



U.S. Citizenship
and Immigration
Services

(b)(6)

Date: **SEP 04 2013** Office: CALIFORNIA SERVICE CENTER

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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, ("the director") denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner describes itself as a "Systems Integration & Information Technology Related Services" business. The petitioner indicates it was established in 2002, employs 225 personnel, and reported \$30,000,000 in gross annual income when the petition was filed. In order to continue to employ the beneficiary in what it designates as a computer systems 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, determining: (1) the petitioner had not established an employer-employee relationship with the beneficiary; (2) the petitioner had not established that the beneficiary's education and experience are equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation; and (3) the petitioner had not provided a credible offer of employment for specialty occupation work throughout the requested period of employment.

The record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director's Notice of Intent to Deny (NOID) the petition; (3) the petitioner's response to the NOID; (4) the director's denial letter; and (5) the Form I-290B, Notice of Appeal or Motion, counsel's brief, and additional documentation. The AAO reviewed the record in its entirety before issuing its decision. The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

On the Form I-129 petition filed February 23, 2012, the petitioner indicated that it wished to continue the beneficiary's employment as a computer systems analyst beginning March 31, 2012 and ending March 30, 2015. The petitioner also provided a Labor Condition Application (LCA) certified on January 20, 2012, valid for a period beginning March 31, 2012 to March 30, 2015 for a Level II (qualified), computer systems analyst SOC (ONET/OES) code 15-1121.

Upon review of the entire record of proceeding, the AAO finds that the petitioner has failed to overcome the director's grounds for denial. Accordingly, the appeal will be dismissed and the petition will remain denied.

Employer-Employee Relationship

The first issue in this matter is whether the petitioner has established an employer-employee relationship with the beneficiary.

The Law

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.

Facts and Procedural History

In a letter submitted in support of the petition dated February 21, 2012, the petitioner noted that it has offices in Illinois, New Jersey, Canada, the United Kingdom, Singapore, and Malaysia, as well as an offshore development center in India. The petitioner indicated that it offered a wide variety of electronic business IT solutions for client companies and has service agreements with a number of companies. The petitioner also stated that it had a computer systems analyst position readily available for the beneficiary. The petitioner stated further that the beneficiary "will be performing services through [a] series of contract[s] between [the petitioner,] [redacted] and [redacted]." The petitioner noted that the beneficiary will work on [redacted] project which is located in Sacramento, California. The petitioner claimed that it had an employer-employee relationship with the beneficiary and that all of its "projects and employees including those located onsite and offsite are completely managed by [the petitioner]."

The petitioner submitted a document titled "Itinerary of Services" listing the beneficiary, the project, the location of work, and the project dates. The location is identified as Sacramento, California and the project dates are identified as the "[t]otal period as requested in the Petition."

The description of responsibilities for the project is allocated in time segments to several different periods beginning with the fourth quarter in 2011 and continuing through each subsequent quarter to the first quarter of 2014. The initial record did not include additional information regarding the actual intermediary companies, the end client, or their roles in the proposed project.

The director issued a NOID advising the petitioner of derogatory information found in two of the petitioner's petitions filed on behalf of other beneficiaries. The director also specifically requested evidence that a valid employer-employee relationship exists between the petitioner and the beneficiary including evidence establishing that the petitioner had the right to supervise or otherwise control the beneficiary's work for the duration of the requested H-1B validity period.

In its February 21, 2012 letter, the petitioner stated that its "[m]anagers oversee every aspect of [the petitioner's] engagements, particularly the control and direction of [its] employees." The petitioner noted that the beneficiary reported to its technical supervisor about the project status on a weekly basis and that it holds a monthly performance review on the basis of the actual work assigned and completed. The petitioner referenced its offer letter to the beneficiary and a letter issued by [REDACTED] along with its contract with [REDACTED]. The January 23, 2012 offer letter signed on behalf of the petitioner and by the beneficiary provided a broad overview of the terms and conditions of the beneficiary's engagement. It did not specify the particular projects, duties, assignments, or locations of the work to be performed by the beneficiary.

The staffing agreement between the petitioner and [REDACTED], dated November 17, 2011, provided the term of agreement as one year with automatic renewal for successive one-year terms unless modified or terminated. The staffing agreement indicated further that the assigned employee's timesheets shall be certified by both [REDACTED] and the end client to document the hours and to demonstrate that the work was performed to the end client's satisfaction. The January 4, 2012 letter authored by [REDACTED] representative stated that the beneficiary has been working at [REDACTED] client's [REDACTED] offices as a System Analyst/Integration Tester with the start date of November 28, 2011, and the estimated end date of May 12, 2013, with possible extensions. The [REDACTED] letter also listed the beneficiary's duties, estimated the [REDACTED] project to last one plus years, and noted that the petitioner is responsible for providing the beneficiary's compensation, fringe benefits, payroll taxes and workman's compensation insurance and for supervising his work.

Upon review, the director denied the petition determining that the petitioner had not submitted sufficient evidence to establish the requisite employer-employee relationship. The director noted the derogatory information that had been submitted by the petitioner in other matters, found that the petitioner had not adequately addressed the derogatory information, and questioned the petitioner's reliability and ability to document the requirements necessary to establish eligibility for approval of the petition.

On appeal, counsel for the petitioner reiterated that the beneficiary is the petitioner's employee and that it has complete discretion over when and how long the beneficiary works. The petitioner re-submitted the beneficiary's employment agreement, the letter from [REDACTED], the

partial itinerary of services, and the beneficiary's paystubs. The petitioner also submitted a work order from [REDACTED]. The [REDACTED] work order references the contract between [REDACTED] and [REDACTED] dated December 7, 2004. The contract is not provided. The work order describes the services as:

Demonstrates that the developed system conforms to requirements as specified in the Functional Requirements Document. Serves as QA to make sure system results are based on the requirements provided. Produces Test Analysis Reports.

The work order identifies the beneficiary as the subcontractor working on a specific project in the position of system analyst/integration tester with a start date of November 28, 2011. The work order also stated that [REDACTED] shall have the right to hire, without any compensation to the subcontractor [REDACTED] any individual who has continuously performed Services for at least one year for [REDACTED]; under a Work Order subject to this agreement.

Analysis

Completely removing any reference to the derogatory information provided to the petitioner for review and any reliance the director may have placed on said derogatory information, 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 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.¹

¹ 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).

There are also 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 318-319.²

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).

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

² 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))).

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." The petitioner indicated that the beneficiary will work on [REDACTED] ongoing project in Sacramento, California and provided an itinerary listing the beneficiary's responsibilities for the [REDACTED] project for a portion of the requested validity period. In response to the director's NOID, the petitioner provided a one-year agreement with a staffing company, [REDACTED] indicating that the assigned employee's timesheets shall be certified by both [REDACTED] and the end client to document the assigned employee's hours and to demonstrate that the work was performed to the end client's satisfaction. In the letter provided by [REDACTED] pertinent to the beneficiary, the [REDACTED] representative provided an overview of the beneficiary's duties for [REDACTED] and cursorily referenced the petitioner's claimed responsibility for supervising the beneficiary's work. In the petitioner's response to the NOID, it noted that the beneficiary reported to its technical supervisor about the project status on a weekly basis and that the beneficiary underwent a performance review on a monthly basis. However, the petitioner did not identify the technical supervisor or provide any documentary evidence regarding weekly reports. Nor did the petitioner provide any documentary evidence demonstrating the claimed monthly performance review. 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)).

Although the petitioner submitted an itinerary outlining the beneficiary's responsibilities on a particular project, included its agreement with [REDACTED] and [REDACTED] provided a broad description of the beneficiary's purported duties on the project, the petitioner did not submit any document which detailed the actual nature and scope of the beneficiary's employment from the end client, [REDACTED]. Similarly, [REDACTED] work order submitted on appeal did not detail the nature and scope of the beneficiary's employment but rather provided a brief statement of "services" and claimed its right to hire the beneficiary after one year of work on the project with no compensation to [REDACTED]. Thus, the key element in this matter, which is who exercises control over the beneficiary, has not been substantiated.

On appeal, the petitioner asserts that the beneficiary is the petitioner's employee and that it has complete discretion over when and how long the beneficiary works. However, 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.

In this matter, the beneficiary will work at the end client's premises, will use the tools and instrumentalities provided by the end client, and the end client has an agreement to be able to hire the beneficiary without compensation to [REDACTED] while the beneficiary is allegedly employed by the petitioner. Moreover, and most importantly, the petitioner has not provided documentary evidence of technical supervisors to whom the beneficiary allegedly reports and has not provided evidence of the beneficiary's monthly performance reviews. Thus, the record does not include supporting evidence demonstrating the petitioner's alleged supervision and control of the beneficiary's work. 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). The petitioner's claim in its letters that it exercises complete control over the beneficiary, without evidence supporting the claim, does not establish eligibility in this matter. Again, without documentary evidence to support the claim, the petitioner has not met its burden of proof in these proceedings. *Matter of Soffici, Id.* 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. 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).

Credible Offer of Employment

The next issue to examine in this matter is whether the petitioner issued a credible offer of employment to the beneficiary.

Facts and Procedural History

On the Form I-129 petition submitted on February 23, 2012, the petitioner indicated that it wished to continue the employment of the beneficiary as a computer systems analyst from March 31, 2012 until March 30, 2015 at an annual salary of \$67,101. The petitioner also provided an LCA certified on January 20, 2012, valid for a period beginning March 31, 2012 to March 30, 2015 for a Level II (qualified), computer systems analyst SOC (ONET/OES) code 15-1121, to be located in Sacramento, California and Arlington Heights, Illinois.

In the February 21, 2012 letter submitted in support of the petition, the petitioner noted that it is equipped to design, develop, manage and integrate information systems and maximize productivity, and generates customer satisfaction by providing a gamut of effective, cost-competitive solutions. The petitioner stated that it has service agreements with a number of companies and has a readily available opening to employ the beneficiary for a temporary period as a computer systems analyst. The petitioner, under the heading "minimum requirements for the position," noted further:

[I]t is common for individuals with formal education in other fields such as Business Administration, Accounting, Economics, Management Information systems, different disciplines of engineering (such as Mechanical, Metallurgical, Civil Production, Manufacturing, Electrical, Electronics, Aerospace etc[.]) and others to enter the computer field after completing computer courses and after gaining relevant work experience. They are thus able to utilize their education and experience in the other fields and act as a bridge between the technical and functional requirements of the computer position they may hold at a given time.

The above industry wide minimum requirements for this professional position are applicable to our organization also. We do not consider anyone with lesser qualifications for this professional level position.

As observed above, the petitioner indicated that the beneficiary "will be performing services through [a] series of contract[s] between [the petitioner,] [redacted] and [redacted]" The petitioner provided an overview of the beneficiary's roles and responsibilities for a [redacted] project. The petitioner stated that in the proffered position the beneficiary "will essentially perform the programming analysis, custom designs, modification, and/or problem solving of software" and "[f]or this, he will apply various programming tools and techniques, and develop applications to run on various environments and platforms." Also as observed above, the petitioner submitted a document titled "Itinerary of Services" listing the beneficiary, the project, the location of work, and the project dates. The location is identified as Sacramento, California and the project dates are identified as the "total period as requested in the Petition." The description of responsibilities for the project is allocated in time segments to several different periods beginning with the fourth quarter in 2011 and continuing through each subsequent quarter to the first quarter of 2014. The initial record did not include additional information regarding the actual intermediary companies, the end client, or their roles in the proposed project. The initial record did not include any information regarding the beneficiary's duties

from the second quarter of 2014 through the first quarter of 2015, the additional period of validity requested in the petition.

In the September 5, 2012, NOID, the director notified the petitioner of derogatory information regarding letters and itineraries submitted by the petitioner in support of two other petitions. The director indicated that USCIS found that a letter from one of the petitioner's end clients and an itinerary from another of the petitioner's end clients had been falsified to establish a longer duration period for the identified project. The director advised the petitioner based on the derogatory information regarding the other two petitions, that the "facts" contained in the instant petition may not be true and correct. The director indicated that the current record lacked a reliable evidentiary basis to determine whether the petitioner's offer to the beneficiary was authentic.

In response, the petitioner disputed the accusations that it had submitted falsified documents or had misrepresented facts to USCIS.³ The petitioner provided: its employment offer to the beneficiary for a three-year period beginning March 31, 2012 and ending March 30, 2015; a January 4, 2012 letter issued by [REDACTED] indicating the beneficiary had been working for its client, [REDACTED] in Sacramento, California, as a system analyst/integration tester with a start date of November 28, 2011, and an estimated end date of May 12, 2013, with possible extensions; and a November 17, 2011 agreement between the petitioner and [REDACTED] for a one-year term with automatic renewals unless modified or terminated. In the agreement, the petitioner agreed to provide [REDACTED] the services of its employees.

The director denied the petition determining that the record lacked a reliable evidentiary basis to determine whether the offer of employment is authentic. The director found that the petitioner had not provided a credible offer of employment and had not established it had sufficient specialty occupation work for the beneficiary throughout the requested period of employment.

On appeal, counsel for the petitioner attaches an affidavit signed by one of the petitioner's officers offering an explanation for the derogatory information. As observed above, counsel also submitted a work order from [REDACTED] which provided a vague statement of the services to be performed and indicated that the beneficiary will work as a system analyst/integration tester with a start date of November 28, 2011. Counsel asserts that the petitioner has established the credibility of the offer of employment.

Analysis

The AAO reviewed the record in its entirety and concurs with the director's ultimate determination. Again, no reference or reliance on the derogatory information is necessary to determine that the record in this matter did not establish that the petitioner had sufficient

³ The petitioner noted that one of its employees admitted to altering a letter from an end client prior to giving the letter to the petitioner and that this employee had been fired. The petitioner also indicated that it was unaware of multiple mid-vendors between its one mid-vendor and the ultimate end client in the other matter.

specialty occupation work for the beneficiary to perform for the duration of the requested petition validity period. For purposes of the H-1B adjudication, the issue of bona fide employment is viewed within the context of whether the petitioner has offered the beneficiary a position that is determined to be a specialty occupation. Therefore, of greater importance to this proceeding, although not directly addressed by the director, is whether the petitioner has provided sufficient evidence to establish that the services to be performed by the beneficiary are those of a specialty occupation.

As recognized in *Defensor v. Meissner*, it is necessary for the end-client to provide sufficient information regarding the proposed job duties to be performed at its location(s) in order to properly ascertain the minimum educational requirements necessary to perform those duties. See *Defensor v. Meissner*, 201 F.3d at 387-388. In other words, as the nurses in that case would provide services to the end-client hospitals and not to the petitioning staffing company, the petitioner provided job duties and alleged requirements to perform those duties were irrelevant to a specialty occupation determination. See *id.*

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. First, as the petitioner has not provided documentary evidence that it has employment for the beneficiary for the requested duration of employment, i.e. March 31, 2012 to March 30, 2015, the petitioner has not overcome the director's basis for denying the petition. The petitioner in this matter has not provided documentary evidence that it has specialty occupation employment for the beneficiary for the requested duration of employment. Second, the only document in the record from the end client, [REDACTED] describing the actual work to be performed is the January 1, 2012 work order submitted on appeal. However, the work order does not detail the beneficiary's duties and does not indicate how long the beneficiary will work on the project starting November 28, 2011. The [REDACTED] letter submitted, although providing more information regarding the assigned employee's alleged duties, is not sufficient to establish the duties required by the end client, [REDACTED]. Moreover, the [REDACTED] letter indicated the end date of the [REDACTED] project as May 12, 2013. Although [REDACTED] noted the possibility of extensions, such possibility is speculative and the petitioner has not provided evidence that the contract or project will be extended. 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, supra*. The petitioner has not established it has employment, let alone specialty occupation employment, for the beneficiary for the time period subsequent to May 12, 2013.⁴ In this matter, the record does not include the required evidence.

⁴ Although the petitioner has provided an itinerary listing duties allegedly to be performed by the beneficiary through the first quarter of 2014, the petitioner has not provided evidence of an underlying agreement, work order, or other evidence in support of such an extension. In addition, the itinerary does not include work to be performed for the duration of the requested petition validity period which ends one year later on March 30, 2015.

Here, the record of proceeding in this case is devoid of sufficient information from the end-client, [REDACTED] regarding the specific job duties to be performed by the beneficiary for that company. 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 4.⁵

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 these reasons, the petition may not be approved.

⁵ Additionally, we observe that, even if the proffered position were established as being that of a systems analyst (the occupational classification certified on the submitted LCA), 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. More specifically, the information on the educational requirements in the "Computer Systems Analysts" chapter of the 2012-2013 edition of the *Handbook* indicates at most that a bachelor's or higher degree in computer science, information systems, or management information systems may be a common preference, but not a standard occupational, entry requirement. See U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Computer Systems Analysts," <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-4> (last visited August 23, 2013).

In fact, this chapter indicates that many systems analysts, including software quality assurance analysts, may only have liberal arts degrees and programming experience, while some only possess associate's degrees and experience. See *id.* Moreover, the petitioner acknowledged that it followed the industry wide minimum standards when hiring for the proffered position and that it found it is common in the industry for individuals with formal education in other fields such as Business Administration, Accounting, Economics, Management Information systems, different disciplines of engineering (such as Mechanical, Metallurgical, Civil Production, Manufacturing, Electrical, Electronics, Aerospace etc. and others to enter the computer field after completing computer courses and after gaining relevant work experience. The petitioner's acceptance of such broad minimum requirements is tantamount to an admission that the proffered position is not in fact a specialty occupation. As such, even if the substantive nature of the work had been established, the instant petition could not be approved for this additional reason.

Beneficiary's Qualifications

The director in this matter determined that the petitioner had not provided probative evidence establishing that the beneficiary was qualified to perform the duties of a specialty occupation. In that regard we observe that USCIS is required to follow long-standing legal standards and determine first, whether the proffered position qualifies as a specialty occupation, and second, whether an alien beneficiary was qualified for the position at the time the nonimmigrant visa petition was filed. *Cf. Matter of Michael Hertz Assoc.*, 19 I&N Dec. 558, 560 (Comm'r 1988) ("The facts of a beneficiary's background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation]."). As discussed in this decision, the petitioner has not demonstrated that the proffered position requires a baccalaureate or higher degree in a specific specialty or its equivalent. Therefore, the AAO need not and will not address the beneficiary's qualifications further.

Itinerary

Beyond the decision of the director, the petitioner has also failed to meet the itinerary requirement at 8 C.F.R. § 214.2(h)(2)(i)(B) and the AAO will enter an additional basis for denial, i.e., the petitioner's failure to comply with the itinerary requirement at 8 C.F.R. § 214.2(h)(2)(i)(B).

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

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

The itinerary language at 8 C.F.R. § 214.2(h)(2)(i)(B), with its use of the mandatory "must" and its inclusion in the subsection "Filing of petitions," establishes that the itinerary as there defined is a material and necessary document for an H-1B petition involving employment at multiple locations, and that such a petition may not be approved for any employment period for which there is not submitted at least the employment dates and locations. Here, given the lack of information regarding the beneficiary's employment subsequent to May 12, 2013 or March 30, 2014, and that the petitioner's requested period of employment for the petitioner extends to March 30, 2015, the petition must be denied on this additional basis.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act,

8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.⁶

ORDER: The appeal is dismissed.

⁶ The AAO observes that a review of USCIS records indicates that on December 6, 2012, a date subsequent to the director's 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 indicate that this other employer's petition was approved on December 14, 2012. The AAO notes that the beneficiary has been approved for H-1B classification with another employer, indicating that the issues in this proceeding are now moot. Although another employer's H-1B petition was approved on behalf of the beneficiary, the AAO has nevertheless provided a full *de novo* review of the instant matter in order to address the issues identified by the director in her denial letter.