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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: SEP 0 4 2013 OFFICE: CALIFORNIA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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,

Michael F. Kelly

Ron Rosenberg
Chief, Administrative Appeals Office

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

On the Form I-129 visa petition, the petitioner describes itself as an information technology services company[1] established in 2006. In order to employ the beneficiary in what it designates as a programmer analyst position,[2] 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, concluding that the petitioner failed to demonstrate: (1) the existence of an employer-employee relationship between the petitioner and the beneficiary; and (2) that it had secured work for the entire period of requested employment when it filed the petition.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's letter denying the petition; and (5) the Form I-290B and supporting documentation.

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

Beyond the decision of the director, the AAO finds an additional aspect which, although not addressed in the director's decision, nevertheless also precludes approval of the petition, namely, the petitioner's failure to demonstrate that the proffered position is a specialty occupation.[3] For this additional reason, the petition must also be denied.

The AAO will first address the director's determination that the petitioner failed to establish 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." 8 C.F.R. § 214.2(h)(4)(ii).

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[1] The petitioner provided a North American Industry Classification System (NAICS) Code of 541511, "Custom Computer Programming Services." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "541511 Custom Computer Programming Services," http://www.census.gov/cgi-bin/sssd/naics/naicsrch (accessed Aug. 16, 2013).

[2] The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for the SOC (O*NET/OES) Code 15-1131, the associated Occupational Classification of "Computer Programmers," and a Level I (entry-level) prevailing wage rate.

[3] The AAO conducts appellate review on a *de novo* basis (*See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)), and it was in the course of this review that the AAO identified this additional ground for denial.

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) . . . .

"United States employer" is defined 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.

As noted above, the record is not persuasive in establishing that the petitioner or any of its clients will have an employer-employee relationship with the beneficiary.

Although "United States employer" is defined in the regulations at 8 C.F.R. § 214.2(h)(4)(ii), it is noted that the terms "employee" and "employer-employee relationship" are not defined for purposes of the H-1B visa classification. Section 101(a)(15)(H)(i)(b) of the Act indicates that an alien coming to the United States to perform services in a specialty occupation will have an "intending employer" who will file a Labor Condition Application with the Secretary of Labor pursuant to section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1) (2012). The intending employer is described as offering full-time or part-time "employment" to the H-1B "employee." Subsections 212(n)(1)(A)(i) and 212(n)(2)(C)(vii) of the Act, 8 U.S.C. § 1182(n)(1)(A)(i), (2)(C)(vii) (2012). Further, the regulations indicate that "United States employers" must file a Petition for a Nonimmigrant Worker (Form I-129) in order to classify aliens as H-1B temporary "employees." 8 C.F.R. §§ 214.2(h)(1), (2)(i)(A). Finally, the definition of "United States employer" indicates in its second prong that the petitioner must have an "employer-employee relationship" with the "employees under this part," i.e., the H-1B beneficiary, and that this relationship be evidenced by the employer's ability to "hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer").

Neither the legacy Immigration and Naturalization Service ("INS") nor U.S. Citizenship and Immigration Services ("USCIS") defined the terms "employee" or "employer-employee relationship" by regulation for purposes of the H-1B visa classification, even though the regulation describes H-1B beneficiaries as being "employees" who must have an "employer-employee relationship" with a

"United States employer." *Id.* Therefore, for purposes of the H-1B visa classification, these terms are undefined.

The United States Supreme Court has determined that where federal law fails to clearly define the term "employee," courts should conclude that the term was "intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (hereinafter "*Darden*") (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). The Supreme Court stated:

> "In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party."

Darden, 503 U.S. at 323-324 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. at 751-752); *see also Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 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)).

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.[4]

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[4] While the *Darden* court considered only the definition of "employee" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(6), and did not address the definition of "employer," courts have generally refused to extend the common law agency definition to ERISA's use of employer because "the definition of 'employer' in ERISA, unlike the definition of 'employee,' clearly indicates legislative intent to extend the definition beyond the traditional common law definition." *See, e.g., Bowers v. Andrew Weir Shipping, Ltd.*, 810 F. Supp. 522 (S.D.N.Y. 1992), *aff'd*, 27 F.3d 800 (2nd Cir.), *cert. denied*, 513 U.S. 1000 (1994).

However, in this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. Instead, in the context of the H-1B visa classification, the term "United States employer" was defined in the regulations to be even

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.[5]

Therefore, 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

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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).

[5] 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)).

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).[6]

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.

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

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[6] 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).

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).

As will now be discussed, applying the *Darden* and *Clackamas* tests to this matter, the AAO finds that 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."

On the Form I-129 the petitioner stated that the beneficiary would work offsite, at in Missouri,[7] which documents in the record of proceeding establish as the business address of Express Scripts, Inc. The petitioner also stated that the beneficiary would work at that location in the itinerary portion of its April 16, 2012 letter of support.

The record of proceeding provides very little information about the entity asserted to be the ultimate end-client here, that is but, based upon the AAO's review of this company's Internet site, on August 29, 2013, it appears that Express Scripts is a relatively large and well established organization that is engaged in the business of pharmacy benefit management (PBM) services and home delivery and specialty pharmacy services, for a client base that spreads across the United States. The AAO bases this observation upon promotional information at the Express Scripts Internet site, a small portion of which is excerpted below:

> **What We Do**
>
> At we help make the use of prescription drugs safer and more affordable. It's been our mission since 1986, when a group of healthcare advocates began applying the rigors of scientific research to the pharmacy benefit. With the country facing hundreds of billions of dollars of prescription-related waste each year from costly drug, pharmacy and health choices, our mission remains as relevant as ever.
>
> [W]e provide best-in-class pharmacy benefit management (PBM) services and industry-leading home delivery and specialty pharmacy services for our diverse client base.
>
> Today, we manage prescription benefits for tens of millions of Americans on behalf of thousands of clients, including health plans and plan sponsors. Employers, unions and government organizations throughout the nation rely on our services. Our team of more than 30,000 employees expresses passion, expresses care and expresses enthusiasm for our mission. We are committed to our members achieving better clinical outcomes dedicated to delivering better financial outcomes for plan sponsors.

About Us, on the Internet at (visited August 29, 2013).

[7] The petitioner's office is located in Illinois.

Based upon contract-type documents that it submitted into the record, the petitioner asserts the following "contractual path" between the petitioner and :

- has contracted with the petitioner, for the petitioner to provide temporary workers to perform services for Siritek's clients. According to the petitioner, it is pursuant to this contract that the petitioner has committed to provide workers that would be assigned Express Scripts.
- has a contract with which calls for Siritek to provide temporary workers to perform services for Jupiter's clients.
- has a contract with by which Jupiter is to provide temporary workers for and its clients.
- it is asserted, contracted with Accenture for Accenture to provide persons to perform services for Express Scripts. *However, it is important to note that the record contains no copy of any agreement between these two entities, or, for that matter, between Express Scripts and any of the other entities mentioned in the record of proceeding.*

The petitioner illustrates this alleged "contractual path" as follows:

Next, the AAO will briefly identify the documents upon which the petitioner relies for showing the "contractual path" that it says is operative in this petition.

The record contains a "Subcontractor Services Agreement" executed between the petitioner and on March 11, 2010, which calls for the petitioner to provide temporary workers to perform services for 's clients. The record also includes a Statement of Work (SOW) issued pursuant to this agreement, on January 10, 2011: the , SOW calls for the beneficiary to provide services to an end-client, , Missouri.

The record also contains an "Independent Contractor/[V]endor Consultant's Agreement" executed between on January 11, 2011. It calls for to provide temporary workers to perform services for 's clients.

The record also contains a "Master Temporary Help Company Agreement," executed by and in March 9, 2010, which calls for to provide temporary workers to perform services for Accenture and/or its clients.

Also submitted is a June 21, 2012 letter from stating that the beneficiary is working for its clients.

Finally, there is a May 10, 2012 letter from stating that the beneficiary is providing services to its client, Missouri.

It is worth repeating that the record of proceeding contains no contract between the so-called end-client, and any entity.

As will now be discussed, based upon its review of the totality of the evidence in this record of proceeding, the AAO finds that the petitioner has failed to demonstrate the existence of an employer-employee relationship between the petitioner and the beneficiary in accordance with the *Darden* common-law analysis discussed above.

The AAO finds that the evidence submitted by the petitioner is sufficient to establish that the beneficiary has been working at However, the AAO also finds that the evidence of record fails to establish that the petitioner has been exercising, or would in the future exercise, actual control over the beneficiary's day-to-day work at E

In reaching this determination, the AAO of course has reviewed and considered – both individually and in the aggregate – all of the submitted documentation that falls within the list that the petitioner submits on appeal as the "CONTRACTUAL PATH DOCUMENTS BETWEEN END CLIENT." The AAO has also taken into consideration the petitioner's roles that are emphasized on appeal, such as in the realms of taxes, benefits, salary payment, and work assignments.

The AAO first notes that the record indicates that the beneficiary is not being assigned to provide services in any areas where he would be basically applying or using any materials, services, or instrumentalities that belong exclusively to the petitioner, and that would then naturally reduce the role that any client would have in determining the particular substantive work that the beneficiary would actually perform for it.

Next, the AAO finds that the copies of e-mail traffic reflect the beneficiary's being involved, day-to-day, in a communications web at that does not include the person whom the petitioner's June 22, 2012 letter to the AAO identifies as the person to whom the petitioner reports. Also, the discussions in the copied e-mails reflect that, at least in matters there addressed, the beneficiary is acting independently from any substantive supervision from Mr. and the petitioner.

Also, while the petitioner claims that it controls the beneficiary's work at it presents no documentation comparable to the specificity and immediacy of work-issue discussions and problem orientation reflected in the e-mail traffic. Thus, the petitioner's claim of control over the petitioner's work pales in the light of the e-mails.

The AAO also finds that both the content of the e-mails and also the range of the participants in the e-mail exchanges (including s own internal staff (i.e., those with the simple "(EHQ)" in their addresses)) suggest that, in his day-to-day work activities, the beneficiary is acting

as a member of an organic team, and with a considerable range of latitude, and subject to the direct input of

Next, the AAO notes that the contract-type documents that the petitioner submitted into the record reflect that the party contracting for services for its client(s) - and, ultimately, each client itself - would maintain material control over who would work for the client, for how long, and subject to what performance standards. Witness, for instance:

- In the "Master Temporary Help Company Agreement" between (as representing clients to be served) and
  - Clause 2(a), which indicates that any person assigned by pursuant to the contract would be subject to removal simply upon 's notification to that it finds the assigned person skills or work unsatisfactory.
  - The term at clause 8(a) that absolves Accenture of any responsibility for any fees associated with work by Jupiter-assigned persons whom Accenture determines to be lacking the technical skills specified "in the applicable Work Statement."
- Clause 4 (Term and Termination), in the "Subcontractor Services Agreement" between and the petitioner, regarding services to be performed by the petitioner pursuant to a Project Notification Form required by this overarching agreement. This clause (1) allows to "immediately cancel this agreement" if it determines that the petitioner's performance is unsatisfactory and (2) vests in the "right to terminate in writing any worker or any project immediately with no obligations" if 's client terminates the project, *or* if 's client becomes dissatisfied with the petitioner or the persons whom the petitioner assigned, *or* if itself becomes dissatisfied with the petitioner or the persons whom the petitioner assigned, *or* without cause, if two weeks' notice is given.

Thus, to the extent that they are relevant, the very documents submitted by the petitioner indicate that whatever work is to be performed by any person pursuant to those documents - and, indeed, the assignment of any person to work pursuant to them - and also the very continuation of any contractor's work pursuant to those documents - are at the grace of the end-client and/or the party representing the end-client in the related contract.

Further, the AAO finds that both the e-mail traffic discussed earlier above and also the contract information discussed immediately above materially conflict with, effectively rebut, and undermine the credibility of s statement, in the final paragraph of June 19, 2012 letter, that only the petitioner "has the right to control" and "is a (sic) solely responsible" for the beneficiary's performance. The AAO also notes that to the extent that the beneficiary's pay may be flowing from work whose very existence and also availability to the beneficiary depends upon the terms that the AAO cited in the documents above, the petitioner would not be the sole factor at least potentially affecting the beneficiary's salary.

In the above regard, the AAO also finds that, while the petitioner has presented many documents of many types to support its claims, the record has none from the end-client. There are no contracts executed by the and there are no letters, affidavits or other documents in which adopts, endorses, or corroborates the petitioner's claims to the employer-employee relationship here at issue. In this regard, the AAO finds that the petitioner's claims are fatally undermined by the petitioner's failures to provide copies of the pertinent contract(s) with the asserted end-client and to provide also whatever additional statements by and corroborating documentary evidence from Express Scripts would establish exactly what the beneficiary is to do for pursuant to what terms and conditions, and subject to what lines and levels of day-to-day substantive supervision, direction, and control.

In sum, then, the evidence of record does not demonstrate the requisite employer-employee relationship between the petitioner and 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.

For all of these reasons, the key element in this matter, which is who exercises actual control over the beneficiary and his work, has not been substantiated. While the petitioner has submitted much documentary evidence to support its claims, the AAO finds that, as reflected in this decision's earlier discussions, they are not persuasive.

The evidence of record does not establish which of the business entities that would be involved in assigning work for this beneficiary would substantially control the beneficiary in his day-to-day work, would determine the specifications and requirements of that work, and would gauge the quality of the beneficiary's performance and hence, ultimately, the beneficiary's acceptability for continued assignment. While the issue has not been resolved in this case, in light of both the evidentiary deficiencies and also the evidentiary indications of the requisite control not resting with the petitioner – which have been discussed above – the AAO also finds that the weight of the evidence does not favor the petitioner's position.

The evidence of record, 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). As reflected in the discussions above, the AAO finds that petitioner's claims regarding control and the totality of the particular evidence that the petitioner has submitted to support them are not persuasive.

Based on the tests outlined above, the petitioner has not established that 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). Accordingly, the appeal will be dismissed and the petition will be denied on this basis.

III. Specialty Occupation

The AAO will now address its supplemental finding, made beyond the decision of the director, that the proffered position is not a specialty occupation. Based upon a complete review of the record of proceeding, the AAO agrees with the director and finds that the evidence fails to establish that the position as described constitutes a specialty occupation.

To meet its burden of proof in establishing the proffered position as a specialty occupation, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

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 one 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 term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

> An occupation which requires [(1)] 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 requires [(2)] 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, the 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), 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. *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.

The AAO notes that, as recognized by the court in *Defensor*, *supra*, where, as here, the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. *See Defensor v. Meissner*, 201 F.3d at 387-388. The court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. *Id.* at 384. Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not rely simply upon a proffered position's title. The specific duties of the position, combined with the nature of the petitioning entity's business operations, are factors to be considered to determine whether the position qualifies as a specialty occupation. USCIS must examine the extent and substance of whatever documentary evidence is provided with regard to the substantive nature of the specific work that the end-client (in this case, Accenture) may require as the ultimate employment of the beneficiary. *See generally Defensor v. Meissner*, 201 F. 3d at 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.

As discussed above, the record of proceeding in this case does not contain documentary evidence from the end-client (Express Scripts) sufficient to establish the substantive nature of whatever work the beneficiary would perform for it. 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 for classification as a specialty occupation. Thus, even if it were determined that the petitioner had overcome the director's ground for denying this petition (which it has not), the petition could still not be approved.

IV. Securing of Work for Entire Period of Requested Employment at Time of Filing

Next, the AAO will discuss the director's finding regarding the petitioner's failure to establish that at the time of this petition's filing, it had secured definite, non-speculative work for the entire period of requested employment, that is, October 1, 2012 through September 30, 2015.

As noted above, issued its SOW on January 10, 2011. That SOW called for the beneficiary to begin providing his services on January 26, 2011 for a period of 12 months, "with [the] possibility of extension." The instant petition was filed on April 17, 2012, several months after the conclusion of that 12-month period. Although the petitioner submits a contract addendum executed by as well as an additional letter from indicating that the assignment upon which the beneficiary is working for has been extended, both documents were prepared in June 2012, more than two months after the petition was filed.

Thus, even if the documents submitted on appeal did constitute credible evidence regarding work that the petitioner may have secured for the beneficiary to perform for Express Scripts during the requested period of employment, they would not constitute evidence that, by the time of the petition's filing, the petitioner had secured definite, non-speculative employment with the beneficiary.[10] USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(12). 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). Accordingly, the appeal will be dismissed and the petition will be denied on this basis.

V. Conclusion

As set forth above, the AAO agrees with the director's finding that the petitioner failed to: (1) demonstrate the existence of an employer-employee relationship between the petitioner and the beneficiary; and (2) demonstrate that it had secured work for the entire period of requested employment when it filed the petition. Beyond the decision of the director, the AAO finds additionally that the petitioner failed to demonstrate that the proffered position is a specialty occupation.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's

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[10] The agency made clear long ago that speculative employment is not permitted in the H-1B program. A 1998 proposed rule documented this position as follows:

> 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.

63 Fed. Reg. 30419, 30419 - 30420 (Jun. 4, 1998).

enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd.* 345 F.3d 683.

The appeal will be dismissed 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.

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