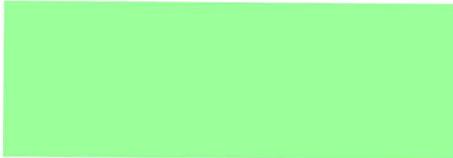




U.S. Citizenship  
and Immigration  
Services

(b)(6)



Date: **JUN 13 2013** 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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

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

On the Form I-129 visa petition, the petitioner describes itself as an information technology provider. In order to employ the beneficiary in what it designates as a programmer analyst position, the petitioner seeks 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 failed to establish that it has standing to submit the application as the beneficiary's prospective U.S. employer and failed to demonstrate that the Labor Condition Application (LCA) submitted to support the visa petition is valid for employment in the area where the beneficiary would work. Further, although the decision did not appear to rely on the lack of an itinerary as a basis for the denial, it did note that the nature of the petitioner's business, placing aliens with computer skills with firms to work on those firms' projects, suggests that the beneficiary would work at multiple locations during the period of requested employment.

On appeal, counsel asserted that the director's bases for denial were erroneous, and contended that the petitioner satisfied all evidentiary requirements. In support of these contentions, counsel submitted a brief and additional evidence.

The AAO bases its decision upon its review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's brief and attached exhibits in support of the appeal.

As was noted above, the director based her denial of the petition, in part, on her determination that the petitioner had not established that it has standing to file an H-1B petition, in that the evidence of record did not establish that the petitioner is the beneficiary's prospective U.S. employer as defined at 8 C.F.R. § 214.2(h)(4)(ii).

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), 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).

The term "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.

(Emphasis added); *see also* 56 Fed. Reg. 61111, 61121 (Dec. 2, 1991).

With the petition, counsel submitted evidence that the beneficiary has a bachelor of engineering degree in computer science and engineering from [REDACTED] in India, and a master of science degree in computer science awarded by the [REDACTED]. The LCA provided to support the visa petition is certified for employment in Dublin, Ohio. Counsel also submitted a copy of the petitioner's Employee Handbook, which describes various required and proscribed behaviors.

On April 29, 2009, the service center issued a request for evidence in this matter. The service center requested, *inter alia*, additional evidence that the petitioner would be the beneficiary's actual employer.

In response, counsel submitted, *inter alia*, (1) a Professional Service Agreement (PSA) between the petitioner and [REDACTED]; (2) an addendum to the PSA; (3) a letter, dated June 9, 2009, from the petitioner's president; (4) a "[REDACTED]," dated February 9, 2009; (5) printouts of positions descriptions from the petitioner's website; (6) a printout of a posting to a job board; and (7) copies of newspaper vacancy announcements placed by the petitioner.

The PSA and the addendum are both dated February 27, 2009, and describe computer services the petitioner agreed to provide to [REDACTED], including account management, business analysis, detail design, development, quality control, testing, website security design, deployment and maintenance, and training development and delivery for end users. The PSA states that [REDACTED] will reimburse the petitioner for travel, which suggests that travel is expected. The addendum, which is headed, "Schedule A to Professional Service Agreement," is a work order. It states that the beneficiary will provide services pursuant to that work order. It further states, "Work is expected to be performed remotely [apparently at the petitioner's offices] with occasional site work [apparently at the offices of [REDACTED]] as necessary."

As to the period of performance, the PSA states:

The initial term of this Agreement shall be 24 months from [February 27, 2009]. This agreement shall automatically renew for the length of the Agreement unless written notice is provided by either party to the other at least 30 days. [sic]

The effect of that renewal clause is unclear to the AAO. Whether the Professional Services Agreement is projected to continue beyond 24 months is also unclear.

The addendum to the PSA states that the beneficiary's work was expected to commence in April 2009, and to continue through December 2010.

The petitioner's president's June 9, 2009 letter states that the beneficiary would work in the petitioner's offices in Dublin, Ohio while performing pursuant to the contracts between the petitioner and [REDACTED].

The [REDACTED] appears to be the petitioner's response to a request for proposal issued to the petitioner by [REDACTED] (hereinafter referred to as the petitioner's proposal, or the proposal). In it, the petitioner evinces its willingness to engage in a web portal application development project for [REDACTED]. The proposal includes various statements pertinent to the location where the work would be performed, including: "Value is enhanced by concentrating resources a client needs in one location with secure remote access," and "[The petitioner] will utilize [its] ability to provide services from our Off-Shore Lab, On-Shore lab and On-Site resources to custom develop a solution that will uniquely address [REDACTED] support needs." It further states, "Travel Expenses will not be billed unless [REDACTED] requires resources to travel to sites other than the main location detailed in the contract."

The proposal also states, as to the mitigation strategy for "Communication/cultural barriers", "[s]ince both [the petitioner's] developers and [REDACTED] development team are based in the same location there will be very little barriers." It does not expressly state at what location the petitioner's developers and [REDACTED] development team would be based.

The printouts from the petitioner's job board include descriptions of Programmer Analyst I, II, and III positions. They state that Programmer Analyst I positions require a bachelor's degree in computer science, engineering, or mathematics, Programmer Analyst II positions require a master's degree in computer science or engineering, and Programmer Analyst III positions require a bachelor's degree in computer science or computer information systems. Those position descriptions do not indicate where the petitioner's programmer analysts would work.

The job board posting was placed by the petitioner on the [REDACTED] on March 30, 2009. It is for a Programmer Analyst I to work in Dublin, Ohio. It states that the position requires "a Bachelor's Degree in Computer Science, Engineering, or Mathematics."

The newspaper vacancy announcements provided were placed in the [REDACTED] on January 4, 2009, and January 11, 2009. Both of those vacancy announcements state:

[The petitioner], a consulting firm headquartered in Dublin, Ohio is looking for Programmer Analysts to fill multiple positions with different experience and education levels in Dublin, Ohio, and various unanticipated locations throughout the U.S. Some positions require a Master's Degree and relevant experience.

On June 17, 2009, the director denied the petition, finding, as was noted above, that the petitioner had failed to demonstrate (1) that it had standing to file the visa petition as the beneficiary's prospective employer, and (2) that the LCA submitted is valid for all of the locations where the beneficiary would be employed.

In his appeal brief, counsel asserted that the evidence in the record demonstrates that the petitioner is the beneficiary's prospective employer within the meaning of 8 C.F.R. § 214.2(h)(2)(i)(A). Counsel listed various indices of an employer/employee relationship, and stated that the evidence demonstrates that such a relationship exists between the petitioner and the beneficiary. Counsel noted that the petitioner would pay the beneficiary's salary and provide benefits, asserted that the beneficiary would work primarily in the petitioner's own offices, and stated that the petitioner would assign the beneficiary's duties and supervise his performance has the right to discharge the beneficiary for poor performance.

As to the finding that the petitioner has not demonstrated that the LCA is valid for all of the locations where the beneficiary would work, counsel asserted that, notwithstanding that the LCA lists only the petitioner's office in Dublin, Ohio, as the location where the beneficiary would work, and that a contract states that the beneficiary would occasionally work at [REDACTED] Gahanna, Ohio site, the petition is approvable. Counsel cited 20 C.F.R. § 655.735 for that proposition, noting that Dublin and Gahanna are both within the Columbus, Ohio, Metropolitan Statistical Area.

Counsel did not contest the director's finding that the nature of the petitioner's business suggests that the beneficiary would work at other locations, but asserted that a complete itinerary is unnecessary, again, because of the nature of the petitioner's business. Counsel cited Interpreter Releases for this proposition.

The AAO preliminarily notes that Interpreter Releases are a secondary source of information on immigration law. They are an unofficial compilation of material relevant to immigration law. Counsel was certainly entitled to argue that any reasoning gleaned from Interpreter Releases is convincing, but his citation of Interpreter Releases, *per se*, is without any precedential effect. Further, the particular Interpreter Release cited by counsel appears to be concerned with a proposed rule that was never adopted. For both reasons, counsel's citation is without effect.

The first issue to be discussed is whether or not the petitioner has established that it meets the regulatory definition of an intending United States employer. § 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." *Id.* The AAO finds that the record is not persuasive in establishing that the petitioner 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. 440, 445 (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)).

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.<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. 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 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).

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.<sup>2</sup>

Accordingly, 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).<sup>3</sup>

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

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<sup>2</sup> 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))).

<sup>3</sup> 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).

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 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.

Lastly, 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, . . . the answer to whether [an individual] 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."

Although the petitioner stated, on both the visa petition and the LCA, that the beneficiary would work at its offices, the evidence submitted suggests otherwise.

The work order provided states that the work the beneficiary would perform for [REDACTED] "is expected to be performed remotely [not at [REDACTED] location] with occasional on[-]site work [at [REDACTED] location] arranged as necessary." Neither the work order nor any other evidence makes clear what is meant by "occasionally." Whether the work order contemplates that the beneficiary would work at [REDACTED] offices once every few months, or one day per month, or multiple days per week is unclear.

The newspaper vacancy announcements indicate that shortly before it filed the instant visa petition, the petitioner was seeking programmer analysts to work "in Dublin, Ohio *and* various unanticipated

locations throughout the U.S." [Emphasis added]. Thus, the petitioner was seeking programmer analysts who would not work solely in the petitioner's own offices, but would work in Dublin, Ohio, *and* in various other unanticipated locations.

The petitioner's proposal for the project with [REDACTED] indicates that the petitioner would not bill [REDACTED] for travel expenses unless it was required to send its workers to locations "other than the main location detailed in the contract," and that both the petitioner's developers and [REDACTED] development team would be based in the same location." Those statements, taken together, strongly suggest that the petitioner's workers assigned to the [REDACTED] project would work at the location of [REDACTED], rather than at the petitioner's location, as stipulated in the visa petition and the LCA.<sup>4</sup>

Further, that the petitioner's developers would be working with the [REDACTED] development team, apparently at the location of [REDACTED], suggests that the petitioner's developers and the [REDACTED] developers, working on the same project, would be jointly supervised. The record contains no indication that the petitioner would provide that supervision, and circumstances suggest that it would not. In any event, the evidence is insufficient to demonstrate that the petitioner would assign tasks to the beneficiary and supervise his performance while he worked for [REDACTED] at [REDACTED] location. The evidence is insufficient, therefore, to demonstrate that, while the beneficiary worked for [REDACTED] he would be an employee of the petitioner, pursuant to the common law test explained above.

Further still, the evidence does not suggest that the beneficiary would work on the [REDACTED] project throughout the requested employment period. The only work order in the record is for work expected to conclude in December 2010. Even if the petitioner had demonstrated that it would be the beneficiary's actual employer while the beneficiary worked on the [REDACTED] project, the record contains insufficient evidence to demonstrate that, after the projected conclusion of the work for which the petitioner and [REDACTED] have contracted, the petitioner would have any work for the beneficiary to perform or, if it did, that, while the beneficiary performed that additional work, the petitioner it would be the beneficiary's actual employer pursuant to the common law test explained above. Given that it claims 120 employees and apparently assigns them to various locations, that the petitioner supervises its employees' work is questionable, at best. Even if the petitioner had demonstrated that it would assign the beneficiary's tasks to him and supervise his performance while he worked at the [REDACTED] location, the AAO would be unable to find that the petitioner would continue to be the beneficiary's actual employer at any time after December 1, 2010.

In view of the above, it appears that the beneficiary will not be an "employee" having an "employer-employee relationship" with the petitioner as its "United States employer." It has not been established that the beneficiary will be "controlled" by the petitioner. To the contrary, it appears that third party clients will ultimately control the beneficiary's employment.

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<sup>4</sup> Those statements in the proposal also indicate that the parties contemplate that the petitioner's workers may be sent to some other location or locations, in which case the petitioner would bill [REDACTED] for travel expenses.

The AAO therefore affirms the director's finding that the petitioner has not demonstrated that it qualifies as the beneficiary's United States employer. The appeal will be dismissed and the petition will be denied on this basis.

The same facts resolve the issue of whether the petitioner has demonstrated that the LCA submitted is valid for employment at the locations where the beneficiary would work. The petitioner stated on the certified LCA, that the beneficiary would work in Dublin, Ohio. The work order indicates that the petitioner had work for the beneficiary to perform from April 2009 to December 2010. The petitioner's proposal, as explained above, indicates that the work would be performed at the location of [REDACTED] in Gahanna, Ohio. Counsel noted, on appeal, that as the Dublin, Ohio, and Gahanna, Ohio locations are both within the Columbus, Ohio MSA, the LCA submitted is sufficient to cover both locations.

However, the petitioner has not demonstrated where the beneficiary would work during the latter portion of the period of requested employment, after the conclusion of the [REDACTED] project. The AAO cannot find that the petitioner has demonstrated that the LCA is valid for employment in unanticipated locations. The AAO is mindful of counsel's argument pertinent to short-term placements pursuant to 20 C.F.R. § 655.735. The record does not demonstrate, however, that the beneficiary's placements from December 2010 through April 19, 2012, would be short-term within the meaning of that regulation.

The petitioner has not demonstrated that the LCA submitted to support the visa petition is valid for all of the locations where the beneficiary would work. Even if the visa petition were otherwise approvable, the AAO would be unable to approve it for any period after December 1, 2010.

The record suggests additional issues that did not form bases of the decision of denial.

If the beneficiary's work would not all be performed at one location, the regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) obliges the petitioner to provide a complete itinerary as initial evidence submitted with the visa petition. The petitioner has not complied with that requirement, notwithstanding that the nature of the petitioner's business and the evidence presented indicate that the beneficiary will not work exclusively at the petitioner's offices. Counsel's explanation is his assertion that a complete itinerary is not required, which assertion he supported with an Interpreter Releases citation. As was noted above, that citation is of no weight. As the petitioner has not provided the requisite itinerary, the appeal will be dismissed and the petition denied for this additional reason.

Further, the petitioner is obliged to show that the beneficiary would 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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

With the petition, counsel submitted a letter, dated April 15, 2009, from the petitioner's president. In that letter the petitioner's president provided a description of the duties of the proffered position and stated:

To adequately perform the duties of a Programmer Analyst, the candidate for this position must possess at least a Bachelor's Degree in Computer Science, Engineering, Information Technology, Mathematics, or Science . . . .

In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in two disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added).

In other words, while the statutory "the" and the regulatory "a" both denote a singular "specialty," the AAO does not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. *See* section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). This also includes even seemingly disparate specialties providing, again, the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

Again, the petitioner claims that the duties of the proffered position can be performed by an individual with a bachelor's degree in Computer Science, Engineering, Information Technology, Mathematics, or Science. The issue here is that there is insufficient evidence in the record demonstrating that these disparate fields of study are closely related or that they are all directly related to the duties and responsibilities of the particular position proffered in this matter.

Absent such evidence, it cannot be found that the particular position proffered in this matter has a normal minimum entry requirement of a bachelor's or higher degree in a specific specialty or its

equivalent under the petitioner's own standards. Accordingly, as the evidence of record fails to establish a standard, minimum requirement of at least a bachelor's degree *in a specific specialty* or its equivalent for entry into the particular position, it does not support the proffered position as being a specialty occupation and, in fact, supports the opposite conclusion.

Therefore, absent evidence of a direct relationship between the claimed degrees required and the duties and responsibilities of the position, it cannot be found that the proffered position requires anything more than a general bachelor's degree. As explained above, 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. USCIS has consistently stated that, although a general-purpose bachelor's degree, such as a degree in business administration, 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).

As the evidence of record fails to establish how these two dissimilar fields of study form either a body of highly specialized knowledge or a specific specialty or its equivalent, the petitioner's assertion that the job duties of this particular position can be performed by an individual with a bachelor's degree in any of an array of only peripherally related fields is tantamount to an admission that the proffered position is not in fact a specialty occupation. This is sufficient reason, in itself, to find that the proffered position has not been shown to qualify as a specialty occupation position by virtue of requiring a minimum of a bachelor's degree in a specific specialty or its equivalent, and to deny the visa petition.

Moreover, it also cannot be found that the proffered position is a specialty occupation due to the petitioner's failure to satisfy any of the supplemental, additional criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

As recognized by the court in *Defensor, supra*, 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 at 387-388. 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 384. 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.

In the instant case, the evidence shows that the petitioner would have provided the beneficiary to [REDACTED] from April 2009 to December 2010. After that, the record is silent as to the entity for which the beneficiary would have worked. Evidence of the work the beneficiary would have performed through December 2010, in order to be competent, would necessarily be provided by [REDACTED]. Evidence pertinent to the work the beneficiary would have performed after that would necessarily

have to be provided by the beneficiary's subsequent end-users. There is insufficient evidence in the record from either [REDACTED] or those unidentified subsequent end-users.

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that 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 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.

The petitioner has not demonstrated that the beneficiary would work in a specialty occupation. The visa petition will be denied on this additional basis.

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

**ORDER:** The appeal is dismissed, and the petition is denied.