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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

DATE: JUN 28 2013

OFFICE: VERMONT SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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 (AAO) 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,

N. B.
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Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director of the Vermont Service Center denied the nonimmigrant visa petition, and the Administrative Appeals Office (AAO) dismissed a subsequent appeal as moot. The matter is now before the AAO on a combined motion to reopen and motion to reconsider. On motion, counsel for the petitioner has asserted that the matter is not, in fact, moot and that the appeal should not, therefore, have been dismissed on that basis. The motion to reopen shall be dismissed as there is no new evidence submitted in support of this motion. The motion to reconsider, however, will be granted. The AAO's prior decision to dismiss the appeal as moot is hereby withdrawn, and the AAO will reconsider the appeal in full on its merits. Upon reconsideration, however, the appeal will be dismissed and the petition will be denied, for the reasons that will be discussed in this decision.

On the Form I-129 visa petition and its allied documents, the petitioner describes itself as an Information Technology firm engaged in software consulting and staffing services, established in 2004. In order to employ the beneficiary in a position to which it assigned the job title "Computer Programmer," 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 on three separate and independent grounds, namely, that the petitioner: (1) failed to comply with the itinerary requirement at 8 C.F.R. § 214.2(h)(2)(i)(B); (2) failed to establish eligibility at the time of filing the petition; and (3) failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's letter denying the petition; (5) the petitioner's Form I-290B, brief dated July 27, 2010, and supporting materials for the underlying appeal; (6) the AAO's May 3, 2012 appeal dismissal and petition denial; and (7) the petitioner's Form I-290B motion to reopen and motion to reconsider, brief dated May 24, 2012, and supporting materials for the joint motion. 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. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

Before addressing the director's grounds for denying the petition, the AAO will first address an additional, independent ground, not identified by the director's decision, that the AAO finds also precludes approval of this petition. Specifically, the AAO finds that there is insufficient evidence to establish that the petitioner will have a valid employer-employee relationship with the beneficiary. For this additional reason, the appeal must be dismissed and the petition must be denied.

In this matter, the petitioner indicated in the Form I-129 and supporting documentation that it seeks the beneficiary's services as a "Computer Programmer" to work on a full-time basis at an annual salary of \$60,000 per year. In addition, the petitioner indicated that the beneficiary would be

working at [REDACTED] for the entire period requested in the petition.

Among the documents submitted with the Form I-129 is a September 10, 2009 letter, on the petitioner's letterhead, and signed by the petitioner's CEO (hereinafter, letter of support). The letter of support described the petitioner's business model as partnering with clients for project-based IT services and indicated that the petitioner is engaged in outsourcing and providing services to its clients or customers, rather than in developing products for sale in any particular market sector.

That letter states, in part, that the petitioner was "offering employment to [the beneficiary] to perform the following tasks independently or as a leader of a team":

Define and administer Interface Style; Define and administer Interface Coding Standards; Define and administer team documentation standards; Set and manage development schedules[.]

Produce acceptable alpha test-level code; Analyze end user requirements, system design and implementation, and documentation as required by the user; Respond and resolve computer[-]related problems and to [sic] improve existing computer systems using Websphere Application Server 6.0, AIX, Unix, Linux, UDB 8, JDBC, EJB, JSP, HTTP, servlets, WebSphere Message Broker/MQ v6.0, Websphere portal, RFHUtil, NetTool, XML Message Structure, LDAP, [and] Shell Scripts.

Maintain and modify programs for application enhancements and develop and maintain system documentation; Provide technical leadership on issues related to the design and implementation of large business applications on a variety of platforms including windows environment.

Coordinate database administrative functions to assure system efficiency, system optimization and system administration and collaborate with quality assurance to migrate turnovers of code through test and quality assurance to production.

Review computer systems capabilities, workflow and scheduling limitations to determine if requested program or program change is possible within the existing system. Analyze business procedures and problems to redefine data and convert it to programmable form of EDP.

Upgrade system and correct errors to maintain system after implementation. Prepare technical reports, user manual and operations manuals as required by the user, [and] organize, coordinate and conduct meeting[s] and seminar[s] on various issues pertaining to automation.

Communicate and interface with the customer's management on issues pertaining to their automation and customization needs including debugging, modifying, performance tuning and enhancing implemented software systems.

Upon review, the AAO finds that the petitioner's letter of support indicates that the beneficiary would provide services to clients or customers to an extent that would be determined by whatever particular contractual arrangements for specific services each client would make with the petitioner. As this record of proceeding does not include any evidence that the beneficiary has been identified in any such contract to provide all of the services specified above, and as the petitioner has not provided any persuasive explanation to the contrary, the AAO finds that the petitioner has not established that the beneficiary would, in fact, perform all of the above-listed work wherever and whenever assigned. In other words, the evidence of record does not establish that the beneficiary would perform the full constellation of duties and employ all of the computer-related applications identified in the letter.

The documents accompanying the Form I-129 on its filing also included an August 26, 2009 letter from the petitioner's CEO to the beneficiary, with the subject line, "Offer of Employment." Only the following sentence of the letter addresses the work to be performed:

You will be responsible for the design, development, and/or administration of the administration of the systems and also participating in, customer software implementation projects.

The AAO notes that the letter does not reference any specific client or any particular project upon which the beneficiary would work. Also, the letter references "your enclosed Employment Agreement," which has not been submitted into the record.

In addition to the aforementioned documentation, the documents filed with the Form I-129 included, *inter alia*, the following:

- The first five pages of a 65-page document entitled, "Subcontract Agreement for the [REDACTED] [REDACTED]" made as of August 19, 2009, between [REDACTED] located in [REDACTED] and the petitioner as a "Subcontractor", which states that "[REDACTED] has entered into a contract with [REDACTED] ("Customer") . . . to perform the technical services for Customer," and that, "Subcontractor shall, upon the request of [REDACTED] furnish the services described in Schedule A"¹ (hereinafter, the Artech Subcontract Agreement);
- A document attached to the [REDACTED] Subcontract Agreement and on [REDACTED] letterhead entitled "ITDA Schedule B, Purchase Order" signed by [REDACTED] and the petitioner on September 9, 2009, and listing, [REDACTED] PO #, an effective date of September 8, 2009, the beneficiary as a subcontractor, and the subcontractor pay rate (hereinafter, the Purchase Order);

¹ The AAO notes that Schedule A was not submitted into the record of proceeding at the time the petition was filed. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

- An 8-page document entitled, “[REDACTED] Subcontract,” made as of May 27, 2004, between [REDACTED] a division of [REDACTED] located in Phoenix, Arizona [REDACTED], and the petitioner as a “Subcontractor”, which states that [REDACTED] “has been awarded a contract by [REDACTED] (“Customer”) to provide, coordinate and manage the contract staffing needs of Customer,” that [REDACTED] “desired to have Subcontractor assist [REDACTED] by having Subcontractor provide certain of the personnel that are required by Customer,” and that “Subcontractor shall render those services described in Schedule A”² (hereinafter, the [REDACTED] Subcontract Agreement);
- A document entitled, “Master Technical Services Agreement # [REDACTED] Statement of Work # [REDACTED]” made and entered into as of April 13, 2004, between [REDACTED] and the petitioner, stating that the agreement “establishes the basis for a multinational procurement relationship under which [the petitioner] will provide [REDACTED] or its Customer, the Deliverables³ and Services⁴ described in SOWs⁵ issued by [REDACTED] to [REDACTED] under this Agreement” (hereinafter, the [REDACTED] Agreement). On page three of the [REDACTED] Agreement, in subparagraph 7.1, the agreement provides that “Delivery under this Agreement means delivery to the location and delivery point as specified in the relevant SOW”⁶;
- A four-page document entitled, “Consulting Agreement,” entered into as of the 9th day of May 2005, by and between [REDACTED] located in New York, New York, and the petitioner, indicating that the petitioner would assist [REDACTED] with programming and other related technical areas by providing consultants with expertise in [REDACTED] (hereinafter, the [REDACTED] Agreement).⁷ Also of note, the [REDACTED]

² The AAO notes that Schedule A was not submitted into the record of proceeding at the time the petition was filed. As previously noted, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190).

³ The AAO notes that “Deliverable” is defined in the [REDACTED] Agreement as meaning “any item that [the petitioner] prepares for or provides to [REDACTED] as described in a SOW. . . .”

⁴ The AAO notes that “Services” is defined in the [REDACTED] Agreement as meaning “the services identified in the relevant SOW.”

⁵ The AAO notes that “SOW” or “Statement of Work” is defined in the [REDACTED] Agreement as meaning “any document attached to or included in this Agreement which describes the Deliverables and Services, including any requirements, specifications or schedules.”

⁶ Notably, the [REDACTED] Agreement is not accompanied by any SOWs, nor is there any other documentary evidence that describes the nature of the services for the end client, the location of the end client, or the end client’s minimum requirements for the tasks to be fulfilled. Also, the petitioner executed the [REDACTED] Agreement on April 22, 2004, and there is no evidence in the record that it was still in effect when the petitioner filed this petition years later, in September 2009.

⁷ The AAO notes that the term of the [REDACTED] Agreement was from May 10, 2005 to November 10, 2005,

Agreement states that the parties may agree to specific work tasks or projects as specified in a Statement of Work (SOW), but it does not delineate the nature of the services for [REDACTED] or the minimum requirements for the tasks to be completed for [REDACTED]. Also, the record of proceeding does not contain a SOW between [REDACTED] and the petitioner that would indicate specific work tasks; and

- A five-page document entitled "Contractor Agreement," made and entered into as of February 16, 2005, by and between [REDACTED], located in Orange, California, and the petitioner, stating that the petitioner will provide [REDACTED] with personnel who have experience in computer programming, data processing and related areas to service special projects and to handle peak workloads (the [REDACTED] Agreement).⁸

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on January 4, 2010. The petitioner was asked to submit probative evidence that the petitioner has specialty occupation work available for the entire requested H-1B employment period. The director outlined the specific evidence to be submitted.⁹

On February 16, 2010, the petitioner responded to the RFE by submitting an RFE response letter and additional evidence. Specifically, the petitioner submitted, *inter alia*, the following:

- An LCA, certified on October 7, 2009, for the occupational classification of "Computer Programmers" - SOC (ONET/OES Code) 15-1021.00, at a Level I (entry level) wage for a work location in Armonk, New York, and a second work location in Bentonville, Arkansas;
- An LCA, certified on February 11, 2010, for the occupational classification of "Computer Programmers" - SOC (ONET/OES Code) 15-1021.00, at a Level I (entry level) wage for a work location in Sylmar, California;
- A letter dated February 11, 2010, from [REDACTED], addressed to U.S. Citizenship and Immigration Services (USCIS), stating that [REDACTED] has a contract with the petitioner and

subject to renewal for consecutive 60 day periods upon mutual written consent of the parties. The AAO further notes that the record of proceeding does not contain mutual written consent documents that would evidence continuity of the [REDACTED] Agreement during any part of the employment period for which the instant petition was filed.

⁸ The AAO notes that on page 1, in Section 1, "Term and Termination" of the [REDACTED] Agreement, the parties agree that the term shall be for the date that the petitioner's employee commences providing services for [REDACTED] until completion of the project for which the petitioner's employee is providing services. The AAO further notes that the record contains no documentation regarding specific projects which define the duration of the [REDACTED] Agreement, and therefore the duration of the [REDACTED] Agreement has not been established.

⁹ The director also noted that the petitioner would reach a total of six years of H-1B status, and requested evidence that he is eligible for additional time in H-1B status. The record reflects that the beneficiary can recover some unused H-1B time, and because this issue is not material to the outcome on appeal, the AAO will not determine the precise amount of time available to the beneficiary in connection with this petition.

the beneficiary "to use their services for their client[,] [REDACTED] to work on the [REDACTED] software project as a Computer Programmer where he is responsible for computer programming of software systems" and that the "contract will go through April 2010 with possible extension" (hereinafter, the [REDACTED] Letter);

- Paystubs for the beneficiary for pay periods beginning on January 26, 2009 through February 16, 2010; and
- A 2009 W-2 Wage and Tax Statement for the beneficiary.

The director reviewed the documentation and found it insufficient to establish eligibility for the benefit sought. The director denied the petition on July 28, 2010. The petitioner submitted an appeal.

On appeal, in a brief dated July 27, 2010, the petitioner, through counsel, states that "[a]t the time of filing of the H-1B transfer petition, [the petitioner] did have a project lined up for the beneficiary. . . . It was based on [the [REDACTED] Subcontract Agreement]." Counsel further states the following:

[T]he signed contract (which we are including the full version, which discusses in more details [sic] about the end client – [REDACTED] - such as billing rates, and project protocols, and technical requirements[,] etc.), along with the signed purchase order, which listed the name of the beneficiary . . . , as well as the projected start date of the project . . . , and the billing rate . . . , were all included in the initial H-1B I-129 petition. . . . In short, [REDACTED] was placing [the] beneficiary . . . with its client [REDACTED] in Armonk, New York. However, despite the concerted efforts of [the petitioner] to request [REDACTED] to provide a supporting letter and/or evidence on the specific project that [the] beneficiary . . . was working on at [REDACTED] refused to provide any such evidence to [the petitioner] on the grounds that it was its corporate policy not to do so.

In the appeal brief, counsel listed the following job duties that the beneficiary performed for the end-client, [REDACTED] located in Armonk, New York, from September 22, 2009 until the project ceased in January 2010:

- Participate in RFS project and perform installation of WebSphere application V7.0.0.7 and configuring it on 32-bit Red-Hat Linux platform - 25%;
- Create WAS profiles, and Clusters and cluster members and performed federation of application server node to deployment manager - 10%;
- Serve as primary contact for PMR to resolve production issues, and shared responsibilities with the team as primary and secondary on-calls to support the production environment 24/7 - 20%;
- Gather trace, logs, and core dumps on production servers to investigate critical

issues and configure enterprise applications for various parameters like [REDACTED] etc. – 10%;

- Troubleshoot web servers and application servers for various issues - 10%;
- Deploy enterprise and stand-alone applications through admin console and scripts, and portal servers. Also deploy themes, properly [sic] files, WAR files, and running XML access provided by the development team and create and manage data source and database connection pools with various databases including UDB DB2 8.x, SQL Database, and Oracle Database – 10%;
- Investigate production, test, and development issues based on the alerts generated [b]y [REDACTED] and interpret log files to locate and solve application server problems - 5%;
- Work with the system administration team to detect and troubleshoot system side problems – 5%[; and]
- Performed [sic] Websphere patching to upgrade the existing application servers to the latest FP levels, and develop shell scripts to automate tasks - 5%.

Counsel states that these complex and technical duties and responsibilities clearly qualify as duties and responsibilities undertaken by someone seeking H-1B specialty occupation classification.

On appeal, the petitioner, through counsel, also states that the beneficiary's "assignment at [REDACTED] came to a close in January 2010, and since February 2010, [the beneficiary] has been working on a [REDACTED] Administration software project at [REDACTED] in Sylmar, California via [the petitioner's] vendor[.] [REDACTED]"

On May 3, 2012, the AAO dismissed the appeal as moot, because a review of USCIS records indicated that on February 6, 2012, a date subsequent to the denial of the instant petition, another employer filed a Form I-129 petition seeking nonimmigrant H-1B classification on behalf of the beneficiary. USCIS records further indicated that this other employer's petition was approved on February 17, 2012. Because the beneficiary in the instant case had been approved for H-1B employment with another petitioner, the AAO had determined that further pursuit of the matter at hand was moot. The appeal was dismissed and the petition was denied.

The Employer-Employee Issue

The AAO will first address an additional, independent ground, not identified by the director's decision, in which the AAO finds that the petitioner has not established that it meets the regulatory definition of a United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii). Specifically, the petitioner has not 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.*

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

subject to section 212(j)(2), who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 214(i)(1) . . . , who meets the requirements for the occupation specified in section 214(i)(2) . . . , and with respect to whom the Secretary of Labor determines and certifies to the [Secretary of Homeland Security] that the intending employer has filed with the Secretary [of Labor] an application under section 212(n)(1)

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).

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 former Immigration and Naturalization Service (INS) nor 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.¹⁰

¹⁰ 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

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 318-319.¹¹

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

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).

¹¹ 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))).

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).¹²

Therefore, in considering whether or not one will be an "employee" in an "employer-employee relationship" with a "United States employer" for purposes of H-1B nonimmigrant petitions, USCIS must focus on the common-law touchstone of "control." *Clackamas*, 538 U.S. at 450; *see also* 8 C.F.R. § 214.2(h)(4)(ii) (defining a "United States employer" as one who "has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise *control* the work of any such employee" (emphasis added)).

The factors indicating that a worker is or will be an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. *Darden*, 503 U.S. at 323-324; *Clackamas*, 538 U.S. at 445; *see also* *Restatement (Second) of Agency* § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. *See Clackamas*, 538 U.S. at 445; *see also* *New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1) (adopting a materially identical test and indicating that said test was based on the *Darden* decision); *see also* *Defensor v. Meissner*, 201 F.3d 384, 388 (5th Cir. 2000) (determining that hospitals, as the recipients of beneficiaries' services, are the "true employers" of H-1B nurses under 8 C.F.R. § 214.2(h), even though a medical contract service agency is the actual petitioner, because the hospitals ultimately hire, pay, fire, supervise, or otherwise control the work of the beneficiaries).

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

Furthermore, when examining the factors relevant to determining control, USCIS must assess and weigh each actual factor itself as it exists or will exist and not the claimed employer's right to 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.

¹² 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).

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."

Specifically, in response to the director's RFE, in which a letter from the end-client was requested, the petitioner submitted a copy of a letter from [REDACTED] (identified as an end-client for the first time in response to the RFE) stating, as previously noted, the following:

[REDACTED] has a contract with [the petitioner] and [the beneficiary] an employee of [the petitioner] to use their services for their client [REDACTED] to work on the [REDACTED] Administration software project as a Computer Programmer where he is responsible for computer programming of software systems. This contract will go through April 2010 with possible extension.

On appeal, the petitioner, through counsel, claims that the beneficiary was working for [REDACTED] located in Armonk, New York, and claims that the [REDACTED] Subcontract Agreement and the Purchase Order supports this contention. The petitioner further claims that the beneficiary's assignment at [REDACTED] ended, and that since February 2010, the beneficiary has been working on a project at [REDACTED] in Sylmar, California through the petitioner's vendor, [REDACTED].

Although the petitioner submitted evidence such as the [REDACTED] Subcontract Agreement and Purchase Order discussed above, the petitioner did not submit any document which outlined in detail the nature and scope of the beneficiary's employment from the alleged initial end client, [REDACTED].¹³ The AAO finds materially significant the absence of any document from [REDACTED] concerning the nature and scope of the beneficiary's employment while assigned to [REDACTED]. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). Therefore, the key element in this matter, which is who exercises control over the beneficiary, has not been substantiated.

¹³ As previously discussed, the AAO notes that the petitioner submitted the [REDACTED] Subcontract Agreement, the [REDACTED] Agreement, the [REDACTED] Agreement, and the [REDACTED] Agreement. Given the fact that the petitioner did not submit into the record of proceeding the applicable schedules and statements of work referenced in such agreements, or other applicable documentation, the AAO finds that there is no supporting documentation to indicate that the beneficiary would be providing any services pursuant to the [REDACTED] Subcontract Agreement, the [REDACTED] Agreement, the [REDACTED] Agreement, and the [REDACTED] Agreement, nor is there any other documentary evidence that describes the nature of the services for the end-client, the specific duties to be performed for the end-client, the location of the end-client, the duration of the specific services that the beneficiary would perform for the end-client, or the end-client's minimum requirements for the tasks to be fulfilled. Without documentation corroborating the specific work details, it is unclear whether the beneficiary is subject to any of these agreements.

Also, the [REDACTED] Letter discussed above, for employment that commenced in February 2010, after the filing of the petition, does not outline in detail the nature and scope of the beneficiary's employment with [REDACTED], for the remainder of the requested H-1B validity period. The [REDACTED] Letter states that "[the petitioner] retains all control over [the beneficiary's] employment[,] including but not limited to [the] right to hire, pay, supervise and control his work. [The petitioner] will be responsible for administering his project work time and salary payment." However, no corroborating evidence, in the form of an agreement with the end-client, statement of work, or other evidence, was submitted to substantiate who exercises control over the beneficiary.

While social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are still relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary's employer. Without full disclosure of all of the relevant factors, the AAO is unable to find that the requisite employer-employee relationship will exist between the petitioner and the beneficiary.

The evidence, therefore, 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). Merely submitting letters claiming that the petitioner exercises complete control over the beneficiary, without evidence supporting the claim, does not establish eligibility in this matter. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. The evidence of record prior to adjudication did not establish that the petitioner would act as the beneficiary's employer in that it will hire, pay, fire, or otherwise control the work of the beneficiary. Despite the director's specific request for evidence such as a letter from the end client, the petitioner failed to submit such evidence. 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).

Based on the tests outlined above, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii). For this reason, the appeal will be dismissed and the petition denied.

The Specialty Occupation Issue

Next, the AAO will address whether the petitioner has provided sufficient evidence to establish that it would employ the beneficiary in a specialty occupation position.

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. 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."

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.

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 providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), USCIS consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular 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 directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F.3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

The AAO notes that, 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 former 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.

Here, the record of proceeding in this case is devoid of sufficient information from the end-client(s) regarding the specific job duties to be performed by the beneficiary for those companies. The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary, therefore, precludes a finding that the proffered position satisfies 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.

Accordingly, as the petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position qualifies as a specialty occupation. For this additional reason, the appeal will be dismissed and the petition denied.

It is noted that, even if the proffered position were established as being that of a computer programmer, a review of the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook* (the *Handbook*) does not indicate that, simply by virtue of its occupational classification, such a position qualifies as a specialty occupation in that the *Handbook* does not state a normal minimum requirement of a U.S. bachelor's or higher degree in a specific specialty or its equivalent for entry into the occupation of computer programmer. *See* U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Computer Programmers," <http://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm#tab-4> (last visited June 26, 2013).¹⁴ In fact, this chapter notes that some computer programmers only possess associate's degrees. *See id.* As such, absent evidence that the position of computer programmer satisfies one of the alternative criteria available under 8 C.F.R. § 214.2(h)(4)(iii)(A), the instant petition could not be approved for this additional reason.

¹⁴ The *Handbook* does not support the assertion that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into this occupation. Rather, the occupation accommodates a wide spectrum of educational credentials, including less than a bachelor's degree in a specific specialty. The *Handbook* repeatedly states that some employers hire workers who have an associate's degree. Furthermore, while the *Handbook's* narrative indicates that most computer programmers obtain a degree (a bachelor's degree or an associate's degree) in computer science or a related field, the *Handbook* does not report that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation. The *Handbook* continues by stating that employers value computer programmers who possess experience, which can be obtained through internships. The text suggests that a baccalaureate degree may be a preference among employers of computer programmers in some environments, but that some employers hire candidates with less than a bachelor's degree, including candidates that possess an associate's degree. The *Handbook* does not support the claim that the proffered position falls under an occupational group for which normally the minimum requirement for entry is at a baccalaureate (or higher degree) in a specific specialty, or its equivalent.

Failure to Comply with Itinerary and LCA Requirements

The next issues before the AAO are whether the petitioner submitted a valid LCA for all work locations and complied with the itinerary requirement at 8 C.F.R. § 214.2(h)(2)(i)(B).

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

Service or training in more than one location. A petition that 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 USCIS as provided in the form instructions. The address that the petitioner specifies as its location on the Form I-129 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.

Additionally, the Department of Labor (DOL) regulations governing Labor Condition Applications state 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 Form ETA 9035 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. Petitioners who know that an employee will be working at additional worksites at the time of filing must include all worksites on Form ETA 9035. Failure to do this will result in a finding that the employer did not file an LCA that supports the H-1B petition.

A necessary condition for approval of an H-1B visa petition is an LCA, certified *on or before* the filing date of the petition, with information, accurate as of the date of the petition's filing, as to where the beneficiary would actually be employed. Furthermore, the petition must list the locations where the beneficiary would be employed and be accompanied by an itinerary with the dates the beneficiary will provide services at each location. The petitioner has failed to establish that such conditions were not satisfied in this proceeding. Again, a petitioner must establish eligibility at the time of filing a 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'r 1978).¹⁵

¹⁵ The agency made clear long ago that speculative employment is not permitted in the H-1B program. For example, a 1998 proposed rule documented this position as follows:

In this case, Form I-129 lists the work location as the petitioner's address. In addition, section G of ETA Form 9035 (Labor Condition Application) states that the beneficiary's intended work site is [REDACTED] and failed to mention any other work site locations. In response to the RFE, the petitioner provided additional LCAs with work locations that had not previously been disclosed. On appeal, counsel for the petitioner indicated, that pursuant to the [REDACTED] Subcontract Agreement, [REDACTED] placed the beneficiary with its client [REDACTED] in Armonk, New York. Counsel also indicated that the beneficiary had performed work for [REDACTED] from its former home location in Arkansas. Further, counsel stated that, since February 2010, following the conclusion of the beneficiary's assignment at [REDACTED] the beneficiary has been working on a project in Sylmar, California through the petitioner's vendor, [REDACTED]. Within the record of proceeding, the petitioner has claimed that the beneficiary will work in New Jersey, New York, Arkansas, and California. The petitioner, however, failed to submit an itinerary, with the initial petition, that included both the dates and locations of the services to be provided at the various locations. Therefore, the petitioner 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.

Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. See section 214(i) of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

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.

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 (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 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.³⁰ In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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

³⁰ As previously discussed, the AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 145. However, as the appeal is dismissed for the reasons discussed above, the AAO will not further discuss the additional issues and deficiencies that it observes in the record of proceedings.