlett Packard, Oracle, and Sun Microsystems, which are companies based throughout the country. Moreover, the sample of client contracts submitted in response to the RFE indicates that in addition to clients in the Fremont, California vicinity (Datagise and SanDisk), it also has a client based in Cincinnati, Ohio (Hobsons). Noting its claims in the March 30, 2009 letter of support, the AAO concludes that there are most likely numerous other clients based throughout the United States for whom the beneficiary may work. Absent end-agreements with clients that specifically identify the beneficiary as a contractor, the duration and location of work sites to which the beneficiary will be sent during the course of his employment cannot be determined. Absent this evidence, the AAO cannot conclude that the LCA submitted is valid for the beneficiary's intended work locations. For this additional reason, the petition may not be approved.¹⁰

¹⁰ It is further noted that 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

The final issue is whether the beneficiary will be employed 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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii):

Specialty occupation means an occupation which requires [1] theoretical and practical application of a body of highly specialized knowledge in field of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires [2] the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, 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;

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 or new petition in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E).

- (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 professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

The record contains insufficient evidence as to where and for whom the beneficiary would be performing his services, and whether his services would be that of a programmer analyst.

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

lists contracts as one of the types of evidence that may be required to establish that the services to be performed by the beneficiary will be in a specialty occupation.

The petitioner's letter of support dated March 30, 2009 failed to discuss the duties of the proffered position. In response to the RFE, the petitioner provided a vague overview of the beneficiary's proposed duties, which included such tasks as planning, developing and testing computer programs, overseeing software and hardware installation, and evaluating user requirements.

As discussed above, no independent documentation, such as agreements with end clients or contracts for the beneficiary to work on specific projects, was submitted. The petitioner's letters contained in the record provide only a generic summary of the duties of a programmer analyst. Moreover, by virtue of the fact that the petitioner is a consulting and staffing company, it is evident that the beneficiary will be assigned to various locations in the United States as necessary to render his services to clients. Therefore, absent evidence to the contrary, it is clear that the beneficiary's duties could potentially vary widely based on the requirements of a client at any given time. Once again, this statement renders it necessary to examine the ultimate end clients of the petitioner to determine the exact nature and scope of the beneficiary's duties for each client, since it is logical to conclude that the services provided to one client may differ vastly from the services provided to another.

As discussed above, the record contains simply the letter of support, response to the RFE, three general contracts with clients, and two documents written by the petitioner pertaining to the employment of the beneficiary. Only the response to the RFE addresses the proffered position, and it outlines the proposed duties of the beneficiary in only a vague fashion. The employment offer and agreement provide no information regarding the end-clients and their requirements for the beneficiary. Without evidence of contracts, work orders, or statements of work describing the duties the beneficiary would perform and for whom, the petitioner fails to establish that the duties the beneficiary would perform are those of a specialty occupation. Providing a generic job description that speculates what the beneficiary may or may not do at each worksite is insufficient. Once again, simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

In support of this analysis, USCIS routinely cites *Defensor v. Meissner*, 201 F.3d 384, 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 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 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 evidence of the client companies’ job requirements is critical if the work is to be performed for entities other than the petitioner. *Id.*

In this matter, the job description provided by the petitioner, as well as various statements from the petitioner prior to adjudication, indicate that the beneficiary will most likely be working on client projects and will be assigned to various clients’ worksites as necessary. Moreover, the petitioner’s failure to provide evidence of an employer-employee relationship and/or work orders or employment contracts between the petitioner and its clients renders it impossible to conclude for whom the beneficiary will ultimately provide services and exactly what those services would entail. The AAO, therefore, cannot analyze whether the beneficiary’s duties at each worksite would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation. Accordingly, the petitioner has not established that the proposed position qualifies as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).¹¹

For the reasons set forth above, even if the other stated grounds of ineligibility were overcome on appeal, the petitioner has failed to provide sufficient evidence to establish at the time the instant petition was filed that the beneficiary would be performing the duties of a specialty occupation, and the petition cannot be approved for this reason.

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 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a de novo basis).

¹¹ It is noted that, even if the proffered position were established as being that of a programmer analyst, a review of the U.S. Department of Labor’s *Occupational Outlook Handbook* (hereinafter the *Handbook*) does not indicate that such a position qualifies as a specialty occupation in that the *Handbook* does not state a normal minimum requirement of a U.S. bachelor’s or higher degree in a specific specialty or its equivalent for entry into the occupation of programmer analyst. *See* Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook*, 2010-11 Edition, "Computer Systems Analysts," <<http://www.bls.gov/oco/ocos287.htm>> and "Computer Software Engineers and Computer Programmers," <<http://www.bls.gov/oco/ocos303.htm>> (accessed March 20, 2012). As such, absent evidence that the position of programmer analyst qualifies as a specialty occupation under one of the alternative criteria available under 8 C.F.R. § 214.2(h)(4)(iii)(A), the instant petition could not be approved for this additional reason.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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 director's decision is affirmed. The petition is denied.