



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: **APR 01 2014** 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 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 submitted a Petition for a Nonimmigrant Worker (Form I-129) to the California Service Center on April 1, 2013. In the Form I-129 visa petition, the petitioner describes itself as an information technology (IT) consulting and development company established in 2000. In order to employ the beneficiary in what it designates on the Form I-129 as a quality 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 on July 23, 2013, finding that the petitioner failed to establish that it will have a valid employer-employee relationship with the beneficiary for the duration of the requested H-1B validity period. On appeal, counsel asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements. In support of this assertion, the petitioner and counsel submitted a brief and supporting evidence.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; and (6) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

For the reasons that will be discussed below, the AAO agrees with the director that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed. The petition will be denied.

As a preliminary matter, the AAO notes that even if the petitioner were to overcome the basis for the director's denial of the petition (which it has not), it could not be found eligible for the benefit sought. That is, upon review of the record of proceeding, the AAO notes that in the instant case, there are additional issues, not addressed by the director, which preclude the approval of the H-1B petition.<sup>1</sup> As will be discussed later in the decision, for these additional reasons the petition also may not be approved. They are considered independent and alternative bases for denial of the petition.

### **I. The Proffered Position**

In this matter, the petitioner stated in the Form I-129 petition that it is an IT consulting and development company and that it seeks the beneficiary's services as a quality analyst to work on a full-time basis. However, the AAO notes that the petitioner provides inconsistent information regarding the proffered position. For example, in the support letter dated March 30, 2013, the

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<sup>1</sup> The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

petitioner stated that it "wishes to offer [the beneficiary] the position of a Programmer Analyst." Immediately following, the petitioner indicated "[i]n this capacity, [the beneficiary] will continue to work as a Quality Analyst with end client, at [REDACTED]." Later in the same letter, the petitioner stated "[a]t present, [the beneficiary] is working for an end client, Wellcare Health Plans Inc. as a Programmer Analyst." Then towards the end of the letter, the petitioner indicated "[a]t [p]resent[,] [the beneficiary] is working with [the petitioner] for end client [REDACTED]." No explanation was provided by the petitioner for the variances.

Further, the petitioner stated that "the duties of this position are clearly those of a 'Specialty Occupation' as per the O\*NET 15-1199.01-Software Quality Assurance Engineers and Testers." The petitioner described the duties of the position as the following:

[D]esign test plans, scenarios, scripts, or procedures, test system modifications to prepare for implementation, develop testing programs that address areas such as database impacts, software scenarios, regression testing, negative testing, error or bug retests, or usability, document software defects, using a bug tracking system, and report defects to software developers, identify, analyze, and document problems with program function, output, online screen, or content, monitor bug resolution efforts and track successes, create or maintain databases of known test defects, plan test schedules or strategies in accordance with project scope or delivery dates, participate in product design reviews to provide input on functional requirements, product design, schedules, or potential problems, review software documentation to ensure technical accuracy, compliance, or completeness, or to mitigate risks.

The AAO notes that the wording of the above duties as provided by the petitioner for the proffered position is recited virtually verbatim from the occupational category "Software Quality Assurance Engineers and Testers" as described in the Occupational Information Network (O\*NET) Code Connector. Specifically O\*NET states, in pertinent part, the following regarding the occupational category "Software Quality Assurance Engineers and Testers" Code – 15-1199.01:

- Design test plans, scenarios, scripts, or procedures.
- Test system modifications to prepare for implementation.
- Develop testing programs that address areas such as database impacts, software scenarios, regression testing, negative testing, error or bug retests, or usability.
- Document software defects, using a bug tracking system, and report defects to software developers.
- Identify, analyze, and document problems with program function, output, online screen, or content.
- Monitor bug resolution efforts and track successes.
- Create or maintain databases of known test defects.
- Plan test schedules or strategies in accordance with project scope or delivery dates.
- Participate in product design reviews to provide input on functional requirements, product designs, schedules, or potential problems.



- Review software documentation to ensure technical accuracy, compliance, or completeness, or to mitigate risks.

Occupational Information Network (O\*NET) Code Connector – "Software Quality Assurance Engineers and Testers," Code 15-1199.01 on the Internet at <http://www.onetonline.org/link/summary/15-1199.01> (last visited March 31, 2014).

This type of generalized description may be appropriate when defining the range of duties that may be performed within an occupational category, but it fails to adequately convey the substantive work that the beneficiary will perform within the petitioner's business operations and, thus, generally cannot be relied upon by a petitioner when discussing the duties attached to specific employment. In establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in the context of the petitioner's business operations, demonstrate a legitimate need for an employee exists, and substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition.

The petitioner stated that "[the beneficiary] is eminently qualified to assume this temporary position based on his academic accomplishments and professional experience." The petitioner indicated that the beneficiary received a Master of Science in Computer Science from the [REDACTED] in 2011, and a Bachelor of Technology degree in India in 2008. The petitioner submitted copies of the beneficiary's academic credentials.

The AAO notes that the petitioner did not state that there are any specific academic requirements for the proffered position. Thus, the petitioner does not claim and has failed to establish that the position requires theoretical and practical application of a body of highly specialized knowledge and 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)(ii).

The petitioner submitted the following documents:

- An employment offer letter, dated March 25, 2013, stating that it is "pleased to offer you a Quality Assurance Analyst position with [the petitioner]" and that "[the beneficiary] [has] been assigned to work through [the petitioner], at end client, [REDACTED]". The letter further indicates that "[f]or such purposes, [the petitioner] has entered into an agreement with mid vendor, [REDACTED]".
- A letter from [REDACTED] dated March 12, 2013 stating that "[the beneficiary], upon issuance of an H-1B visa, will be extended to the **Clinical Program Data Mart**," "for the benefit of [REDACTED]". The letter also indicated that "[the beneficiary] has been working on this assignment as of 8-6-2012" and that it "anticipate[s] that [it] will need the services of [the beneficiary] as this is an ongoing project." The letter further states:



The Technology Specialist will ensure the successful completion of software projects as follows:

With general guidance and coaching, participates in design, development and implementation of specific new and emerging technologies, platforms and services. Assists in the assessment of technical viability of new products and technologies. Works with developers and infrastructure specialists to pilot and evaluate new technologies. Participates in development of business cases and obtaining approvals for capital expenditures. Familiar with standard concepts, practices, and procedures within a particular field. Significant creativity is required. Minimum 3-5 years related experience preferred. Bachelor's degree in related field preferred.

The desired candidate will coordinate functional activities of system integration testers participating on cross-functional teams for specific product development efforts. The candidate must be a self starter and be able to work with little or no supervision. Requires to lead the testing of new applications. Determines testing strategies and provides testing resource estimations and consulting to project teams. Documents and assists in the resolution of complex problems and issues. The position will also include working with business and technical resources to analyze problems encountered in testing and determining changes required to correct problems. Extensive creativity required across areas of expertise. A high proficiency level in specific job related skills is required.

**Required Skills:**

- Extensive experience in leading complex projects with division or company wide scope.
- Strong skills required in communications, leadership, presentations to senior management, problem-solving, project management, team development and organization.
- Extensive experience specifically with leading System Integration and User Acceptance Testing
- Extensive Experience in SQL server 2008 platform
- Experience in Data centric testing. Should be able to verify data loaded in tables as per the algorithms.
- Extensive ETL experience.
- Must able to understand transformation rules, and able to validate principal totals.
- Experience in testing data warehousing applications.
- Expertise in Data analysis, Data modeling, Database design, Data migration, and Business intelligence solutions.
- Solid understanding of relational database concepts, SQL and procedural SQL in Teradata[.]

- Expertise in processing data available in Message Queues, Flat Files and Relational Databases[.]
  - Create processes to ensure the data quality of the information collected.
  - Write and troubleshoot SQL queries and stored procedures.
  - Extensive hands-on-experience in writing excel macros.
  - Extracting data from tables and formatting and dumping in files for validation.
- The petitioner's Independent Contractor Agreement, Schedule #01, Effective Date 01/01/13, dated March 2013 and signed by the petitioner and [REDACTED]. The contractor is identified as the beneficiary and the dates are "01/01/13 to 06/30/13." It also states that "extensions are anticipated but not guaranteed." The assignment is identified as [REDACTED] and its affiliates and subsidiaries." The entry for services to be performed states "Technology Specialist."
  - [REDACTED] Independent Contractor Agreement dated February 3, 2011, signed by both [REDACTED] and the petitioner. It states that "[the petitioner], is an independent contractor regularly engaged in the business of providing consulting services, and [the petitioner] desires to be engaged by [REDACTED] in servicing [REDACTED] customer, under the terms and conditions set forth herein." The agreement further indicates that the "term of this Agreement is for one (1) year period from the date hereof and will renew for consecutive one year periods, unless terminated by either party as provided for herein."

Further, the petitioner also submitted printouts from its website, and copies of its corporate tax returns, lease agreement, and the beneficiary's 2012 and 2011 Form W-2, Wage and Tax Statements, along with pay statements issued by the petitioner.

In addition, the petitioner also submitted an LCA in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification of "Computer Occupations, All Other"- OES/SOC code 15-1799. The petitioner designated the proffered position as a Level I (entry) position.<sup>2</sup>

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<sup>2</sup> The "Prevailing Wage Determination Policy Guidance" issued by DOL provides a description of the wage levels. A Level I wage rate is described by DOL as follows:

**Level I** (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.



Furthermore, the petitioner indicated on the Form I-129 and LCA that the beneficiary would work at [REDACTED]. The LCA also listed the petitioner's address as a place of employment.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on April 24, 2013. The director outlined the evidence to be submitted.

Counsel and the petitioner responded to the RFE by submitting a brief and additional evidence. In a letter dated July 15, 2013, the petitioner indicated that the beneficiary will continue to work as a "Programmer Analyst with [REDACTED]." Later, in the same letter, the petitioner stated that "[a]t present, [the beneficiary] is working for an end client, [REDACTED] as Quality Analyst."

The submission included copies of: (1) an e-mail sent to the beneficiary from [REDACTED], Manager at [REDACTED] stating that it is their policy not to provide client letters for contract resources; (2) a letter from [REDACTED] dated June 21, 2013 which is same as the letter provided on March 12, 2013, except that in the paragraph that describes the duties and preferred qualification, it states "[m]inimum 10 years related experience preferred"; (3) the petitioner's Independent Contractor Agreement dated 07/01/13 showing the beneficiary's name and the dates from 07/01/13 to 12/31/13, and the assignment at [REDACTED], and services to be performed as Technology Specialist; (4) a copy of ID badge showing the beneficiary's name and picture, with [REDACTED] written under; (5) work related e-mails describing the beneficiary's assignments and work performed; (6) time sheets; (7) recent pay stubs issued to the beneficiary from the petitioner from May and June 2013; (8) performance evaluations; (9) the petitioner's organizational chart listing the beneficiary as a computer programmer; and (10) the petitioner's business documents including quarterly tax returns and 2012 corporate tax return.

The director reviewed the evidence but determined that the petitioner failed to establish that it would have an employer-employee relationship with the beneficiary. The director denied the petition on July 23, 2013. Counsel submitted an appeal of the denial of the H-1B petition.

## II. Employer-Employee Relationship

The first issue for consideration is whether the petitioner has established that it meets the regulatory definition of a United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii). The AAO will now review the record of proceeding to determine whether the petitioner has established that it will have "an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." *Id.*

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See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).



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 (emphasis added):

*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.

8 C.F.R. § 214.2(h)(4)(ii); *see also* 56 Fed. Reg. 61111, 61121 (Dec. 2, 1991). In the instant case, 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 an LCA with the Secretary of Labor pursuant to section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). 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). Further, the regulations indicate that "United States employers" must file a Petition for a Nonimmigrant Worker (Form I-129) in order to classify aliens as H-1B temporary "employees." 8 C.F.R. § 214.2(h)(1), (2)(i)(A). Finally, the definition of "United States employer" indicates in its second prong that the petitioner must have an "employer-employee relationship" with the "employees under this part," i.e., the H-1B beneficiary, and that this relationship be evidenced by the employer's ability to "hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer").

Neither the former Immigration and Naturalization Service (INS) nor USCIS defined the terms "employee" or "employer-employee relationship" by regulation for purposes of the H-1B visa

classification, even though the regulation describes H-1B beneficiaries as being "employees" who must have an "employer-employee relationship" with a "United States employer." *Id.* Therefore, for purposes of the H-1B visa classification, these terms are undefined.

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

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

*Darden*, 503 U.S. at 323-324 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. at 751-752); see also *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440, 445 (2003) (hereinafter "*Clackamas*"). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).

In this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. See generally 136 Cong. Rec. S17106 (daily ed. Oct. 26, 1990); 136 Cong. Rec. H12358 (daily ed. Oct. 27, 1990). On the contrary, in the context of the H-1B visa classification, the regulations define the term "United States employer" to be even more restrictive than the common law agency definition.<sup>3</sup>

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

However, in this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in



Specifically, the regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to engage a person to work within the United States, and to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee" or "employer-employee relationship" combined with the agency's otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition" or, more importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. *Cf. Darden*, 503 U.S. at 318-319.<sup>4</sup>

Accordingly, in the absence of an express congressional intent to impose broader definitions, both the "conventional master-servant relationship as understood by common-law agency doctrine" and the *Darden* construction test apply to the terms "employee" and "employer-employee relationship" as used in section 101(a)(15)(H)(i)(b) of the Act, section 212(n) of the Act, and 8 C.F.R. § 214.2(h).<sup>5</sup>

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

The factors indicating that a worker is or will be an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. *Darden*, 503 U.S. at 323-324; *Clackamas*, 538 U.S. at

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section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. Instead, in the context of the H-1B visa classification, the term "United States employer" was defined in the regulations to be even more restrictive than the common law agency definition. A federal agency's interpretation of a statute whose administration is entrusted to it is to be accepted unless Congress has spoken directly on the issue. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-845 (1984).

<sup>4</sup> To the extent the regulations are ambiguous with regard to the terms "employee" or "employer-employee relationship," the agency's interpretation of these terms should be found to be controlling unless "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359, 109 S.Ct. 1835, 1850, 104 L.Ed.2d 351 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945))).

<sup>5</sup> That said, there are instances in the Act where Congress may have intended a broader application of the term "employer" than what is encompassed in the conventional master-servant relationship. *See, e.g.*, section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F) (referring to "unaffiliated employers" supervising and controlling L-1B intracompany transferees having specialized knowledge); section 274A of the Act, 8 U.S.C. § 1324a (referring to the employment of unauthorized aliens).



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).

The first factor to be weighed is "the hiring party's *right to control* the manner and means by which the product is accomplished." *Darden*, 503 U.S. at 323 (quoting *C.C.N.V.*, 490 U.S. at 751) (emphasis added); see also *Clackamas*, 538 U.S. at 445 (emphasis added).<sup>6</sup> That said, the extent of control the hiring party may exercise over the details of the product is not dispositive. *C.C.N.V.*, 490 U.S. at 752. In *C.C.N.V.*, the Supreme Court rejected tests based exclusively on either the hiring party's right to control or actual control of a work product. *C.C.N.V.*, 490 U.S. at 750. Instead, the Court used the principles of the general common law of agency to determine whether the individual performing the work would be an employee or an independent contractor. *Id.* at 751.

As such, USCIS must assess and weigh the relevant factors as they exist or will exist. Moreover, unless specifically provided for by the common-law test, USCIS will not determine control exclusively based upon the employer's right to control or exercise of actual control. See *C.C.N.V.*, at 752-753 (applying the common law test to determine control). For example, while the Court in *C.C.N.V.* considered the right to assign additional projects, it weighed the actual source of the instrumentalities and tools, not who had the right to provide such tools. See *id.*

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).

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<sup>6</sup> The relevant H-1B regulation effectively, if not expressly, adopts the common-law approach. See 8 C.F.R. § 214.2(h)(4)(ii) (recognizing an employer-employee relationship "by the fact that [the employer] may hire, pay, fire, supervise, or otherwise *control* the work of any such employee . . . ." (emphasis added)).

The petitioner claims that it will have an employer-employee relationship with the beneficiary. The AAO has considered this assertion within the context of the record of proceeding. However, as will be discussed, there is insufficient probative evidence in the record to support this assertion. 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)).

The AAO notes that a key element in this matter is who would have the ability to hire, fire, supervise, or otherwise control the work of the beneficiary for the duration of the H-1B petition. Upon review, the AAO finds that the record of proceeding provides limited substantive information on this issue.

For example, in the support letter, the petitioner claimed that it "shall undertake all responsibilities pertaining to [the beneficiary]'s payroll, hiring, firing, assigning his work, providing him with any additional employee benefits and filing/extending his H-1B visa and dealing with all other immigration related matters for [the beneficiary], according to relevant federal and/or State law, regulations and rules." In support of the H-1B petition, the petitioner submitted pay stubs and W-2 statements that it issued to the beneficiary. The AAO acknowledges that the method of payment of wages can be a pertinent factor to determining the petitioner's relationship with the beneficiary. However, while such items such as wages, social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., where will the work be located, who will provide the instrumentalities and tools, who will oversee and direct the work of the beneficiary, 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.

Upon review of the record of proceeding, the AAO finds that the petitioner failed to adequately establish several basic elements of the beneficiary's employment. Specifically, the petitioner has provided inconsistent information as to the nature and requirements for the proffered position. For example, as noted above, the petitioner provided varied job titles for the proffered position throughout the record. As mentioned, in the Form I-129, the petitioner indicated that the job title is "quality analyst." However, in the support letter dated March 30, 2013, the petitioner indicated it wishes to offer the beneficiary "the position of a Programmer Analyst." Then in the immediate following sentence, the petitioner states that "[the beneficiary] will continue to work as a Quality Analyst with end client, at [REDACTED]." Later in the letter, the petitioner claimed that the beneficiary is "working for an end client, [REDACTED] as a Programmer Analyst." Then in the latter part of the letter, the petitioner stated that "[a]t present [the beneficiary] is working with [the petitioner] for end client [REDACTED] as Technology Specialist where he is responsible for designing, development and implementation of emerging technology, platforms and services." Further, in the offer letter, the petitioner referred to the proffered position as "Quality Assurance Analyst position." However, in the [REDACTED] letter dated March 12, 2013, the proffered position is described as a "Technology Specialist" position. Moreover, in the organization chart provided in response to the RFE, the beneficiary is listed as a "computer programmer." The petitioner did not explain the discrepancies in the record.



The record also contains inconsistent information as to the requirement for the proffered position. As mentioned above, the petitioner did not specify academic requirements for the proffered position. However, in the letter dated March 12, 2013, [REDACTED] stated that the technology specialist position requires a minimum of three to five years of related experience is preferred and that a bachelor's degree in a related field preferred. In another letter, also from [REDACTED], dated June 21, 2013, [REDACTED] states the same preference for three to five years of related experience and a preference for a bachelor's degree in a related field, along with a minimum of 10 years related experience preferred. With the appeal, the petitioner submitted a letter from [REDACTED] also stating a preference for three to five years of related experience and a preference for a bachelor's degree in a related field, along with a minimum of 10 years related experience preferred.

On the Form I-129, the petitioner requested that the beneficiary be granted H-1B classification from October 1, 2013 to September 16, 2016. However, the independent contractor agreements in the record do not establish that H-1B caliber work exists for the beneficiary for the duration of the requested period. For example, the petitioner's independent contractor agreement with [REDACTED] identifies the beneficiary as a contractor assigned to [REDACTED] as a Technology Specialist, and is effective from 01/01/13 until 06/30/2013. It states that "extensions are anticipated but not guaranteed." Another extension agreement indicates that it is valid from 07/01/13 until 12/31/13. On appeal, the petitioner provided a copy of a Purchase Order from [REDACTED] dated June 21, 2013. It lists the beneficiary's name as a service provider and further states "renewal 07/01/13 to 12/31/13." There is a lack of documentary evidence to substantiate the petitioner's claims that the project would last for the duration of the beneficiary's requested employment. Moreover, in response to the RFE, the petitioner indicated that "[t]here is no in-house project that the beneficiary will work on."

Moreover, the petitioner provided a copy of a photo identification badge showing the beneficiary's name, photo, with [REDACTED] written under." It does not name or identify the beneficiary as working for the petitioner or mention the petitioning company. The badge does not contain validity dates, nor does it appear to contain security features (e.g., access restrictions, bar code, holographic, digital signature, magnetic strip). There is no indication as to when the badge was produced. Upon review of the photocopy of the badge, it suggests, at best, that the beneficiary is working for [REDACTED] there is no indication that the beneficiary is employed by the petitioner.

The petitioner failed to establish that the petition was filed on the basis of employment for the beneficiary as a quality analyst that, at the time of the petition's filing, was definite and nonspeculative for the requested period of employment specified in the Form I-129.<sup>7</sup> The record of

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<sup>7</sup> The AAO notes that the agency made clear long ago that speculative employment is not permitted in the H-1B program. For example, a 1998 proposed rule documented this position as follows:

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



proceeding lacks (1) evidence corroborating that the petitioner has work that exists as an ongoing endeavor generating definite employment for the beneficiary's services (e.g., documentary evidence regarding the scope, staging, time and resource requirements, supporting contract negotiations, documentation regarding the business analysis and planning to support the work); and (2) evidence that the beneficiary's duties ascribed would actually require the theoretical and practical application of a body of highly specialized knowledge, and 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.

A position may be awarded H-1B classification only on the basis of evidence of record establishing that, at the time of the filing, definite, non-speculative work would exist for the beneficiary for the period of employment specified in the Form I-129. The record of proceeding does not contain such evidence. 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)(1). 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). Accordingly, the petitioner has not demonstrated that it will maintain an employer-employee relationship for the duration of the period requested. The AAO finds that the petitioner has failed to establish that the petition was filed for work that was reserved for the beneficiary as of the time of the petition was submitted.

The AAO notes that the record does not contain sufficient evidence to establish that the petitioner oversees and directs the work of the beneficiary. In the support letter, the petitioner claimed that it "retains the ability to exercise discretion over the performance of its employees and to give regular performance reviews in relation to their work at the end client." The petitioner submitted copies of performance reviews, time sheets, and an organization chart. However, the copies of performance reviews and time sheets are faint and not readable. Consequently, they do not provide sufficient information regarding how the beneficiary is supervised on a day-to-day basis. Further, the record does not contain any information from the petitioner regarding the purpose of the performance report; the methods used for accessing and evaluating the beneficiary's performance; how work and performance standards are established; and the criteria for determining bonuses and salary adjustments.

Moreover, while the petitioner submitted an organization chart that lists the beneficiary, the beneficiary's position is described as "computer programmer," which differs from the proffered

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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.

position. In addition, the organization chart does not provide information on by whom and how the beneficiary is supervised. Thus, the petitioner has failed to satisfactorily establish the probative value and relevancy of the documents to the matter here.

Moreover, the record contains copies of email correspondence between the beneficiary and various individuals who appear to be employed by [REDACTED]. Based upon the e-mail correspondence, it appears that the beneficiary's work is supervised by [REDACTED] employees. For example, a message from the beneficiary dated April 4, 2013 that explains the work completed, is sent to [REDACTED] a Manager of Medical Informatics at [REDACTED] and he replies "Approved." In another e-mail dated June 6, 2013, [REDACTED] describes the work that needs to be completed, and on June 10, 2013, the beneficiary sends an attached document and explains what has been done. On the following day, Jim Stephens sends a response to the beneficiary stating "Approved."

The AAO notes that it is not sufficient to establish eligibility in this matter for the petitioner and counsel to merely claim that the petitioner will be responsible for hiring, firing, supervising, and controlling the beneficiary's employment. The petitioner has failed to provide sufficient details or submit probative evidence substantiating the claims. In the instant case, there is insufficient evidence of an employer-employee relationship for the entire period specified in the petition. The submitted documents do not substantiate the services to be performed, do not cover the entire period of requested employment, and do not establish the existence of projects or specific work for the beneficiary at the time of filing. Without full disclosure of all of the relevant factors or sufficient corroborating evidence to support the counsel's assertions, the AAO is unable to find that the requisite employer-employee relationship will exist between the petitioner and the beneficiary.

Upon review of the record of proceeding, it cannot be concluded that the petitioner has established that it qualifies as a United States employer with standing to file the instant petition in this matter. *See* section 214(c)(1) of the Act (requiring an "Importing Employer"); 8 C.F.R. § 214.2(h)(2)(i)(A) (stating that the "United States employer . . . must file" the petition); 56 Fed. Reg. 61111, 61112 (Dec. 2, 1991) (explaining that only "United States employers can file an H-1B petition" and adding the definition of that term at 8 C.F.R. § 214.2(h)(4)(ii) as clarification). That is, 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).

### **III. Beyond the Decision of the Director**

#### **Specialty Occupation**

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:



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

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

*Specialty occupation* means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R.



§ 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 387. To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), USCIS consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

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

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

In the instant case, the record of proceeding is devoid of substantive information from [REDACTED] regarding not only the specific job duties to be performed by the beneficiary, but also information regarding whatever the [REDACTED] may or may not have specified with regard to the educational credentials of persons to be assigned to its projects. The record of proceeding does not contain

documentation on this issue from, or endorsed by, [REDACTED], the company that will actually be utilizing the beneficiary's services.

Upon review of the record of proceeding, the AAO notes again that the petitioner failed to establish educational requirements for the proffered position. That is, while the petitioner did not state that there are any academic requirements in its initial submission, the petitioner submitted several letters from Jawood indicating that a bachelor's degree is preferred, but not required. Moreover, as previously discussed, the petitioner provided inconsistent information regarding the occupational category for the proffered position. The petitioner failed to establish the substantive nature of the work to be performed by the beneficiary and an educational requirement of at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position. This precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

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

#### IV. Conclusion

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 145 (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*. 345 F.3d 683.

The petition must be denied 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; *see e.g., 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.