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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

DATE: **APR 08 2014** OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

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

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

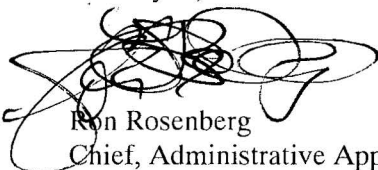
ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

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 8, 2013. In the Form I-129 visa petition, the petitioner describes itself as an IT consulting company established in 2008. In order to employ the beneficiary in what it designates 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 9, 2013, finding that the petitioner failed to establish that it will be a United States employer having an employer-employee relationship with the beneficiary as an H-1B temporary employee. Further, the director found that the petitioner did not establish that a reasonable and credible offer of employment exists for the beneficiary and that the proffered position qualifies as a specialty occupation. On appeal, counsel asserts that the director's bases for denial of the petition were erroneous and contends that the petitioner satisfied all evidentiary requirements. In support of this assertion, 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 (5) 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.¹ Accordingly, the director's decision will not be disturbed. The appeal will be dismissed. The petition will be denied.

I. Factual and Procedural History

In this matter, the petitioner stated in the Form I-129 petition that it is an IT consulting company and that it seeks the beneficiary's services as a quality analyst to work on a full-time basis for \$60,000 per year.² In a letter dated March 12, 2013, the petitioner referred to the position as a "software quality assurance analyst" and provided the following job description:

Software Quality Assurance Analyst for our company writes Test Cases, Testing in a Lab Testing Documents Regression Testing, and then comparing against them. Computer System Analyst (Quality Analyst) develops documentation that is helpful to the programmer, management stakeholders, project managers, testing personnel

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

² In the LCA, the petitioner also indicated that the beneficiary will be paid \$60,000. However, in the offer and the employment agreement letters dated March 18, 2013, the petitioner indicated that the beneficiary will be paid \$60,320 or \$29 per hour.

and support employees. Those documents are fundamentals of using programming languages such as Java, J2EE, .NET, C#, VB, PHP, Java Scripts, Perl, Shell, SQL, PL/SQL, C++, C, TSQL, Python, HTML, XML, Ajax, SharePoint in environment such as Linux, UNIX and Windows and test that software in various automated tools, as well as manually.

Quality Analyst also provides guidance and support to facilitate the ongoing tasks in any company as a middle man. They coordinate calls, set up conference schedule, plan deployment and coordinate new application need and plan accordingly for further activities.

Quality Analyst converts requirement specification of projects to an application. They design flowchart, and that helps translate it to the programming language, develop and write programming languages to develop websites, retrieve data from databases, and develop costume application for any information to store in company database, web, data warehouse or SharePoint.

The petitioner did not state that the proffered position has any particular requirements, although the petitioner indicated that the beneficiary is qualified for the position.

With the petition, the petitioner submitted copies of the beneficiary's academic credentials. The documentation indicates that the beneficiary received a Bachelor of Science in Management from [REDACTED] on May 5, 2012.

Further, the petitioner indicated that the beneficiary "has been working with [the petitioner] since last year as a Quality Analyst." and that he is "currently engaged in to deliver his service for [REDACTED] located at [REDACTED]

Moreover, the petitioner submitted a Labor Condition Application (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 Others" – SOC (ONET/OES Code) 15-1799. The petitioner designated the proffered position as a Level I (entry) position and identified [REDACTED] address as the place of employment.

In addition, the petitioner submitted documentation in support of the petition, including the following evidence:

- A Subcontractor Services Agreement between [REDACTED] and the petitioner effective April 13, 2010. The agreement includes an Exhibit B-Supplier Purchase Order. It indicates the beneficiary's name, the start date as "10/29/2012." with an anticipated end date of "03/01/2012." The [REDACTED] client is listed as [REDACTED]
- An offer letter issued on March 14, 2013. In the letter, it states that the petitioner is "pleased to renew the offer to you the position of Computer Systems Analyst-

Quality Assurance Analyst."³ In the next paragraph, the petitioner indicates "as a Quality Analyst, you will be earning \$60,320 per year (\$29/HR)."

- A letter from the petitioner dated March 14, 2013 entitled "Employer and Employee: [the beneficiary]." The letter states that the beneficiary "will report to [redacted] at [the petitioning company] for his project and technology related topics." [redacted] job title is HR Manager.
- An employment agreement between the petitioner and the beneficiary signed and dated March 18, 2013. The agreement states that the petitioner "hereby engages [the beneficiary] to serve as a Software Quality Analyst." It indicates that the "term of this Agreement shall be one (1) year from the Effective Date, but shall automatically renew at the end of each Term, unless otherwise terminated by [the petitioner] or [the beneficiary]." The agreement further states that "[the beneficiary]'s initial position at [the petitioner] shall be as; Software Quality Analyst however, [the beneficiary] may be placed with [the petitioner]'s client ("Client") for staffing purposes in which case his/her position will be designated by the Client."
- An itinerary which indicates that the beneficiary is "currently providing his consulting responsibilities as a Software Quality Analyst for [redacted] located at [redacted]. The petitioner states that the beneficiary is "involved with test case management, creating, executing test cases, defect analysis, and defect logging using HP Quality Center." The following was provided as a breakdown of responsibilities for the project:

Requirement analysis, User's Meeting, and Collaboration	20%
Information gathering and documentation using Microsoft tools and technologies	10%
Quality Analyst, GUI testing, and Test Activities	45%
Coordinating Testing and debugging of application in Staging Environment	10%
Information documentation in Deployment, maintenance and production support of application	15%

³ The petitioner provides different job title for the proffered position throughout the record. Specifically, the offer letter dated March 14, 2013 states that the petitioner is "pleased to renew the offer to you the position of Computer Systems Analyst-Quality Assurance Analyst." However, in the paragraph immediately below, the petitioner referred to the position as a "Quality Analyst." Further, the employment agreement dated March 18, 2013, states that the "Employer hereby engages the Employee to serve as a Software Quality Analyst." As mentioned earlier, the petitioner indicated in the Form I-129 and the LCA that the proffered position is "Quality Analyst." However, in the support letter dated March 12, 2013, the petitioner referred to the proffered position as a "Software Assurance Quality Analyst." No explanation was provided for why the same job title for the proffered position was not used consistently throughout the record.

It also states that the beneficiary will report to [REDACTED] HR Manager, and listed the following as his additional responsibilities:

- Provide up to date project progress on weekly basis.
 - Provide timesheet and attendance.
 - Provide vacation plan, any off days, and sick day reporting.
 - Yearly performance evaluation, and benefit discussion.
 - Training needs, that is directly related to the current job responsibility.
 - Any other questions that are related to the job growth and employment related.
- 2011 Performance Appraisal Template.
 - Form W-2, Wage and Tax Statement, issued to the beneficiary by the petitioner. The beneficiary's address is in [REDACTED] Texas.
 - Copies pay statements issued to the beneficiary by the petitioner, dated from February 14, 2013 to March 3, 2013.
 - An organization chart for 2013. [REDACTED] job title is human resource manager. The beneficiary is not listed on the chart.
 - Documents regarding the petitioner, including an agreement to lease 600 square feet of office space.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on May 8, 2013. The director outlined the types of evidence to be submitted. Furthermore, the petitioner was notified that it may submit any and all additional evidence that it believed would establish eligibility for the benefit sought.

Counsel for the petitioner responded to the RFE by submitting a brief and additional evidence. In a letter June 13, 2013, counsel states that the beneficiary is "currently working for the petitioner on F-1 Opt status at the end client location and will continue working for [the petitioner] until the expiration of H1B status." Counsel further claims that "[the petitioner] will be responsible for paying the beneficiary's salary, holidays, health insurance, all employment tax wages, vacation and performance review." In support of the assertion, the petitioner and counsel submitted the following additional documents:

- An e-mail exchange printout between the beneficiary (email domain name: [REDACTED]) (email domain name: [REDACTED]), and [REDACTED] (email domain name: [REDACTED]). The beneficiary requests the [REDACTED] and then [REDACTED] provide him with a client letter for immigration purposes. The email exchange is dated May 16-17, 2013, thus after the RFE was issued.

- Copies of the beneficiary's pay statements from March 18 to April 29, 2013.
- Weekly review reports from March 4, 2013 to May 27, 2013 printed on the petitioner's letter head. The report lists the beneficiary's name and position as quality analyst. The end client name is indicated as [REDACTED] and the mid-client is identified as [REDACTED]. The supervisor is [REDACTED]. According to the organizational chart, Mr. [REDACTED] job title is Sr. VP – Business.

The director reviewed the evidence but determined that the petitioner did not establish eligibility for the benefit sought. The director denied the petition on July 9, 2013. Counsel for the petitioner submitted an appeal of the denial of the H-1B petition. With the appeal, counsel submitted additional documentation.

II. The Director's Grounds for Denial of the Petition

A. Employer-Employee Relationship and Offer of Employment

The AAO will now discuss the record of proceeding and 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." 8 C.F.R. § 214.2(h)(4)(ii).

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.

See also 56 Fed. Reg. 61111, 61121 (Dec. 2, 1991).

The record is not persuasive in establishing that the petitioner will have an employer-employee relationship with the beneficiary.

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

Neither the former Immigration and Naturalization Service (INS) nor USCIS defined the terms "employee" or "employer-employee relationship" by regulation for purposes of the H-1B visa classification, even though the regulation describes H-1B beneficiaries as being "employees" who must have an "employer-employee relationship" with a "United States employer." *Id.* Therefore, for purposes of the H-1B visa classification, these terms are undefined.

The United States Supreme Court has determined that where federal law fails to clearly define the term "employee," courts should conclude that the term was "intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (hereinafter "*Darden*") (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989) (hereinafter "*C.C.N.V.*"). 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.⁴

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

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 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).

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

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).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).

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)

(1945)).

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).

(emphasis added); see also *Clackamas*, 538 U.S. at 445 (emphasis added).⁷ 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).

The petitioner claims that it has an employer-employee relationship with the beneficiary. The AAO has considered the 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)). Applying the *Darden* and *Clackamas* tests to this matter, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee."⁸

In support of the H-1B petition, the petitioner submitted copies of several pay statements issued by the petitioner to the beneficiary from February to April 2013, along with a Form W-2 for 2012. 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, federal and state income tax withholdings, and other benefits are relevant factors in determining whether a hired party is an employee, other incidents of the relationship, e.g., where will the work be located,

⁷ 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)).

⁸ Furthermore, as will be discussed, the AAO observes there are numerous inconsistencies and discrepancies in the petition and supporting documents, which undermine the petitioner's credibility with regard to several aspects of the beneficiary's employment. When a petition includes numerous errors and discrepancies, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

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.

For instance, the record lacks sufficient information about the work to be performed. This is exemplified by the petitioner's job description of the duties of the proffered position. The responsibilities for the proffered position contain general functions without providing sufficient information regarding the particular work, and associated educational requirements, into which the duties would manifest themselves in their day-to-day performance. The abstract, speculative level of information regarding the proffered position and the duties comprising it is exemplified by the breakdown of responsibilities for the current project provided in the itinerary. The petitioner states that "Quality Analy[sis], GUI testing and Test Activities" consists of 45% of the beneficiary's duties, but it does not adequately convey the substantive work that the beneficiary will perform. In another instance, 20% of the duties consist of "Requirement Analysis, User's Meeting, and Collaboration." Notably, the statements fail to establish the beneficiary's actual responsibilities, and they do not include any details regarding the specific tasks that the beneficiary will perform. To the extent that they are described by the petitioner, the AAO finds, the proposed duties do not provide a sufficient factual basis for conveying the substantive matters that would engage the beneficiary in the actual performance of the proffered position for the entire three-year period requested. The petitioner has failed to provide sufficient details regarding the nature and scope of the beneficiary's employment or substantive evidence regarding the actual work that the beneficiary has been and will continue to perform.

Moreover, the petitioner did not adequately establish the relationship between the parties involved in the project. The petitioner indicated in the Form I-129 and supporting documents that the beneficiary would be employed at [REDACTED]

In support of the petition, the petitioner submitted a subcontractor agreement with [REDACTED] a middle vendor, along with an Exhibit B-Supplier Purchase Order. The purchase order indicated that the petitioner is the supplier, the beneficiary is the supplier personnel, and [REDACTED] is [REDACTED] client.

Thereafter, in response to the RFE, counsel submitted email printouts that suggest that another company is the middle vendor. Specifically, counsel submitted copies of emails exchanged between the beneficiary, [REDACTED], and [REDACTED]. It is noted that while Mr. [REDACTED] position is not identified, but the domain name of his email address is [REDACTED] suggesting that he is an employee with the end-client. Likewise, the beneficiary's email address within the email and on his resume – also indicate a domain name of [REDACTED]. The email sent by the beneficiary to Mr. [REDACTED] is dated May 16, 2013. The beneficiary requests a client letter for immigration purposes, and Mr. [REDACTED] replies, "[REDACTED] should be able to help you with that." A response email from Ms. [REDACTED] from [REDACTED] dated May 17, 2013 states that [REDACTED] doesn't write these letters" and that she "is checking with [its] immigration department to see if they could write this for [the beneficiary] but since [the beneficiary] is not [its] W2 employee, [the beneficiary] may have to ask [his] employer to write it for [the beneficiary]." In another email dated May 17, 2013, Ms. [REDACTED] advises the beneficiary "to talk to your employer and ask that they

write this employment verification letter for you." In an email dated May 17, 2013, the beneficiary wrote "FYI" and sent the above mentioned emails to [REDACTED]. It is noted that no further information was provided regarding [REDACTED].

In the decision, the director noted that the emails indicated that the middle vendor is [REDACTED] rather than [REDACTED]. On appeal, counsel submitted a letter dated September 23, 2011 stating that the legal name of [REDACTED] has been changed to [REDACTED]. The letter was issued over 18 months prior to filing the H-1B petition; however, the petitioner failed to provide the information with the initial petition or in response to the RFE. Further, the AAO observes that the Supplier Purchase Order submitted with the initial petition was on [REDACTED] letterhead and was dated October 19, 2012, over a year after the legal name of [REDACTED] had been changed. No explanation was provided.

On appeal, counsel claims that "[e]nough evidence has been provided that describes the job, shows the location of the job and the duration of the job." However, contrary to counsel's claim, the AAO finds that the record contains insufficient evidence regarding the nature of the beneficiary's employment, including the actual duties and length of the project to establish that work exists for the beneficiary for the duration of the requested period.

The petitioner has not established that the petitioner has H-1B caliber work for the beneficiary for the duration of the requested validity dates of the H-1B petition, specifically from October 1, 2013 to September 11, 2016. For example, the Supplier Purchase Order, indicated the start date is "10/29/2012," but the anticipated end date is "03/02/2012" which is nonsensical as it indicates that the end date is prior to the start date. No explanation was provided. The petitioner did not submit probative evidence of specific additional projects or work for the beneficiary that would continue until the requested validity date of September 11, 2016. There is a lack of substantive documentation regarding work for the beneficiary for the duration of the requested period. Rather than establish definitive, non-speculative employment for the beneficiary for the period requested, the petitioner simply claimed that the beneficiary would be working on a project for [REDACTED] for the requested period. However, the petitioner did not submit probative evidence substantiating specific work for the beneficiary for the duration of the H-1B period requested.⁹

⁹ 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 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

In the offer letter, the petitioner states that it will offer "healthcare." Although presumably the petitioner means healthcare benefits, it must be noted that a substantive determination cannot be made or inferred regarding the "healthcare" as insufficient information regarding this topic was provided to USCIS (including specific eligibility requirements).

Further, the director provided examples of evidence in the RFE for the petitioner to submit to establish eligibility for the benefit sought, which included documentation regarding the source of the instrumentalities and tools needed to perform the job. In the appeal, counsel lists various programming languages; however, no further information was provided. Although the petitioner claimed that the beneficiary had served in the proffered position for approximately ten months (at the time of the appeal), the petitioner and counsel failed to sufficiently address or clarify the source of instrumentalities and tools used by the beneficiary. The petitioner has not established that it provides or is the source of the instrumentalities and tools needed to perform the job.

In the RFE, the director also asked the petitioner to provide information regarding the beneficiary's role in hiring and paying assistants. The petitioner and its counsel elected not to address this issue instead counsel indicated "N/A." While the petitioner was given an opportunity to clarify the beneficiary's role in hiring and paying assistants, it chose not to submit any probative evidence on the issue.

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. The record of proceeding provides insufficient probative evidence on this issue. For example, it must be noted that while the beneficiary will be physically located at [REDACTED] the petitioner is located approximately 2,130 miles away in [REDACTED] Texas, raising questions as to who will supervise, control and oversee the beneficiary's work. Further, the employment agreement dated March 18, 2013, states that "[the beneficiary]'s initial position at [the petitioner] shall be as; Software Quality Analyst however, [the beneficiary] may be placed with [the petitioner]'s client ("Client") for staffing purposes in which case his/her position will be designated by the Client," suggesting that it is the client that determines the terms and conditions of the employment.

Moreover, the AAO finds that the petitioner has provided inconsistent information as to who will supervise the beneficiary. In the letter dated March 14, 2013 entitled "Employer and Employee: [the beneficiary]," and also in the itinerary, the petitioner indicated that the beneficiary will report to [REDACTED] the HR manager. The petitioner did not submit a description of [REDACTED] duties and responsibilities, nor did it address how [REDACTED] (whose job title suggests that this person is responsible for office and human resources issues) directs, reviews and supervises the beneficiary's duties as a quality analyst. There is a lack of information regarding what these tasks (direct, review and supervise) actually entail. Further, the petitioner did not

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.

indicate where [REDACTED] is located.

Moreover, this issue must be considered within the context of the totality of the evidence provided. For instance, in response to the RFE, the petitioner and counsel provided documents entitled "Weekly Reports." The supervisor is listed as [REDACTED] and the report is signed by Mr. [REDACTED] (Like [REDACTED] the petitioner does not indicate where Mr. [REDACTED] is located.) The report further listed [REDACTED] as the contact person at the client site.

Upon review, the petitioner did not establish how such weekly reports would translate to performance standards, how they are used for assessing and evaluating the beneficiary's work, and/or the criteria for determining bonuses and salary adjustments. The record does not contain any further specific information from the petitioner regarding the methods used for assessing the reports; any instructions provided to the beneficiary regarding the reports; the consequences, if any, of failing to prepare the reports; etc. Although an entry exists for "Supervisor's Remarks," the entry is blank on all of the reports. Furthermore, although the "Weekly Reports" purport to cover a weekly period, the reports were consistently signed and dated prior to the end of the period. The petitioner has failed to satisfactorily establish the probative value and relevance of the weekly reports to the question presented here, i.e., whether the petitioner will have the requisite employer-employee relationship with the beneficiary. Although the petitioner indicated that the beneficiary had been serving in the proffered position for several months, there is no evidence (aside from the offer letter) that [REDACTED] or Mr. [REDACTED] has or will actually supervise, direct, or guide the beneficiary.

The AAO notes that the petitioner submitted an organization chart depicting its staffing hierarchy as of 2013. It is further noted that while the petitioner claims in the Form I-129 that it has 50 employees, the organization chart only lists 29 employees. Moreover, the beneficiary is not included on the chart, although the petitioner claimed in its support letter dated March 12, 2013 that the beneficiary had been employed with the petitioner since 2012. Notably, there is no indication based upon the organizational chart that [REDACTED] or [REDACTED] supervises the beneficiary or the proffered position of quality assurance analyst.

In the letter dated March 14, 2013 entitled "Employer and Employee: [the beneficiary]," the petitioner indicated that the petitioner views all its employees' performance on yearly basis. The petitioner indicated during the review it considers the employee's contribution in following areas: project performance and adaptability, revenue growth through consistent project deliverables, emphasis in cultural and work place diversity, and motivation toward new technologies and training programs. The petitioner also submitted a blank copy of 2011 Performance Appraisal Template. The template states that the "employee appraisal and performance review are based on below three components," which includes client review, employee component, and internal review. The AAO notes that the client review consists of the following criteria: timely completion of the tasks, and projects, communication, leadership and team spirit, and overall performance. Each criterion has the rating of strong, average or low. The internal review includes revenue and cost factors, employees' current technology expertise and market analysis, employees' goal appraisals, client feedbacks, and other comments. The template does not provide percentage of each component to determine how the evaluation is conducted. However, the AAO notes that internal review is

dependent on the client feedback. Further, the document does not relate any specificity or details regarding this particular position and the beneficiary's performance, including who specifically will appraise the beneficiary's performance; how work and performance standards are established for this particular position; the methods for assessing and evaluating the beneficiary's performance for this particular position; and the criteria for determining bonuses and salary adjustments for this particular position. In other words, there is a lack of information as to how the day-to-day work of the beneficiary has been and will be supervised and overseen.

The AAO finds that the petitioner has not established that the petition was filed for non-speculative work for the beneficiary that existed as of the time of the petition's filing. There is insufficient documentary evidence in the record corroborating the availability of work for the beneficiary for the requested period of employment and, consequently, what the beneficiary would do, where the beneficiary would work, as well as how this would impact the circumstances of his relationship with the petitioner. 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'r 1978). Moreover, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act. The petitioner has failed to establish that, at the time the petition was submitted, it had located H-1B caliber work for the beneficiary that would entail performing the duties as described in the petition, and that was reserved for the beneficiary for the duration of the period requested.

Further, the evidence in this matter is insufficient to establish that the petitioner qualifies as a United States employer, as defined by 8 C.F.R. § 214.2(h)(4)(ii). The evidence of record does not establish that the petitioner would act as the beneficiary's employer. It is not sufficient to establish eligibility in this matter for the petitioner to merely claim that it will be responsible for the beneficiary's employment. Despite the director's specific request for evidence on this issue, the petitioner failed to submit sufficient evidence to corroborate its claim. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). As previously mentioned, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. 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). It appears that the petitioner's role is likely limited to invoicing and proper payment for the hours when it is reported by the beneficiary. With the petitioner's role limited to essentially the functions of a payroll administrator, the beneficiary is even paid, in the end, by the client or end-client. *See Defensor v. Meissner*, 201 F.3d at 388.

It cannot be concluded, therefore, that the petitioner has satisfied its burden and 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). Accordingly, the director's decision must be affirmed and the petition denied on this basis.

B. 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 stating additional requirements that a position must meet, supplementing 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.

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

To ascertain the intent of a petitioner, USCIS must look to the Form I-129 and the documents filed

in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

The AAO notes that despite its claims that the beneficiary's education qualifications and experience "fully satisf[ies] our Company's minimum requirements for this position," the petitioner did not specify its "minimum requirements" for the proffered position. In other words, the petitioner does not claim that the proffered position requires 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).

The AAO also 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 company's 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 the middle vendor and end-client regarding not only the specific job duties to be performed by the beneficiary on a day-to-day basis, but also information regarding whatever the end-client may or may not have specified with regard to the educational credentials of persons to be assigned to the project. The record of proceeding does not contain documentation on this issue.

The AAO finds that the petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary, therefore, precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

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

IV. Beneficiary's Qualifications

The AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient evidence to demonstrate that the proffered position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation.

V. 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 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.