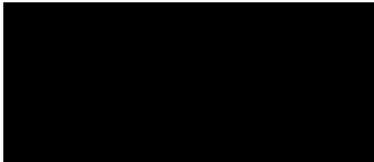




U.S. Citizenship  
and Immigration  
Services

L1



FILE: WAC 08 144 53114 Office: CALIFORNIA SERVICE CENTER Date: **DEC 09 2009**

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:** This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

  
Perry Rhew  
Chief, Administrative Appeals Office

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

The petitioner alleges that it is a software services company. It seeks to employ the beneficiary as a programmer analyst and to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on the ground that the petitioner does not qualify as a United States employer or agent.

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

In the H-1B petition, which was submitted on April 1, 2008, the petitioner listed 1 employee in the Form I-129. The petitioner indicated that it wished to employ the beneficiary as a programmer analyst from October 1, 2008 through September 18, 2011 at an annual salary of \$55,000.

The scope of the position is described as follows in the support letter the petitioner submitted with the H-1B petition on behalf of the beneficiary:

The Programmer Analyst, under the direct supervision of a Project Manager, gathers the project requirements, analyzes the data processing requirements to determine the computer software which will best serve those needs, then designs a computer system using that software which will process the data in the most timely and inexpensive manner, and implements that design by overseeing the installation of the necessary system software and its customization to the client's unique requirements.

In the support letter, the petitioner goes on to provide the following breakdown of job duties:

- Consulting with the client, analyzing the client's software development needs and gathering the requirements for the specific project (20%);
- Analysis and design of the project (20%);
- Developing the system using Java, J2EE, Java Script, Web Logic, Web Sphere, Visual Source Safe and other Software tools and languages (40%); and
- System testing on the base code using Rational Suite, Test director, WinRunner, ClearCase 4.0 and other in different phases of cycles (20%).

The petitioner describes the minimum degree requirements for the proffered position as follows:

The position requires an individual with an advanced analytical background and skill.

Such a background can only be obtained through one of several limited means, which include a bachelor's degree in engineering, computer science, or business with a specialization in IS or MS. We have never placed an individual in the above position, who holds less than a bachelor's degree in one of the above disciplines, or a closely related field.<sup>1</sup>

This is a position that normally requires a minimum of a bachelor's degree, or its equivalent, for entry into the field.

The submitted Labor Condition Application (LCA) was filed for a programmer analyst to work in Troy, MI and covers the period requested by the petitioner. The LCA lists a prevailing wage of \$49,504.

With respect to the proposed worksite where the beneficiary will be assigned, the petitioner's support letter states that she will work in Troy, MI. This location is also indicated on the Form I-129.

The beneficiary's education documents, indicating that she has a foreign degree, were submitted with the petition, but the petitioner did not include an education evaluation.

On June 4, 2008, the director issued an RFE stating that the evidence of record is not sufficient to demonstrate whether the petitioner is the actual employer or acting as an agent, whether a specialty occupation exists, and whether there was a bona fide job offer at the time of filing. The petitioner was advised to submit an itinerary of definite employment, listing the names of the employers and locations where the beneficiary would provide services, as well as the dates of service, for the period of requested H-1B status. The petitioner was also advised to submit copies of its contractual agreements with the beneficiary and with companies for which the beneficiary would be providing consulting services. The RFE specifically noted that "providing evidence of work to be performed for other consultants or employment agencies who provide consulting or employment services to other companies may not be sufficient. The evidence should show specialty occupation work with the actual client-company where the work will ultimately be performed." The director also requested documentation evidencing the petitioner's business.

Counsel for the petitioner responded to the RFE on August 27, 2008, asserting that the petitioner is the actual employer of the beneficiary and not an agent. With the RFE response, counsel included the following documents:

- A letter from the petitioner addressed to USCIS dated August 25, 2008, asserting that it will be the actual employer of the beneficiary and will directly control the beneficiary's employment and guarantee her wages; the letter also states, "as we have stated, we anticipate her performing complex software design and software analysis duties for us, under our supervision, **at our company headquarters in Troy, Michigan** (emphasis added);
- A copy of the offer letter from the petitioner to the beneficiary dated February 15, 2008, which states,

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<sup>1</sup> It is interesting that the petitioner makes this claim when, as stated earlier, the petitioner stated on the Form I-129 that it has only 1 employee at the time the petition was filed.

**“Employee agrees to submit copy of time sheet at the end of each week, signed by the client. Employee agrees to call [the petitioner] on or before Monday morning to report previous week’s time.”** (emphasis added) The offer letter goes on to say, **“You will be required to meet at least once a month with a representative from [the petitioner] to review the development of your project.”** (emphasis added);

- A copy of a letter from the beneficiary dated July 1, 2008, stating that she “will be working in-house at [the petitioner’s] office in Troy . . . .”; and
- A copy of the 2007 U.S. Income Tax Return for the petitioner, which states that the petitioner’s business is in “computer training & travel services.”

This documentation provided in response to the RFE evidencing that the beneficiary will be assigned to a third party client site through a subcontract between the petitioner and another company provides conflicting information. On the one hand, the offer letter indicates that the beneficiary will be assigned to client sites and will call the petitioner once a week to report her time. On the other hand, the petitioner and beneficiary state in their letters that the beneficiary will be employed at the petitioner’s offices in Troy, MI, which is what was also indicated in the forms initially submitted. Moreover, the petitioner’s tax return, which indicates that the petitioner is involved in the business of computer training and travel services, conflicts with the petitioner’s assertion in the initial support letter that it is “an aggressive software services company.” It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The AAO will first address the issue of whether or not the petitioner qualifies as a United States employer. In the RFE response letter and in the appeal brief, counsel for the petitioner argues that the petitioner is the actual employer.

In support of its assertion that the petitioner will be the employer of the beneficiary and not a contractor or agent, counsel cites to *Matter of Smith*, 12 I&N Dec. 772 (Dist.Dir. 1968). *Smith* can be distinguished from this case. First, *Smith* involved a sixth preference immigrant petition and not an H-1B nonimmigrant petition. Second, the petitioner in *Smith*, a staffing service, provided a continuous supply of secretaries to third-party clients. The district director determined that the staffing service, rather than its clients, was the beneficiary’s actual employer. To reach this conclusion, the director looked to the fact that the staffing service would directly pay the beneficiary’s salary; would provide benefits; would make contributions to the beneficiary’s social security, worker’s compensation, and unemployment insurance programs; would withhold federal and state income taxes; and would provide other benefits such as group insurance. (*Id.* at 773). Although these factors are relevant in determining the beneficiary’s employer for the purpose of guaranteeing permanent employment in an immigrant petition context, in an H-1B context the petitioner has to establish that it is an employer that has or will have an employer-employee relationship with the beneficiary and that it is making a bona fide offer of employment to the beneficiary. See 8 C.F.R. § 214.2(h)(4)(ii)(definition of United States employer).

On appeal, counsel for the petitioner argues that “the beneficiary will be working in-house at petitioner’s office, under petitioner’s direct control and hence the petitioner would be the actual employer.” This argument is not persuasive given the evidence provided that directly contradicts this assertion. As mentioned above, the offer letter to the beneficiary, which is dated prior to the when the petition was submitted,

specifically states that she will be assigned to work at other client sites.<sup>2</sup> The other letters submitted in response to the RFE, which state the beneficiary will be assigned to work at the petitioner's offices in Troy, Michigan, were dated after the petition was initially filed on April 1, 2008. Even assuming that the petitioner now intends to change the scope of its offer to the beneficiary and employ her at its offices in Troy, Michigan, instead of the client site(s), the AAO notes that a visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, a petitioner may not make material changes to a petition in an effort to make a petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). The AAO must therefore assign significantly more weight to the evidence generated before the petition was submitted than that which was generated after, which means that the offer letter to the beneficiary is more probative to this discussion than the letters from the petitioner and beneficiary submitted in response to the RFE.

Given that the offer letter to the beneficiary explicitly states that the beneficiary will be assigned to client sites and will report to the petitioner by phone once a week and in person once a month, the AAO concludes that the petitioner's client(s) are likely the actual end-user entity that would generate work for the beneficiary and whose business needs would ultimately determine what the beneficiary would actually do on a day-to-day basis. Moreover, the offer letter corroborates the petitioner's statement in the support letter, dated March 20, 2008, that "[the petitioner] has signed subcontractor/supplier agreements and became a preferred vendor for the following companies . . . . [The petitioner] is in the process of supplying candidates to the above companies." Therefore, by not submitting any documentation justifying the assignment of the beneficiary to the projects for third party client(s) requiring the performance of duties in a specialty occupation, the petitioner precluded the director from establishing whether the petitioner has made a bona fide offer of employment to the beneficiary or that it has sufficient control over the beneficiary to establish an employer-employee relationship based on the evidence of record.<sup>3</sup>

Counsel also argues that the petitioner is an employer under the test of *Nationwide Mutual Ins. Co. v. Darden*,

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<sup>2</sup> Counsel for the petitioner argues on appeal that the petitioner mistakenly used the wrong offer letter for the beneficiary and that the "Petitioner now clarifies that the offer letter format that it gave to the beneficiary and also submitted with its response was incorrect and had not been updated from its previous employees that were, in fact, at client sites." This is not persuasive given that, at the time the petition was filed, the petitioner indicated that it had only 1 employee and that the petitioner's support letter dated March 20, 2008, stated that it is in the business of supplying candidates through subcontracts to clients and that part of the beneficiary's job description would be to consult with the client.

<sup>3</sup> Even though the petitioner put in the Form I-129 and LCA that it intends to employ the beneficiary at its offices in Troy, MI, given that this information contradicts the statements made in the offer letter and the petitioner's support letter as described above, the AAO cannot verify where the beneficiary will actually be employed. In addition, as mentioned previously, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92.

503 U.S. 318, 322-323 (1992) (hereinafter "*Darden*"). 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." *Darden*, 503 U.S. at 322-323 (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; see also *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. at 440 (hereinafter "*Clackamas*"). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).<sup>4</sup>

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<sup>4</sup> While the *Darden* court considered only the definition of "employee" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(6), and did not address the definition of "employer," courts have generally refused to extend the common law agency definition to ERISA's use of employer because "the definition of 'employer' in ERISA, unlike the definition of 'employee,' clearly indicates legislative intent to extend the definition beyond the traditional common law definition." See, e.g., *Bowers v. Andrew Weir Shipping, Ltd.*, 810 F. Supp. 522 (S.D.N.Y. 1992), *aff'd*, 27 F.3d 800 (2<sup>nd</sup> Cir. 1994), *cert. denied*, 513 U.S. 1000 (1994). However, in this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. Instead, in the context of the H-1B visa classification, the term "United States employer" was defined in the regulations to be even more restrictive than the common law agency definition. A federal agency's interpretation of a statute whose administration is entrusted to it is to be accepted unless Congress has spoken directly on the issue. See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984).

The regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to employ persons in the United States, and to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to

Therefore, in considering whether or not one is an "employee" in an "employer-employee relationship" with a "United States employer" for purposes of H-1B nonimmigrant petitions, USCIS 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)(2) (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)).

Factors indicating that a worker is or will be an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. 503 U.S. at 323-324; *see also* *Restatement (Second) of Agency* § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. *See Clackamas*, 538 U.S. at 448-449; *cf. New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1), (EEOC 2006) (adopting a materially identical test and indicating that said test was based on the *Darden* decision).

It is important to note that the factors listed in *Darden* and *Clackamas* are not exhaustive and must be evaluated on a case-by-case basis. Other aspects of the relationship between the parties may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met; however, the fact finder must weigh and compare a combination of the factors in analyzing the facts of each individual case.<sup>5</sup> The determination must be based on all of the

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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).

<sup>5</sup> It is noted that in analyzing *Matter of Smith* within the context of *Darden* and *Clackamas*, 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 director would be unable to properly assess whether the requisite

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).

Applying the *Darden* test 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." First, under *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000), which came after *Darden* and does not contradict the findings of *Darden*, it was determined 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.

The petitioner asserts that it will be the employer of the beneficiary. However, the documentation submitted when reviewed in its entirety does not support this conclusion. As mentioned above, the offer letter and statements made by the petitioner in the initial support letter indicate that the beneficiary will be subcontracted out to clients. The offer letter even states that the client will sign the timesheet and the beneficiary need only meet with a representative of the petitioner once per month. Therefore, even if the petitioner will directly pay the salary and benefits to the beneficiary, the client will control and supervise the work of the beneficiary, provide the space and tools necessary to perform the duties, terminate her work on a project, and ultimately pay the beneficiary's salary and benefits, albeit indirectly through the petitioner. This does not indicate that the petitioner has a controlling interest in the beneficiary's employment.

Without seeing a copy of the contract between the petitioner and the client company, it is unclear what role the petitioner has in the beneficiary's assignment. However, assuming that the petitioner's client does have a project on which the beneficiary will work, no independent evidence was provided to indicate that the petitioner would control whether there is any work to be performed or that the petitioner would even oversee the beneficiary's work.

Therefore, the information provided is insufficient to determine whether the beneficiary will be an "employee" having an "employer-employee relationship" with a "United States employer." It has not been established that the beneficiary will be "controlled" by the petitioner or that the termination of the beneficiary's employment is the ultimate decision of the petitioner. Moreover, whether there is any work to be performed by the beneficiary as well as the nature of that work is unclear. Therefore, 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). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

On appeal, for the first time, counsel for the petitioner submits a copy of an agreement letter, dated October 1, 2008 and signed by the petitioner on November 4, 2008, from 3D solutions, which states that 3D solutions

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employer-employee relationship will exist between the petitioner and the beneficiary.

intends to consult the beneficiary for three years, that the petitioner will be the actual employer, and that the beneficiary's job location will be at the petitioner's offices in Troy, MI. The letter also states "Final contract will be written and drafted between 3D Solutions and [the petitioner] after beneficiaries [sic] H1 B approval."

In addition, counsel submits a copy of a new offer from the petitioner to the beneficiary dated October 1, 2008 and signed October 20, 2008, which states, "You will be working in-house at [the petitioner] on the project with 3DSolutions [sic]." The new offer letter does not include the language of the previous offer letter that indicated the beneficiary would be assigned at the client site.

The AAO notes that these documents submitted for the first time on appeal are dated after the petition was denied and, moreover, the letter with 3D Solutions does not constitute a final contract. As stated previously, a petitioner may not make material changes to a petition in an effort to make a petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Given that the 3D Solutions document is not a final contract for work, it does not demonstrate that there is sufficient work for the beneficiary to perform and therefore does not prove that the petitioner made a bona fide offer of employment to the beneficiary at the time the petition was filed. Regardless, if significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). For this additional reason, the petition cannot be approved.

The AAO therefore affirms the director's finding that the petitioner does not qualify as a United States H-1B employer or agent as it failed to establish that it has sufficient work and resources for the beneficiary.

Beyond the decision of the director, the AAO will next consider whether the proffered position is a specialty occupation. Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

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

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

*Specialty occupation* means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field 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 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, 8 U.S.C. § 1184(i)(1), 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 at 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

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

In addressing whether the proposed position is a specialty occupation, as discussed above, the AAO finds that the record is devoid of documentary evidence with respect to the end-client firm, and therefore whether the beneficiary’s services would actually be those of a programmer analyst.

The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that “[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation.” Moreover, the regulation at 8 C.F.R. § 214.2(h)(4)(iv)(A)(1) specifically lists contracts as one of the types of evidence that may be required to establish that the services to be performed by the beneficiary will be in a specialty occupation.

To determine whether a particular job qualifies as a specialty occupation position, the AAO does not solely rely on the job title or the extent to which the petitioner's descriptions of the position and its underlying duties correspond to occupational descriptions in the Department of Labor's *Occupational Outlook Handbook (Handbook)*. Critical factors for consideration are the extent of the evidence about specific duties of the proffered position and about the particular business matters upon which the duties are to be performed. In this pursuit, the AAO must examine the evidence about the substantive work that the beneficiary will likely perform for the entity or entities ultimately determining the work's content.

On appeal, counsel asserts that *Defensor* does not apply because *Defensor* is a Fifth Circuit case while this petition falls under the jurisdiction of the Sixth Circuit. However, counsel argues that even if *Defensor* does apply, the petitioner should still be considered the employer because "the position in this case will be in-house and the beneficiary will be supervised and controlled by the Petitioner."

The problem with counsel's assertions is that they are based largely on documentation submitted for the first time on appeal and dated after the petition was filed (indeed, dated after the petition was denied). Therefore, these documents cannot be considered as evidence in support of the petition at the time it was submitted. As mentioned previously, a visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248; *Matter of Katigbak*, 14 I&N Dec. 45, 49. Moreover, as discussed above, the letter from 3D Solutions does not constitute a contract for work and therefore is not probative in determining whether the proffered position justifies the performance of duties normally associated with a specialty occupation.

The AAO notes that, although the petitioner is located in the jurisdiction of the sixth circuit court, case law from other circuit courts can be used as persuasive authorities in adjudicating an immigration application. As recognized by the court in *Defensor v. Meissner*, 201 F.3d at 387, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. The court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. 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. The record of proceedings lacks such substantive evidence from any end-user entities that may generate work for the beneficiary and whose business needs would ultimately determine what the beneficiary would actually do on a day-to-day basis. In short, the petitioner has failed to establish the existence of H-1B caliber work for the beneficiary.

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner's normally requiring

a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

As the record does not contain sufficient evidence of the work the beneficiary would perform for the third party client, the AAO cannot analyze whether her placement is related to the provision of a product or service that requires the performance of the duties of a programmer analyst. Applying the analysis established by the Court in *Defensor*, USCIS has found that the record does not contain any relevant documentation from the end user client(s) for which the beneficiary will provide services that establishes the specific duties the beneficiary would perform. Without this information, the AAO cannot analyze whether these duties would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation.

The AAO therefore finds that the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation.

Finally, the AAO does not need to examine the issue of the beneficiary's qualifications because the petitioner has not provided sufficient documentation to demonstrate that the position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, it cannot be determined what the actual proffered position is in this matter and, therefore, the issue of whether it will require a baccalaureate or higher degree, or its equivalent, in a specific specialty also cannot be determined. Therefore, the AAO need not and will not address the beneficiary's qualifications further. However, the AAO notes that, in any event, the petitioner did not submit an education evaluation as required for a foreign degree or other sufficient documentation to show that the beneficiary qualifies to perform services in a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C).

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 *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The appeal will be dismissed and the petition denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. 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.