U.S. Department of Homeland Security

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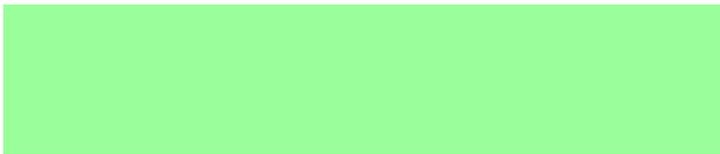Washington, DC 20529-2090

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**U.S. Citizenship
and Immigration
Services**

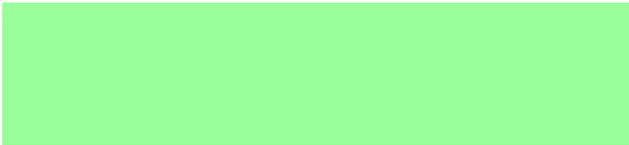DATE: **AUG 0 7 2014**   OFFICE: VERMONT SERVICE CENTER   FILE:

IN RE: Petitioner:
                Beneficiary:

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

ON BEHALF OF PETITIONER:

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

www.uscis.gov

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

On the Form I-129 visa petition, the petitioner describes itself as a three-employee "Software Integration and Computer Consulting" business established in 2012. In order to employ the beneficiary in what it designates as a full-time Software QA Engineer position at a salary of $50,000 per year,[1] 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 because the evidence of record was insufficient to demonstrate the existence of an employer-employee relationship between the petitioner and the beneficiary.

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

Upon review of the entire record of proceeding, we find that the record of proceeding does not overcome the director's grounds for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

Beyond the decision of the director, we find that there are two additional issues that preclude approval of the petition, namely, that the record of proceeding does not demonstrate that the position qualifies as a specialty occupation, nor does it demonstrate that the petitioner had secured work for the entire period of requested employment when it filed the petition.[2] Accordingly, the petition must also be denied for these additional reasons.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

The petitioner stated on the Form I-129 that it intended to employ the beneficiary from October 1, 2013 until September 14, 2016. In the initial support letter dated March 29, 2013, the petitioner described the proffered position's duties; stated that it employs in house employees; and asserted that it is an employer, rather than an agent or a placement/recruitment company. We note that the initial filing materials did not include details about the petitioner's arrangement with its vendor, ., nor did it include information about the vendor's arrangement with the end-client,

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[1] The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for use with a job prospect within the occupational classification of "Computer Applications, All Others," SOC (O*NET/OES) Code 15-1799, and for which the appropriate prevailing wage level would be Level I (the lowest of the four assignable wage-rates).

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

in relation to the beneficiary's employment. The LCA that the petitioner submitted in support of the petition was certified for employment in [   ], New Jersey, where the petitioner is located, and in [   ], New Jersey, where the end-client is located. As noted earlier, the petitioner submitted the LCA in support of this petition for a job prospect within the occupational classification of "Computer Applications, All Other" SOC (O*NET/OES) Code 15-1799, at a Level I (entry-level) prevailing wage rate. In support of the petition, the petitioner submitted Form W-2 for the beneficiary to establish an employer-employee relationship.

In its March 29, 2013 letter, the petitioner described the Software QA Engineer duties as follows:

1. Conduct software compatibility tests with programs, hardware, operating systems, or network environments.
2. Create or maintain databases of known test defects.
3. Design test plans, scenarios, scripts, or procedures.
4. Design or develop automated testing tools.
5. Develop or specify standards, methods, or procedures to determine product quality or release readiness.
6. Develop testing programs that address areas such as database impacts, software scenarios, regression testing, negative testing, error or bug retests, or usability.
7. Document software defects, using a bug tracking system, and report defects to software developers.[3]
8. Monitor bug resolution efforts and track successes.
9. Document test procedures to ensure reliability and compliance with standards.
10. Evaluate or recommend software for testing or bug tracking.
11. Identify program deviance from standards, and suggest modifications to ensure compliance.
12. Identify, analyze, and document problems with program function, output, online screen or content.
13. Participate in product design reviews to provide input on functional requirements, product designs, schedules or potential problems.
14. Perform initial debugging procedures by reviewing configuration files, logs, or code pieces to determine breakdown source.

The petitioner also stated the following with respect to the requirements of the proffered position:

> The position requires a minimum of a U.S. Baccalaureate or higher degree, or its equivalent in [c]omputer [s]cience, [m]anagement/[c]omputer [i]nformation [s]ystems, [e]ngineering, or closely related fields, coupled with progressive work experience in [a related] field, in order for an individual to accomplish the above-mentioned job duties.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and

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[3] It is noted that this duty was listed twice in the petitioner's letter.

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issued an RFE on May 3, 2013. In the RFE, the director requested specific documentation that would allow it to determine that the petitioner can demonstrate an employer-employee relationship with the beneficiary.

In response to the director's RFE, the petitioner's former counsel submitted a Master Services Agreement (MSA) between the petitioner and its vendor,   that defined the relationship as effective on August 16, 2012, and in effect unless terminated by both parties. The MSA contains a provision for the petitioner to supply personnel who could perform computer programming and maintenance services to   or its clients.[4] Counsel's response letter described the petitioner's relationship to the beneficiary, and asserted that it maintains an employer-employee relationship. In addition, counsel stated that its vendor   , has a signed a vendor contract with the end-client,   Counsel further stated that confidentiality issues and company policies precluded   from releasing records such as the vendor contract. The response letter also contained a general itinerary of services, indicating that the beneficiary would work on a project for the end-client.[5]

Counsel's letter described the beneficiary's position as being divided into two tiers:

1. Systems development, [c]oding, assurance and analysis process which will be performed for approximately **twenty[-]four months** (unless extended) mostly at   location in   , NJ and thereafter[;]
2. Automation, support, quality assurance, testing, trouble[-shooting] and administration process [,] which will be performed continuously only at the company's corporate office address, as a part of the team [that] will require short [term] travel to [the] client site for support and training on assignment.

Other evidence submitted by the petitioner in support of its asserted employer-employee relationship includes the following:

1. The beneficiary's pay statements;
2. Form W-2 Wage and Tax Statement for the beneficiary;
3. An employment agreement;
4. The petitioner's 2012 tax returns;[6] and
5. Several project status reports prepared by the petitioner, detailing status of the end-

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[4] The petitioner did not submit a copy of a "Statement of Work" referencing services to be provided by the beneficiary as described in the MSA. It is therefore unclear whether this agreement had any binding effect with respect to the beneficiary on the date this petition was filed.

[5] The project assigned to the beneficiary began on August 20, 2012, with an undetermined end date. Counsel explained that the project could be expected to last 24 months based on a tentative verbal commitment, and that the project could be extended in quarterly increments.

[6] We observe that the petitioner described its business activities as "Training & Placement" on Schedule K of its 2012 federal tax return.

client's projects.

The director denied the petition on October 30, 2013. On appeal, counsel[7] submits a letter from dated December 17, 2013, stating that the beneficiary is providing services as a Programmer Analyst in its Application Development Department, and that the minimum educational requirements for the position are a minimum of a bachelor's degree in computer science, engineering, or a closely related field.[8] In addition, this letter states that the V.P of Software Engineering at supervises the beneficiary's work. The end-client lists the following duties for the beneficiary's role as a Programmer Analyst in the Application Development Department:

- Analyze functional and business requirements;
- Design, develop, configure, program and implement software applications, packages and components customized to meet specific needs and requirements;
- Enhance the applications to comply with new regulations and per client requests;
- Review, repair and modify programs to ensure technical accuracy, security and reliability of the software applications;
- Resolve issues relating to enterprise level and client specific application and act as a point of contact for clients on technical matters and provide support as necessary;
- Prepare test plans and perform unit and system testing; and
- Provide quality documentation, status updates and support.

Counsel supplements the record of proceeding with statements from the vendor, and from the petitioner, both of which describe the petitioner's relationship to the beneficiary in the course of his employment. The petitioner's letter asserts that the beneficiary reports to the petitioner's HR Manager on a weekly basis, and explains that it would schedule site visits, as required, to observe the beneficiary as he worked on a project for the-end client. We acknowledge that the record contains additional monthly project status reports prepared by the beneficiary in order to report progress on the end-client's project.

In adjudicating this petition, we will first address the director's determination that the record of proceeding failed to demonstrate the existence of an employer-employee relationship between the petitioner and the beneficiary. Next, we will analyze our supplemental finding that the proffered position does not qualify as a specialty occupation. Finally, we will discuss our supplemental

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[7] A new attorney entered appearance on appeal; we refer to counsel generically throughout this decision without distinguishing each individual attorney.

[8] We note that the end-client specified that the incumbent working on the project must have knowledge and experience with .Net, C#, VB.Net, ASP.Net, Ajax and Relational database such as MS SQL Server or Oracle.

finding that the record of proceeding failed to establish that the petitioner had secured work for the entire period of requested employment.

II. EMPLOYER-EMPLOYEE RELATIONSHIP
BETWEEN THE PETITIONER AND BENEFICIARY

We will now address the director's determination that the record of proceeding fails to establish that the petitioner would engage the beneficiary in an employer-employee relationship.

Section 101(a)(15)(H)(i)(b) of the Act defines an H-1B nonimmigrant in pertinent part as an alien:

> subject to section 212(j)(2), who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 214(i)(1) . . ., who meets the requirements for the occupation specified in section 214(i)(2) . . ., and with respect to whom the Secretary of Labor determines and certifies to the [Secretary of Homeland Security] that the intending employer has filed with the Secretary [of Labor] an application under section 212(n)(1) . . . .

The term "United States employer" is defined in the Code of Federal Regulations at 8 C.F.R. § 214.2(h)(4)(ii) as follows:

> *United States employer* means a person, firm, corporation, contractor, or other association, or organization in the United States which:
>
> > (1)   Engages a person to work within the United States;
> >
> > (2)   *Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee*; and
> >
> > (3)   Has an Internal Revenue Service Tax identification number.
>
> (Emphasis added); *see also* 56 Fed. Reg. 61111, 61121 (Dec. 2, 1991).

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

Although "United States employer" is defined in the regulations at 8 C.F.R. § 214.2(h)(4)(ii), it is noted that the terms "employee" and "employer-employee relationship" are not defined for purposes of the H-1B visa classification. Section 101(a)(15)(H)(i)(b) of the Act indicates that an alien coming to the United States to perform services in a specialty occupation will have an "intending employer" who will file a Labor Condition Application with the Secretary of Labor pursuant to section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1) (2012). The intending employer is described as offering full-time or part-time "employment" to the H-1B "employee." Subsections 212(n)(1)(A)(i) and 212(n)(2)(C)(vii) of the

Act, 8 U.S.C. § 1182(n)(1)(A)(i), (2)(C)(vii) (2012). Further, the regulations indicate that "United States employers" must file a Petition for a Nonimmigrant Worker (Form I-129) in order to classify aliens as H-1B temporary "employees." 8 C.F.R. § 214.2(h)(1), (2)(i)(A). Finally, the definition of "United States employer" indicates in its second prong that the petitioner must have an "employer-employee relationship" with the "employees under this part," i.e., the H-1B beneficiary, and that this relationship be evidenced by the employer's ability to "hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer").

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

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

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

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

In this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. *See generally* 136 Cong. Rec. S17106 (daily ed. Oct. 26, 1990); 136 Cong. Rec. H12358 (daily ed. Oct. 27,

1990). On the contrary, in the context of the H-1B visa classification, the regulations define the term "United States employer" to be even more restrictive than the common law agency definition.[9]

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.[10]

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

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[9] 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).

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

in section 101(a)(15)(H)(i)(b) of the Act, section 212(n) of the Act, and 8 C.F.R. § 214.2(h).[11]

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

The factors indicating that a worker is or will be an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. *Darden*, 503 U.S. at 323-324; *Clackamas*, 538 U.S. at 445; *see also Restatement (Second) of Agency* § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. *See Clackamas*, 538 U.S. at 445; *see also New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1) (adopting a materially identical test and indicating that said test was based on the *Darden* decision); *see also Defensor v. Meissner*, 201 F.3d 384, 388 (5th Cir. 2000) (determining that hospitals, as the recipients of beneficiaries' services, are the "true employers" of H-1B nurses under 8 C.F.R. § 214.2(h), even though a medical contract service agency is the actual petitioner, because the hospitals ultimately hire, pay, fire, supervise, or otherwise control the work of the beneficiaries).

It is important to note, however, that the factors listed in *Darden* and *Clackamas* are not exhaustive and must be evaluated on a case-by-case basis. Other aspects of the relationship between the parties relevant to control may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met; however, the fact finder must weigh and compare a combination of the factors in analyzing the facts of each individual case. The determination must be based on all of the circumstances in the relationship between the parties, regardless of whether the parties refer to it as an employee or as an independent contractor relationship. *See Clackamas*, 538 U.S. at 448-449; *New Compliance Manual* at § 2-III(A)(1).

Furthermore, when examining the factors relevant to determining control, USCIS must assess and weigh each actual factor itself as it exists or will exist and not the claimed employer's right to influence or change that factor, unless specifically provided for by the common-law test. *See Darden*, 503 U.S. at 323-324. For example, while the assignment of additional projects is dependent on who has the *right to* assign them, it is the *actual* source of the instrumentalities and tools that must be examined, and not who has the *right to* provide the tools required to complete an assigned project. *See id.* at 323.

Lastly, the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to

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[11] 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).

the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450. "Rather, . . . the answer to whether [an individual] is an employee depends on 'all of the incidents of the relationship . . . with no one factor being decisive.'" *Id.* at 451 (quoting *Darden*, 503 U.S. at 324).

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

That the beneficiary would not be providing services to the petitioner directly is not in dispute. The petitioner's claim is that the end-user of the beneficiary's services would be   Both counsel and the petitioner assert that the petitioner would control the beneficiary's work.   makes the same claim in its December 6, 2013 letter submitted on appeal.[12] The end-client   claims in its December 17, 2013 letter submitted on appeal that the beneficiary "is not an employee of   This letter describes the beneficiary's role as a Programmer Analyst performing such duties as "[d]esign[ing], develop[ing], configur[ing], program[ming], and implement[ing] software applications, packages and components customized to meet specific needs and requirements" in its Application Development Department. This iteration of the position is different from the software quality assurance testing position discussed in the petitioner's letter of support. As this materially conflicts with other statements in the record, we find that the record lacks detailed, sufficiently probative information from   , the actual end-user of the beneficiary's services, regarding the nature and scope of the services to be provided by the beneficiary. In addition, we note that the end-client clearly states in this letter that the beneficiary's project progress is supervised by the VP of Software Engineering at   which conflicts with the petitioner's claim that it supervises the beneficiary's work. When applying the *Darden* and *Clackamas* tests to this matter, we find that the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee."

While social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are still relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as

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[12] On appeal, the petitioner asserts that the beneficiary reports weekly to the petitioner, prepares monthly status reports, and that the petitioner schedules site visits to the end-client as needed, but does not provide sufficient evidence to substantiate its involvement in these activities. For example, the petitioner may have corroborated the evidence with any written records, such as emails between itself and the beneficiary, records of the weekly meetings such as calendar print outs, or any similar evidence that could establish the ongoing petitioner's involvement and supervision over the beneficiary's work product. There are numerous monthly reports prepared by the beneficiary, but these merely list the petitioner's name at the top, and the end-client's name in the body of each report. Therefore, the petitioner's level of involvement is unclear based on these reports.

to who will be the beneficiary's employer. Again, we note that the record of proceeding contains conflicting statements regarding the beneficiary's supervision: the end-client claims that its VP of Software Engineering is charged with overseeing and supervising the beneficiary's work, whereas the petitioner states that it supervises the beneficiary's work. We are unable to find that the requisite employer-employee relationship will exist between the petitioner and the beneficiary because the record contains inconsistent information regarding supervision, insufficient corroborating evidence, and without full disclosure of all relevant factors.

Upon complete review of the record of proceeding, we find that 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. Despite the director's specific request for evidence on this issue, the record of proceeding does not corroborate the petitioner's claim. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). 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).

On the contrary, the evidence indicates that the petitioner will not control the beneficiary. The beneficiary will not work at the petitioner's location and, absent evidence to the contrary, it also follows that the beneficiary will not use the tools and instrumentalities of the petitioner. Moreover, the day-to-day work of the beneficiary appear to be supervised and overseen by the end-client, with the petitioner's role likely limited to invoicing and proper payment for the hours worked 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). Accordingly, the director's decision must be affirmed and the petition denied on this basis.

III. SPECIALTY OCCUPATION ANALYSIS

Beyond the decision of the director, we have determined that proffered position does not qualify for classification as a specialty occupation. As recognized in *Defensor v. Meissner*, it is necessary for the end-client to provide sufficient information regarding the proposed job duties to be performed at its location, and their educational requirements, in order to establish the minimum educational requirements necessary to perform those duties. *See Defensor v. Meissner*, 201 F.3d at 387-388. In other words, as the nurses in that case would provide services to the end-client hospitals and not

to the petitioning staffing company, the petitioner-provided job duties and alleged requirements to perform those duties were irrelevant to a specialty occupation determination. *See id.*

Here, the record of proceeding in this case is similarly devoid of sufficient information from the end-client,   regarding the beneficiary's job duties and their associated educational requirements, because the information presented by the end-client conflicts with the characterization of the position throughout the record of proceeding. The evidence of record fails to establish the substantive nature of the work to be performed by the beneficiary, and 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.

It is noted that, even if the proffered position were established as being that of a software quality assurance engineer as claimed in the letter of support, a review of the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook* (the *Handbook*) does not indicate that, simply by virtue of its occupational classification, such a position qualifies as a specialty occupation. More specifically, the information on the educational requirements in the "Computer Systems Analysts" chapter of the 2014-2015 edition of the *Handbook* indicates at most that a bachelor's or higher degree in a computer or information science field may be a common preference, but not a standard occupational, entry requirement. *See* U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Computer Systems Analysts," http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-4 (last visited Aug. 6, 2014). In fact, this chapter indicates that many computer systems analysts, including software quality assurance analysts, may only have liberal arts degrees and programming or technical experience. *See id.* As such, absent evidence that the position would be a software quality assurance engineer and that it would satisfy one of the alternative criteria available under 8 C.F.R. § 214.2(h)(4)(iii)(A), the instant petition could not be approved for this additional reason.[13]

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[13] We observe that the petitioner originally selected the occupational classification of "Computer Applications, All Others," SOC (O*NET/OES) Code 15-1799 for the proffered position. On appeal, however, counsel asserts that the position is more akin to a job prospect within the occupational classification of "Software Developers, Systems Software," SOC (O*NET/OES) Code 15-1133. 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 petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

It is further noted that if the proffered position is indeed a software developer position, the petitioner was required to provide at the time of filing an LCA certified for SOC code 15-1133, not 15-1799, in order for it to be found to correspond to the petition. Therefore, even if the proffered position is a software developer

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), we cannot find that the proffered position qualifies as a specialty occupation. Accordingly, the appeal will be dismissed and the petition will be denied on this basis.

IV. SECURING OF WORK FOR THE PERIOD OF REQUESTED EMPLOYMENT AT TIME OF FILING

Next, we will discuss our supplemental finding that the record of proceeding does not establish that the petitioner had secured work for the entire period of requested employment, that is, October 1, 2013 through September 14, 2016.

Although the petitioner submitted a copy of a Master Services Agreement executed between the petitioner and its vendor, [redacted] when it filed this petition, it did not submit a copy of a "Statement of Work" referencing services to be provided by the beneficiary as described in the Master Services Agreement. Accordingly, we cannot find that the work arrangement between the petitioner and the vendor is complete, or that it represents that work was secured for the entirety of the beneficiary's proposed employment.

In addition, counsel asserted in the July 22, 2013 response to the RFE that the vendor's project with [redacted] had an undetermined end date, but that based on a tentative verbal commitment that it would end 24 months after the project began on August 20, 2012. Based on the tentative timeline, the project would end prior to the end date requested on the visa petition. According to counsel, the beneficiary would be working continuously at the company's corporate office address, but that the work could involve short term travel to client sites. The record of proceeding does not contain any probative evidence substantiating any in-house projects that the beneficiary would work on once the [redacted] project would conclude.

The record therefore lacks evidence establishing that, at the time of the petition's filing, the petitioner had secured definite, non-speculative employment for the three-year period of employment requested in the petition. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(12). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comrn. 1978). Thus, even if it were found that the petitioner would be the beneficiary's United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii), the petitioner has not

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position, the petition would also be denied due to the petitioner's failure to provide a certified LCA that corresponds to the petition. Had the petitioner provided the occupational code and prevailing wage for software developers to DOL, it would have been required to pay at least $20,000 more per year to the beneficiary. *See* Foreign Labor Certification Data Center, Online Wage Library, http://www.flcdatacenter.com/OesQuickResults.aspx?code=15-1133&area=35644&year=13&source=1 and http://www.flcdatacenter.com/OesQuickResults.aspx?code=15-1799&area=35644&year=13&source=1 (last visited Aug. 6, 2014).

demonstrated that it would maintain such an employer-employee relationship for the duration of the period requested.[14] Thus, even if it were determined that the petitioner had overcome the director's grounds for denying this petition (which it has not), the petition could still not be approved for the entire three-year period of employment requested in the petition.

V. CONCLUSION AND ORDER

As set forth above, we agree with the director's findings that the evidence of record fails to demonstrate to the existence of an employer-employee relationship between the petitioner and the beneficiary. Beyond the decision of the director, we also find that the record of proceeding has also failed to demonstrate that the petitioner had secured work for the entire period of requested employment when it filed the petition, and that the record does not demonstrate that the proffered position qualifies as a specialty occupation. Accordingly, the director's decision will not be disturbed.

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.

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

> Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. See section 214(i) of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998). While a petitioner is certainly permitted to change its intent with regard to non-speculative employment, e.g., a change in duties or job location, it must nonetheless document such a material change in intent through an amended or new petition in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E).