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



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



*D2*

Date: **MAR 07 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)

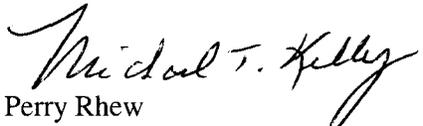
ON BEHALF OF PETITIONER:



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*   
Perry Rhew  
Chief, Administrative Appeals Office

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

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the California Service Center on February 5, 2009. The petitioner stated that it is a for-profit enterprise engaged in information technology (IT) services with eight employees.

Seeking to employ the beneficiary in what it designates as a business systems analyst, the petitioner filed this H-1B petition in an endeavor to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner: (1) failed to establish that it is qualified to file an H-1B petition, that is, as either (a) a United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii), or (b) a U.S. agent, in accordance with the regulation at 8 C.F.R. § 214.2(h)(2)(i)(F); (2) failed to establish the Labor Condition Application (LCA) submitted with the petition includes all of the work locations where the beneficiary will be employed. On appeal, counsel asserts that the director's basis for the denial was erroneous and contends that the petitioner satisfied all evidentiary requirements. In support of this assertion, counsel submitted a brief and additional evidence.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) Form I-290B and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

For the reasons that will be discussed below, the AAO agrees with the director's decision on each of the enumerated grounds. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

In this matter, the petitioner stated on the Form I-129 petition that it seeks the beneficiary's services as a business systems analyst. The petitioner submitted a letter of support with the petition, stating that the beneficiary would be employed to perform the following duties:

- Analysis, design, implementation and consultation into corporate accounting and financial systems and data analysis. Management analysis and improvement. Preliminary investigation and analysis of technological opportunity to meet corporate needs[.]
- Conduct organizational studies and evaluations, design systems and procedures, conduct work simplifications and measurement studies, and prepare operations and procedures manuals to assist management in operating more efficiently and effectively.

- Designs and develops report formats to meet management information needs; works with Information Systems to develop or modify systems to provide required data.
- Monitor budget expenditures and prepare written reports and analyses to management setting forth progress, adverse trends and appropriate recommendations or conclusions.
- Evaluates findings and recommends changes or modifications in procedures, utilizing knowledge of functions of operating units.

The petitioner reported that "a strong background in any business, any engineering discipline and computer programming knowledge" is required to perform the duties of the proffered position and that "we require a Bachelor's Degree in Business, any Engineering, and/or knowledge or Computer applications with related experience" for the position.

The AAO notes that the petitioner's statements with regard to the beneficiary's work are extremely vague and it did not provide any information as to whether the beneficiary would be assigned to an in-house project or client project(s), the nature and scope of the project(s) to which the beneficiary would be assigned and for whom the beneficiary would be providing services. The petitioner failed to fully disclose relevant information necessary for establishing definite H-1B employment.

On March 6, 2009, the director issued an RFE requesting additional information from the petitioner. The RFE outlined the specific evidence to be submitted by the petitioner. In response to the RFE, the petitioner provided several documents, including the following:

- Agreement for Professional Services, dated January 19, 2009, between [REDACTED] and the petitioner.
- Purchase Order for Services between [REDACTED] and the petitioner. The document involves a project for a third-party client. The Purchase Order lists a consultant who is not the beneficiary, for a project located in Austin, Texas that will last for a period of approximately one month, beginning April 6, 2009.
- Letter, dated April 15, 2009, from [REDACTED]
- Employment Agreement, dated January 16, 2009, between the petitioner and the beneficiary, for a "Term of 3 years starting from **January 22, 2009** to **January 22, 2011** . . . [for] full-time services." The AAO notes that the dates cover a period of two years.
- Letter from the petitioner to the beneficiary, dated January 16, 2009.

The director reviewed the documentation submitted and observed that the Purchase Order was not for the beneficiary. Further, the Purchase Order stated that the worksite would be in Austin, Texas – a location not previously mentioned on the H-1B petition and LCA. The director also noted that, although the letter from [REDACTED] mentioned the beneficiary, the letter did not include essential terms of the project, including information regarding the final end-client, location, dates, etc. The director determined that the petitioner had not satisfied its burden of proof to establish eligibility at the time the Form I-129 was filed in accordance with the controlling statutory and regulatory provisions, and denied the petition.

On January 5, 2010, counsel submitted an appeal of the director's denial of the petition. Counsel asserts that "the previous counsel submitted the wrong work order at the time of the RFE response which resulted in denial of the H-1B petition." In the appeal, counsel further states that "the documentation already submitted should be sufficient." Counsel claims that although the "wrong work order" was previously submitted, the director's basis for denial is erroneous and contends that the petitioner satisfied all evidentiary requirements. Counsel submits a brief and additional evidence, including the following documents:

- Purchase Order for Services between [REDACTED] and the petitioner;
- Letter, dated April 15, 2009, from [REDACTED] (previously submitted);
- LCA (including page 3, which had not previously been submitted);
- Letter, dated December 30, 2009, from the petitioner.

The AAO reviewed the complete record of proceeding and, for the reasons that will be discussed below, concludes that the director was correct in the determination to deny the petition.

First, the AAO will address counsel's assertion that the previous legal representative submitted the incorrect work order for the beneficiary and that the H-1B petition should be granted "on the basis of justice and equity."

Any appeal based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). In this case, none of these items has been provided.

The petitioner's current counsel makes an assertion regarding the petitioner's previous legal

representative; however, the record is devoid of any of the required evidence to support a claim of ineffective assistance of counsel. The AAO notes that the "wrong work order [Purchase Order]" submitted in response to the RFE was apparently provided to the previous legal representative by the petitioner and then sent to the director. Yet, the petitioner failed to submit any explanation describing the circumstances under which this error arose or specify who was responsible for the mistake. The unsupported assertions of the petitioner's current 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). The petitioner has not provided sufficient documentation to grant a request to provide discretionary relief on the basis of ineffective assistance of counsel.

The petitioner's current counsel further asserts that the petition should have been granted despite the fact that the "wrong work order was submitted" and claims that "USCIS is overstepping its boundaries by asking for work orders, contracts and end client letters to determine if the position qualifies for a specialty occupation or not, the USCIS should instead rely on the job description given by the petitioner." The AAO is not persuaded by counsel's assertion. For the reasons described below, the record does not support his claim and the AAO finds that the director properly denied the H-1B petition.

The petitioner bears the burden of establishing eligibility for the benefit sought. A petitioner must establish that it is eligible for the requested benefit at the time of filing the petition. All required petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form's instructions. See 8 C.F.R. § 103.2(b)(1). In the RFE, the director notified the petitioner that basic information about the proposed employment and employer was "missing, incomplete, conflict[ed] with other information provided in the record, or [was] inconsistent with DHS records." The petitioner responded by providing additional documentation, including evidence that was further inconsistent and conflicted with the record of proceeding (including the "wrong work order.") 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).

Counsel references two AAO decisions in support of his assertion that USCIS should not request "work orders, contracts and end client letters." However, he only submitted a copy of one of the referenced decisions. If a petitioner wishes to have unpublished decisions considered by USCIS in its adjudication of a petition, the petitioner is permitted to submit copies of such evidence that it either obtained itself through its own legal research and/or received in response to a Freedom of Information Act request filed in accordance with 6 C.F.R. Part 5. Otherwise, "[t]he non-existence or other unavailability of required evidence creates a presumption of ineligibility." 8 C.F.R. § 103.2(b)(2)(i). In the instant case, the petitioner failed to submit a copy of one of the referenced decisions. In this regard, as the record of proceeding does not contain any evidence of the decision, there are no underlying facts to be analyzed and, therefore, no prior, substantive determinations could have been made to determine what facts, if any, were analogous to those in this proceeding.

When any person makes an application for a "visa or any other document required for entry, or makes an application for admission [ . . . ] the burden of proof shall be upon such person to establish that he is eligible" for such relief. 8 U.S.C. § 1361; *see also Matter of Treasure Craft of California*, 14 I. & N. Dec. 190 (Reg. Comm'r 1972). Furthermore, any suggestion that USCIS must review unpublished decisions and possibly request and review each case file relevant to those decisions, while being impractical and inefficient, would also be tantamount to a shift in the evidentiary burden in this proceeding from the petitioner to USCIS, which would be contrary to section 291 of the Act, 8 U.S.C. § 1361. Accordingly, the AAO was not required to request and/or obtain a copy of the unpublished decision cited by counsel.

Upon review of the enclosed decision, the AAO does not find that it supports counsel's conclusion. It involves distinct issues from the instant H-1B petition and the petitioner's counsel does not sufficiently establish its relevancy here. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the enclosed, unpublished decision. The decision specifically states that "[o]n appeal, counsel provides additional documentation regarding the petitioner's clients and work product, and the beneficiary's duties."

More importantly, neither of the AAO cases referenced by counsel has been designated as a precedent decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all US Citizenship and Immigration Services (USCIS) employees in the administration of the Act, non-precedent decisions are not similarly binding.

Counsel also cites a memorandum from Michael L. Aytes, Assistant Commissioner, INS Office of Adjudications, *Interpretation of the Term "Itinerary" Found in 8 C.F.R. 214.2(h)(2)(i)(B) as it Relates to the H-1B Nonimmigrant Classification*, HQ 70/6.2.8 (December 29, 1995) (hereinafter referred to as the Aytes memo). The referenced Aytes memorandum deals with the itinerary requirement mandated at 8 C.F.R. § 214.2(h)(2)(i)(B). (It is noted that in the denial of the instant petition, the director stated that she was unable to determine whether the petitioner had submitted a valid LCA covering all of the work locations where the beneficiary would be employed because of the conflicting and inconsistent information contained in the record proceeding.) Counsel claims that "at the most an itinerary may be required . . . . USCIS has overstepped its boundaries by asking for work orders, contracts and end client letters." A review of the record indicates that counsel's reliance on the Aytes memo is misplaced as it does not address "work orders, contracts and end client letters." Moreover, the memo qualifies its guidance as being subject to the exercise of the adjudicating officer's discretion. This is evident in the memo's statements that the itinerary requirement has been met "[a]s long as the officer is convinced of the bona fides of the petitioner's intentions with respect to the alien's employment," and that "[s]ervice officers are encouraged to use discretion in determining whether the petitioner has met the burden of establishing that it has an actual employment opportunity for the alien." As such, the Aytes memo does not mandate that the director in this matter, or any USCIS officer, suspend, dispose with, or accept any substitute for the itinerary minimum (i.e., dates and locations) required at 8 C.F.R. § 214.2(h)(2)(i)(B).

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. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, 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 regulations at 8 C.F.R. §§ 103.2(b)(8) and 214.2(h)(9)(i) provide the director broad discretionary authority to require such evidence as contracts and itineraries to establish that the services to be performed by the beneficiary will be in a specialty occupation during the entire period requested in the petition. A service center director may issue an RFE for evidence that he or she may independently require to assist in adjudicating an H-1B petition, and his or her decision to approve a petition must be based upon consideration of all of the evidence as submitted by the petitioner, both initially and in response to any RFE that the director may issue. *See* 8 C.F.R. § 214.2(h)(9). The purpose of an RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1), (8), and (12). The AAO finds that, in the context of the record of proceeding as it existed at the time the RFE was issued, the request for additional evidence was appropriate under the above cited regulations, not only on the basis that it was required initial evidence, but also on the basis that it was material in that it addressed the petitioner's failure to submit documentary evidence substantiating the petitioner's claim that it had H-1B caliber work for the beneficiary for the entire period of employment requested in the petition.

The AAO notes that where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5<sup>th</sup> Cir. 2000) (hereinafter *Defensor*). In *Defensor*, The court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. *Id.* at 387-388. Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work.

With the RFE, the director put the petitioner on notice that additional evidence was required and the petitioner was given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petitioner failed to submit the requested evidence (including the proper Purchase Order/Work Order) and now attempts to submit it on appeal. However, the evidence is outside the scope of this appeal, as it is the type of documentation encompassed by the RFE but was not submitted as part of the RFE reply. Evidence requested in an RFE but not included in the petitioner's RFE response will not be considered if later submitted. *See* 8 C.F.R. §§ 103.2(b)(8)(iv) and (b)(11). *See also Matter of Soriano*, 19 I&N Dec.

764 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director. If the petitioner wishes for the additional evidence submitted on appeal to be considered, it may file a new petition, with fee, to USCIS.

The AAO will next address the issue of whether or not the petitioner has established that it qualifies as an H-1B employer or agent. To meet its burden of proof in this regard, the petitioner must establish that it meets the regulatory definition of a United States employer at 8 C.F.R. § 214.2(h)(4)(ii) or agent at 8 C.F.R. § 214.2(h)(2)(i)(F).

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

(i) who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 1184(i)(1) . . . , who meets the requirements of the occupation specified in section 1184(i)(2) . . . , and with respect to whom the Secretary of Labor determines . . . that the intending employer has filed with the Secretary an application under 1182(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 its client will have an employer-employee relationship with the beneficiary.

Although "United States employer" is defined in the regulations, it is noted that "employee," "employed," "employment," and "employer-employee relationship" are not defined for purposes of the H-1B visa classification even though these terms are used repeatedly in both the Act and the regulations, including within the definition of "United States employer" at 8 C.F.R. § 214.2(h)(4)(ii). Section 101(a)(15)(H)(i)(b) of the Act indicates that an alien coming to the United States to perform services in a specialty occupation will have an "intending employer" who will file a labor condition application with the Secretary of Labor pursuant to section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). The intending employer is described as offering full-time or part-time "employment" to the H-1B "employee." Sections 212(n)(1)(A)(i) and 212(n)(2)(C)(vii) of the Act, 8 U.S.C.

§§ 1182(n)(1)(A)(i) and 1182(n)(2)(C)(vii). Further, the regulations indicate that "United States employers" must file Form I-129 in order to classify aliens as H-1B temporary "employees." 8 C.F.R. §§ 214.2(h)(1) and 214.2(h)(2)(i)(A). Finally, the definition of "United States employer" indicates in its second prong that the petitioner must have an "employer-employee relationship" with the "employees under this part," i.e., the H-1B beneficiary, and that this relationship be evidenced by the employer's ability to "hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer"). Accordingly, neither the legacy Immigration and Naturalization Service (INS) nor USCIS has defined the terms "employee," "employed," "employment," or "employer-employee relationship" by regulation for purposes of the H-1B visa classification, even though the law describes H-1B beneficiaries as being "employees" who must have an "employer-employee relationship" with a "United States employer." Therefore, for purposes of the H-1B visa classification, these terms are undefined.

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

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

*Darden*, 503 U.S. at 323-324 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. at 751-752); see also *Restatement (Second) of Agency* § 220(2) (1958); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) (hereinafter "*Clackamas*"). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. at 258 (1968)).<sup>1</sup>

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<sup>1</sup> 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.*

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).

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*Andrew Weir Shipping, Ltd.*, 810 F. Supp. 522 (S.D.N.Y. 1992), *aff'd*, 27 F.3d 800 (2<sup>nd</sup> 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, 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).

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 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 will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee."

While social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary's employer.

The AAO notes that there are a number of inconsistencies in the record of proceeding regarding the beneficiary's employment. Without further information, the petitioner has failed to adequately establish several basic elements of the beneficiary's employment. For example, on the Form I-129, the petitioner stated that the beneficiary will be employed at its office in Naperville, Illinois. No other work sites were provided on the Form I-129. A letter dated April 15, 2009, from the client [REDACTED] reported that the beneficiary will work "at our facility located in Palatine, IL." As previously mentioned the petitioner also submitted a Purchase Order in response to the RFE that provided information about a project in Austin, Texas. Thus, the petitioner submitted inconsistent information as to the worksite of the proffered position.

Furthermore, throughout the record there are discrepancies as to the specific number of hours the beneficiary will work each week, and whether the position is a part-time position or a full-time position. For example, on the Form I-129, the petitioner reported that the beneficiary would be employed on a part-time basis, working 25 hours per week. On the LCA, the petitioner also stated that the position was part-time. In the letter of support dated January 21, 2009, the petitioner stated on the first page that it was a "full time position" and stated on the second page that it intended to employ the beneficiary "in a part-time position." On the employment agreement (between the

petitioner and the beneficiary), the petitioner stated (at Section 1.1) that the beneficiary would be employed to provide "full-time services" but later in the document (in Sections 2.3 and 2.4) the petitioner reported that the beneficiary would work "Monday through Friday, between 9 am to 4 pm inclusive of 1 hour Lunch break" for "30 hours per week." In the employment offer letter, the petitioner stated that it was offering the beneficiary a position "on a temporary full time basis. This is a temporary full time position." The petitioner did not address or provide any evidence to reconcile the inconsistencies in the record of proceeding regarding this issue.

Moreover, the petitioner has not established that the beneficiary will be employed in a specialty occupation during the entire period requested in the petition. On the Form I-129, the petitioner requested that the beneficiary be granted H-1B classification from January 22, 2009 to January 22, 2012. The employment agreement between the petitioner and beneficiary is for a "term of 3 years starting from **January 22, 2009 to January 22, 2011**" [which the AAO notes, is for a two-year period]. The letter from the client submitted in response to the RFE does not contain the dates of the project. The AAO notes that the Purchase Order that the petitioner submitted on appeal lists a start date of January 22, 2009 and states that the project duration is "12 months +." Thus, even if the Purchase Order submitted on appeal were to be considered, it does not establish that the petitioner has sufficient work for the beneficiary for a three-year period. There is no further evidence from the client regarding the expected length of the project and the petitioner did not submit any further evidence establishing any additional projects or specific work for the beneficiary. There is an absence of documentary evidence of actual work that the beneficiary would definitely perform during the period requested in the petition. The AAO finds that the petitioner has failed to establish that the petition was filed for work that was reserved for the beneficiary, for the entire period requested, as of the time of the petition's filing. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 ('Reg. Comm'r 1978).

In the instant case, the director specifically requested that the petitioner provide documentation to clarify the petitioner's employer-employee relationship with the beneficiary, including a brief description of who would supervise the beneficiary and their duties. In response to the RFE, the petitioner submitted a letter from the client stating that the petitioner would be responsible for supervising the beneficiary. However, no specific information regarding the supervision of the beneficiary for this project (or any other projects) was provided, e.g., the supervisor's name, job title, general duties, location or any other relevant information. The AAO notes that on appeal, the petitioner provided a Purchase Order for the beneficiary that states "Trinuc Manager: [Name]." No further information regarding the management/supervision of the beneficiary for the project was provided. Thus, even if this Purchase Order were to be considered, the petitioner did not sufficiently establish that it would control, manage or supervise the beneficiary. A key element in this matter is who would have the ability to hire, fire, supervise, or otherwise control the work of the beneficiary for the duration of the H-1B petition. The petitioner has failed to provide sufficient documentation to meet its burden of proof in this regard.

Based upon a review of the record, the petitioner has failed to establish that it would act as the beneficiary's employer. Despite the director's specific request for evidence on this issue, the petitioner failed to submit sufficient documentation to establish an employer-employee relationship with the beneficiary. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). The evidence is insufficient to establish that the petitioner qualifies as a United States employer, as defined by 8 C.F.R. § 214.2(h)(4)(ii).

Furthermore, the AAO finds that the petitioner is not an agent as defined by the regulations. 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." The petitioner has not claimed to be an agent, nor has it submitted evidence to establish that it could be considered an agent under either prong of the regulation. As a result, absent additional documentation, the petitioner cannot be considered an agent in this matter.

In sum, based upon its complete review of the record of proceeding, the AAO finds that the petitioner has failed to demonstrate that it is a United States employer or an agent.

The AAO will now address the LCA submitted by the petitioner in support of the Form I-129. The AAO will briefly identify the decisive aspects of the record of proceeding leading it to affirm the director's determinations on the LCA issue. Additionally, beyond the decision of the director, the AAO will enter an additional ground for denial of the petition. Specifically, the petitioner failed to submit an LCA that corresponds to the petition.<sup>2</sup>

A review of the record of proceeding before the director reveals that there was a lack of documentary evidence sufficient to corroborate the claim that the beneficiary would be serving as a business systems analyst at the client's facility for the period sought in the petition. The record contained conflicting and inconsistent information regarding the employment. For efficiency's sake, the AAO hereby incorporates the above discussion and analysis regarding the inconsistencies and discrepancies in the record of proceeding regarding the work location of the beneficiary's proposed employment. It is incumbent upon the petitioner to resolve any inconsistencies in the record by

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<sup>2</sup> It must be noted that the AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). 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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

independent objective evidence. As previously mentioned, 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. The AAO concurs with the director that the petitioner did not provide sufficient documentation to determine whether the petitioner had submitted a valid LCA covering all the locations where the beneficiary would be employed.

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

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the 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 regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary.

Petitioners who are H-1B-dependent and/or found to have willfully violated their H-1B obligations are required to designate their status on the LCA. An LCA that does not accurately state the employer's status may not be used to support an H-1B petition. *See* Title 20 C.F.R. § 655.736(e) and (g), which states, in pertinent part:

The employer is required to designate its status by marking the appropriate box on the Form ETA-9035 or 9035E (*i.e.*, either H-1B-dependent or non-H-1B-dependent) . . . . An employer that is "H-1B-dependent" . . . is subject to the attestation obligations regarding displacement of U.S. workers and recruitment of U.S. workers . . . for all LCAs . . . to be used to support any petitions for new H-1B nonimmigrants or any requests for extensions of status for existing H-1B nonimmigrants. An LCA which does not accurately indicate the employer's H-1B-dependency status or willful violator status shall not be used to support H-1B petitions or requests for extensions.

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), states the following:

*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.

The regulations require that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner obtain a certified LCA from DOL in the occupational specialty in which the H-1B worker will be employed. *See* 8 C.F.R. § 214.2(h)(4)(i)(B). The Form I-129 filing requirements imposed by regulation require that the petitioner submit evidence of a certified LCA at the time of filing. Here, the petitioner submitted an LCA with its petition to USCIS, but failed to include page 3 of the LCA. On appeal, the missing page was provided to the AAO. A review of the document reveals that there is a significant discrepancy between information provided on the LCA and information in the record of proceeding. Specifically, on the LCA, the petitioner attested that it would only be used to support H-1B petitions for exempt nonimmigrants. However, there is no evidence in the record of proceeding to support a finding that the beneficiary is an exempt nonimmigrant. That is, the beneficiary's annual rate of pay is less than \$60,000 and the beneficiary does not possess a master's degree or higher degree in a specific specialty related to the employment. This is confirmed by the petitioner on the Form I-129 (page 10). There is no explanation for this discrepancy in the record of proceeding. Thus, the LCA does not correspond with the Form I-129 petition. As a result, the regulations preclude the LCA from being used by the petitioner to support the instant H-1B petition filed on behalf of the beneficiary. *See* 20 C.F.R. § 655.705(b). Thus, for this reason also, the petition must be denied.

Additionally, beyond the decision of the director, the AAO will briefly discuss the claimed educational requirements for the position, as well as the beneficiary's qualifications for the proffered position.

As a preliminary matter, it must be noted that the petitioner stated in its letter of support that it requires "a minimum of a Bachelor's Degree in Business, any Engineering, and/or knowledge of Computer applications with related experience" for the proffered position. In response to the RFE, the petitioner submitted a letter from the client [REDACTED] stating that the "work to be performed at our facility requires a minimum of a Bachelor of Business Administration or Commerce as well as experience in the IT field." The AAO notes that, in addition to the inconsistencies as to the requirements of the proffered position, such assertions, i.e., the duties of the proffered position can be performed by a person with a degree in any one of those disciplines, implies that the proffered position is not, in fact, a specialty occupation.

A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business/business administration, commerce or engineering, without further specification, does not establish the position as a specialty occupation.<sup>3</sup> See *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

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

In this matter, the petitioner and the client claim that the duties of the proffered position can be performed by an individual with only a general-purpose bachelor's degree, i.e., a bachelor's degree in business/business administration, commerce or engineering. This assertion is tantamount to an admission that the proffered position is not in fact a specialty occupation.

The AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient evidence to demonstrate that the position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the petitioner did

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<sup>3</sup> The field of engineering is a very broad category that covers numerous and various disciplines, some of which are only related through the basic principles of science and mathematics, e.g., petroleum engineering and aerospace engineering.

<sup>4</sup> Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

[t]he courts and the agency consistently have stated that, although a general-purpose bachelor's degree, such as a business administration degree, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify the granting of a petition for an H-1B specialty occupation visa. See, e.g., *Tapis Int'l v. INS*, 94 F.Supp.2d 172, 175-76 (D.Mass.2000); *Shanti*, 36 F. Supp.2d at 1164-66; cf. *Matter of Michael Hertz Assocs.*, 19 I & N Dec. 558, 560 ([Comm'r] 1988) (providing frequently cited analysis in connection with a conceptually similar provision). This is as it should be: otherwise, an employer could ensure the granting of a specialty occupation visa petition by the simple expedient of creating a generic (and essentially artificial) degree requirement.

not submit sufficient evidence regarding the proffered position to determine that it is a specialty occupation and, therefore, the issue of whether it will require a baccalaureate or higher degree, or its equivalent, in a specific specialty also cannot be determined. Therefore, the AAO need not and will not address the beneficiary's qualifications further, except to note that, the petitioner in this case submitted a copy of the beneficiary's foreign Bachelor of Commerce degree from Amravati University, his Statement of [REDACTED], and two letters from previous employers. The petitioner did not submit an evaluation of the beneficiary's credentials or sufficient evidence to establish that his credentials are the equivalent of a U.S. bachelor's degree in a specific specialty. As such, since evidence was not presented that the beneficiary has at least a bachelor's degree or the equivalent in a specific specialty, the petition could not be approved even if eligibility for the benefit sought had been otherwise established.

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

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