

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

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**

PUBLIC COPY



D2

Date: **MAR 14 2012**

Office: VERMONT SERVICE CENTER

FILE: 

IN RE: Petitioner:
 Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

Thank you,

for Michael T. Kelly
Perry Rhew

Chief, Administrative Appeals Office

DISCUSSION: The 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 is a software development business seeking to employ the beneficiary in a position that the Form I-129 identified as a quality assurance analyst/mainframe tester and to classify her 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 upon finding that the petitioner (1) failed to satisfy the itinerary requirement per 8 C.F.R. § 214.2(h)(2)(i)(B); (2) failed to submit a valid Labor Condition Application to cover the locations where the beneficiary will work; and (3) failed to establish that the proposed position qualifies for classification as a specialty occupation.

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) the Form I-290B. The AAO reviewed the record in its entirety before issuing its decision.

In the petition submitted on September 2, 2009, the petitioner stated it has 73 employees and a gross annual income of over \$9.9 million. The petitioner indicated that it wished to employ the beneficiary as a quality assurance analyst/mainframe tester in McLean, Virginia from August 21, 2009 to September 28, 2011 at an annual salary of \$71,200.

The petitioner states that an individual in this position should possess, at a minimum, a bachelor's degree in computer science, management information systems, chemistry or engineering.

The submitted Labor Condition Application (LCA) was filed for a quality assurance analyst/mainframe tester to work in McLean, Virginia or Richardson, Texas. The LCA lists a prevailing wage of \$71,178 for McLean, Virginia and \$49,899 for Richardson, Texas.

The petitioner submitted the beneficiary's credentials, indicating that she has a foreign degree. The education evaluation submitted states that the beneficiary's education is equivalent to a U.S. bachelor's degree in computer science and information technology.

Additionally, the petitioner provided a copy of a Subcontracting Agreement between the petitioner and Digital Intelligence Systems Corp. (DISYS), as well as a work order and letter describing the nature of the work to be done by the beneficiary, on behalf of DISYS, at the Freddie Mac offices in McLean, Virginia.

The Specialty Occupation Issue

The AAO will first discuss its conclusion that the director's determination that the petitioner had not

established the proffered position as a specialty occupation was correct.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

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

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

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

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must also meet one of the following criteria:

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT*

Independence Joint Venture v. Federal Sav. and Loan Ins. Corp., 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary and sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

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

Of decisive significance to this appeal, the AAO notes that, as recognized by the court in *Defensor v. Meissner*, 201 F.3d at 387, where, as here, the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. 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.* 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. As will be discussed below, the record of proceedings lacks such substantive evidence from any end-user entities in place at the time the petition was filed and that covers the petition's duration, even though it is apparent from the contractual documents submitted into the record of proceeding that it is end-user entities' business needs that would ultimately determine what the beneficiary would actually do on a day-to-day basis. In short, the petitioner has failed to establish the existence of H-1B caliber work for the beneficiary.

As will be evident in the discussion below, the evidence before the director when he rendered his decision to deny the petition indicated that the petitioner would assign the beneficiary to work for the end-client [REDACTED], per a subcontracting agreement between the petitioner and [REDACTED] but that evidence did not include any documentation from Freddie Mac itself as to the substantive nature of the work for which it contracted DISYS to have performed by workers, like the beneficiary, to be supplied by subcontractors, like the petitioner.

Thus, the AAO observes, the record of proceeding before the director did not provide him with an adequate factual basis for determining the substantive nature of the work to be actually performed by the beneficiary, and, consequently, for determining whether performance of that work would require a minimum of at least a bachelor's degree, or the equivalent, in a specific specialty, as the Act specifies for a specialty occupation.

The proffered position's duties are described by the petitioner as including research, analysis and design of computer-based solutions for defined businesses. The petitioner states that the quality assurance analyst/mainframe tester is responsible for:

- Identification and clear definition of needs of the customer, including analysis of customer operations and understanding of client's end purpose,
- Preparation of separate information flows and processes,
- Use of techniques such as structured analysis, data modeling, information engineering, mathematical model building and sampling,
- Analysis of hardware and software packages to determine their compatibility, and
- Programming to develop new and novel applications where needed.

In the petitioner's August 28, 2009 letter of support filed with the Form I-129, the petitioner's H.R. Manager ascribed the following job duties and related percentages of work-time expenditures to the proffered position:

- Research, design and develop computer software systems, in conjunction with hardware choice[;] 10%
- Apply principles and techniques of computer sciences and quantitative methodology & techniques to determine feasibility of design within time and cost constraints; 10%
- Analyze the communications, informational, database and program requirements of clients; plan, develop, design, test and implement software programs for engineering applications and highly sophisticated network systems; 10%
- Design, program, and implement software application packages customized to meet specific client needs; 10%
- Review existing computer systems to determine compatibility with projected or identified client needs; research and select appropriate system, including ensuring forward compatibility of existing systems; 10%
- Review, repair and modify software programs to ensure technical accuracy and reliability of programs; 5%
- Train on use of software applications and computer systems developed; provide trouble shooting and debugging support; 5%
- Test internet/client server applications using HTML, Java, and .NET and tools like Test Director, Clear Case, WinRunner, Requisite Pro And ToAD[;] 5%

- Create test harness, test traceability matrix, test plan, test design, test cases, automated test scripts and defect reporting [;] 5%
- Perform White Box (Unit, Integration), Black Box (system, Functional, System Integration, Regression, End to End), (UAT) acceptance testing and buck tracking system on windows and Unix environments [;] 5%
- Develop and execute shell scripts for testing in Unix environment[;] 5%
- Test in Enterprise Application Integration (EAI) environment involving TIBCO middleware and implement the system to provide analytical support to monitor operation of assigned application system[;]
- Support the project team by participating in enhancements and develop accurate documentation that complies with the company standards; 5%
- Assist as part of the team to resolve technical problems requiring good judgment and creativity in developing solutions; 10%
- Review complex specifications to identify problems in the systems package for systems development requiring need for revision of project scope and operational strategies[.] 10%

Additional documentation filed with the Form I-129 included *inter alia*, copies of the following documents pertaining to the proffered position: (1) a printout from the U.S. Department of Labor's Foreign Labor Certification Data Center (FLCDC) Online Wage Library, which displays the prevailing wage information regarding Software Quality Assurance Engineers and Testers that the petitioner used to discern the prevailing wage for the proffered position; (2) a Subcontracting Agreement between the petitioner and the computer-consulting firm DISYS, dated July 28, 2009 (hereinafter referred to as the DISYS Subcontracting Agreement); and (3) a "Supplement 1 – Work Order" (hereinafter referred to as the SUPP1WO) signed by DISYS and the petitioner in August 2009, that references the beneficiary as the person to perform it.

On September 11, 2009, the director issued an RFE advising the petitioner to submit the name of the business associated with the work location listed in the Form I-129 as well as a letter from the end-client detailing the project (including the name of the project and vendor, if applicable; contact information for the end client; and the name of the beneficiary's supervisor). Alternatively, the director requested evidence describing any in-house duties assigned to the beneficiary.

The petitioner's counsel submitted the response to the RFE. The response consists of a six-page letter from counsel and, as attachments, copies of the following documents related to the issues on appeal: (1) an Offer of Employment Letter, dated July 27, 2009, signed by the beneficiary and by the petitioner's H.R. Manager (newly submitted); (2) the previously submitted DISYS Subcontracting Agreement. with the previously submitted SUPP1WO referencing the beneficiary; and (3) an undated statement (newly submitted) on DISYS letterhead, signed by a Keith Larson, as

Sales Manager,¹ that purports to confirm that the beneficiary will work as a Mainframe Tester for the end-client Freddie Mac, at the Freddie Mac premises in Mclean, Virginia. The petitioner explained that the beneficiary would be serving as quality assurance analyst/mainframe tester for Freddie Mac located in McLean, Virginia pursuant to a contract between DISYS and the petitioner, but that the beneficiary would be supervised by the petitioner's technical manager.

The offer-of-employment letter states the following in pertinent part:

[The beneficiary] will be designated as Quality Assurance Analyst/Mainframe Tester ... responsible to support [the petitioner's] client software application development efforts *as assigned*.

As a Quality Assurance Analyst/Mainframe Tester, [the beneficiary] shall be assigned to work at [the petitioner's offices] or its client Location.

[The beneficiary] agree[s] to perform the duties that may be assigned

The AAO finds that the following aspects of the RFE and RFE response have a decisive negative impact upon the merits of this petition. The documents submitted in response to the RFE do not include a letter from the asserted end-client (i.e., Freddie Mac), although the RFE requested, in part, a letter from the end-client that would, *inter alia*, name the project to which the beneficiary is assigned, state the duties and title of the proffered position, and provide the name, title, and contract information of the person who primarily supervises or will supervise the beneficiary at the work site. Neither the DYSIS Subcontracting Agreement, the DISYS Sales Manager's letter, nor any other evidence in the record of proceeding satisfies the director's request for such evidence. As previously discussed, by application of the evidence-evaluation principle whose validity is recognized by the *Defensor* court, substantive evidence from the ultimate end-client regarding the nature and educational requirements of the work to be performed by the beneficiary is a critical and necessary foundation without which the AAO cannot determine that the proffered position qualifies as a specialty occupation.

The director denied the petition on October 27, 2009.

On appeal, counsel states that "the job duties of the beneficiary are performed for the end-client for a specific duration at the location specified in the labor condition application; [t]he position is a specialty occupation position; [and a] work assignment for the beneficiary exists via the work order between the end-client and the vendor." The appeal is not accompanied by any additional evidence or a brief.

The AAO finds unsuccessful counsel's attempt on appeal to establish the end-client Freddie Mac's requirements for the proffered position by submitting the Freddie Mac Purchase Order (Type: Work

¹ Although this document is referenced as a "letter," it lacks an addressee.

Order). Whether by design or oversight, counsel failed to submit a copy of “the Master Agreement dated 4/1/09” which the Purchase Order references as containing “terms and conditions” by which the Purchase Order “is governed.” Further, the Purchase Order has been redacted, without explanation, to conceal terms (including the Total Purchase Order amount) which are material for an AAO determination of the true evidentiary value of the Purchase Order. The AAO therefore finds that the Purchase Order as presented - that is, redacted without explanation and unaccompanied by the overarching Master Agreement - has no probative value towards establishing the proffered position as a specialty occupation. In this regard, the AAO additionally notes that the wording of the Purchase Order refers to itself “as including the scope of work attached hereto as Exhibit 1” – but no such attachment is included.

The AAO also finds that the petitioner has not established that the “Test Engineer” page submitted on appeal as “the detailed duties the beneficiary is required to perform for the end-client, Freddie Mac” was actually either produced or endorsed by Freddie Mac. Therefore, it has no probative value with regard to establishing Freddie Mac’s requirements with regard to work to be performed by the beneficiary. The AAO also accords no probative value to the document submitted on appeal that bears the DISYS letterhead and is signed by a DISYS sales manager. The record of proceeding contains no evidence that the end-user Freddie Mac has endorsed or even seen the information contained in this document. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). 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 Obaighena*, 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 AAO further finds, however, that as the petitioner attests to the accuracy of the “Test Engineer” page by submitting it on appeal, the petitioner affirmatively indicates that the proffered position does not require at least a bachelor’s degree, or the equivalent, in a specific specialty: this document specifies only a requirement for a certain amount of experience in certain computer-related work, and it does not specify a requirement for any college-level coursework, let alone a degree in a specific specialty.

The evidence submitted by the petitioner, including the offer of employment, subcontracting agreement, work order and Freddy Mac letter, fails to clearly establish the substantive nature of the work to be performed by the beneficiary and therefore precludes a finding that the proffered position is a specialty occupation under any supplemental criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). The substantive nature of the work to be performed is what determines: (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner’s normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5)

the degree of specialization and complexity of the specific duties, which is the focus of criterion 4. As the record does not contain sufficient evidence, existing at the time the petition was filed and covering the petition's validity, of the specific duties the beneficiary would perform for the petitioner's client(s), the AAO cannot analyze whether her placement is related to the provision of a product or service that requires the performance of the duties of a quality assurance analyst.²

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

The Itinerary and LCA Issues

The LCA and Form I-129 in this matter, which indicate the proffered position's location as being in McLean, Virginia and Richardson, Texas, do not correspond with the offer of employment, which does not limit where in the United States the employee may be required to work or what duties the beneficiary may be assigned. The offer of employment does not specify any location where the beneficiary will be required to work, except to state that the location of the work will be assigned. The petitioner did not submit an itinerary including both the dates and locations of the services to be provided during the validity period requested.

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) states, in pertinent part:

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

The itinerary language at 8 C.F.R. § 214.2(h)(2)(i)(B), with its use of the mandatory "must" and its inclusion in the subsection "Filing of petitions," establishes that the itinerary as there defined is a material and necessary document for an H-1B petition involving employment at multiple locations, and that such a petition may not be approved for any employment period for which there is not submitted at least the employment dates and locations. The AAO finds that in light of the

² Even if the AAO could find that the proffered position would indeed be that of a quality assurance analyst, such a position does not generally qualify as a specialty occupation. According to the U.S. Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) section on computer systems analysts, which includes software quality assurance analysts, while many employers "prefer" to hire individuals with a bachelor's degree, the *Handbook* does not state that at least a bachelor's degree or the equivalent in a *specific specialty* is a normal, minimum entry requirement for a software quality assurance analyst position. See Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2010-11 ed., available at <http://www.bls.gov/oco/ocos287.htm> (last accessed February 28, 2012).

aforementioned stipulations stated in the offer of employment, and in light of the previously discussed evidentiary issues with regard to the actual nature of the work that the beneficiary would perform and for whom, it is likely that the beneficiary would be subject to assignment to work at locations other than those specified in the petition and the accompanying LCA. Accordingly, the AAO finds, that an itinerary in compliance with 8 C.F.R. § 214.2(h)(2)(i)(B) was required and that the failure to provide one precludes approval of this petition. Accordingly, the itinerary basis of the director's decision will not be disturbed.

Additionally, the Department of Labor (DOL) regulations governing Labor Condition Applications states that "[e]ach LCA *shall state...[t]he places of intended employment.*" 20 C.F.R. § 655.730(c)(4) (emphasis added). "Place of intended employment" is defined as "the worksite or physical location where the work actually is performed by the H-1B...nonimmigrant." 20 C.F.R. § 655.715. Moreover, the instructions for Section G of the LCA require that the employer list the place of intended employment "with as much geographic specificity as possible" and notes that the employer may identify up to three physical locations, including street address, city, county, state, and zip code, where work will be performed. Petitions that will require the beneficiary to perform his services at multiple worksites at the time must include all of them on the LCA. Failure to do this will result in a finding that the employer did not file an LCA that supports the H-1B petition.

In light of the fact that the record of proceeding indicates that the beneficiary may work at locations not identified in the Form I-129 and the LCA filed with it, the AAO cannot ascertain that this LCA corresponds to the H-1B petition. A petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Therefore, for this additional reason, the petition cannot be approved. Therefore, the petitioner not only has failed to comply with the itinerary but has also failed to submit a valid LCA that corresponds to all of the proposed work locations.

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 (emphasis added):

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.*

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. Here, the petitioner has failed to submit the

required itinerary as well as a valid LCA that corresponds to all of the proposed work locations, and the petition must be denied for these additional reasons.

For the reasons just discussed, the AAO also finds correct the director's determination that the petitioner failed to comply with the LCA requirements.

Although not addressed by the director's decision to deny the petition, the AAO's independent, *de novo* review of the record of proceeding surfaced two additional aspects of the petition that each also precludes approval of the petition. The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

First, the AAO finds that the expanse of the proposed duties related in this decision's previously quoted August 28, 2009 letter of support from the petitioner's H.R. Manager materially exceeds the scope of work that the pertinent sections of the *Handbook* and the *O*NET* ascribe to the occupational classification (Software Quality Assurance Engineers and Testers) for which the LCA was certified. Likewise, that letter of support's references to and discussions about Computer Systems Analysts and Programmers, the letter's assertions to the effect that actual work requirements for a particular type of computer-related position may extend beyond the categories of work included within generic occupational-classifications, and the letter's characterization (at page 6) of Systems Analyst as "the comparable position," are all indicative of the likelihood that the beneficiary would be assigned substantial duties and position responsibilities not encompassed by the occupational classification specified in the LCA. For these additional reasons, it appears that the LCA does not correspond to the position that it would be expected that the petitioner would perform, and, therefore, to the petition itself. Consequently, for the reasons just discussed, the petition must also be denied.

Finally, also beyond the decision of the director, the AAO will quickly address the issue of whether or not the petitioner qualifies as an H-1B employer or agent. The United States Supreme Court 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)).

As such, 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. The evidence in the record indicates that the beneficiary may be supervised by an employee of the end-client, and that her work duties may ultimately be determined by the end-client, and not the petitioner. Therefore, the AAO cannot find that there is the required employer-employee relationship between the petitioner and the beneficiary and the petition must be denied for this additional 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 *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it 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 at 1043, *aff'd*, 345 F.3d 683.

The appeal will be dismissed and the petition denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. § 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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