

(b)(6)



U.S. Citizenship
and Immigration
Services

DATE: **JAN 27 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,

N.B.
for

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. On the Form I-129 petition, the petitioner describes itself as a software consulting business, established in 2008.¹ In order to employ the beneficiary in a position to which it assigned the job title of "programmer analyst," the petitioner seeks to classify the beneficiary 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).

Upon reviewing the Form I-129 and the documentation submitted as support, the director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued a request for additional evidence (RFE) which requested that the petitioner submit evidence to demonstrate that a valid employer-employee relationship would exist with the beneficiary, including evidence to establish that the petitioner would have the right to control the manner and means by which products or services are accomplished, for the duration of the requested H-1B validity period.

After reviewing the petitioner's response to the RFE, the director denied the petition, finding (1) that the petitioner had not established that it would be a "United States employer" having an employer-employee relationship" with the beneficiary as an H-1B "employee," and (2) that the record failed to establish that the position offered to the beneficiary qualifies as a specialty occupation and that there is sufficient work for the requested period of intended employment. The petitioner, through counsel, submitted a timely appeal of the decision. On appeal, counsel for the petitioner contends that the director's basis for denial of the petition was erroneous. In support of this contention, counsel for the petitioner submits a brief and additional evidence.

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

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

In addition, beyond the decision of the director, the AAO finds that the evidence in the record of proceeding does not establish that the petition was filed for non-speculative work that existed at the time of filing for the entire period requested.

The petitioner indicated on the Form I-129 that it intends to employ the beneficiary in a position designated as a programmer analyst from October 1, 2013 to September 14, 2016, on a full-time basis at a salary of \$71,000 per year. The Form I-129 indicates that the beneficiary will be employed off-site at [REDACTED]

¹ The petitioner's support letter and promotional materials also indicate that it is a staffing firm.

In the Labor Condition Application (LCA) submitted in support of the instant petition the petitioner indicated that the beneficiary will be employed at [REDACTED]

The LCA also indicated that the proffered position corresponds to the occupational classification of "Computer Programmers," SOC (ONET/OES) code 15-1131 at a Level I (entry level) wage; that the period of intended employment is from September 14, 2013 to September 14, 2016; and that the petitioner will pay the beneficiary an annual salary of \$71,000.

In the undated support letter, signed by the petitioner's director, the petitioner states, "[in] the capacity of a programmer analyst, the Beneficiary will have the following job duties":

- IBM WebSphere (6,7,8) Administration and Upgrades for the IT infrastructure.
- Administration of IBM DataPower, MQ, Message Broker and Wily Introscope.
- Create and Administer Websphere/Datapower Environments in Development, Testing, and Production.
- Provide on-call support for the end user applications in the Production environment.
- Interface with different departments within the organization regarding new deployments, upgrades and tuning of applications.
- Create Shell/Jython scripts to automate some administrative tasks in Solaris/AIX/WebSphere environment.
- Work on open tickets to resolve WebSphere related issues and support Application/DB teams.
- Monitor and tune Application Servers/Web Servers for maximum performance.
- Deploy and support existing applications during the enterprise release and routine change controls.
- Troubleshoot JVM, Application related issues and escalate to the appropriate teams in the organization.

Regarding the requirements of the position, the support letter states:

Due to the high level of professional responsibility inherent to the instant petition, the Petitioner's minimum requirement for this position is a comprehensive understanding of computer systems and programming, which comes with at least a Bachelor's degree in science or a related field. Please note that the Petitioner would not consider anyone with lesser qualifications for this professional level position, and that we have demonstrated that this is a typical minimum requirement in the Petitioner's industry.

In the support letter, the petitioner also asserts that it is a United States employer. The petitioner states that it "is a consulting company which places workers at end-client locations through contractual agreements" and "at[t]ests that [the] Beneficiary will perform all aforementioned

duties under the direct control and supervision of the employer at the employer's own worksite."

With the initial filing, the petitioner also submitted the following documents, among others:

1. A document entitled "Employment Contract" dated February 21, 2013, between the petitioner and the beneficiary (hereinafter, the Employment Contract). The Employment Contract states that the "[petitioner] hires the [beneficiary] in the capacity of Programmer Analyst" and that the beneficiary's duties will include:
 - Technical proficiency in UNIX/Linux and Shell scripting. (10%)
 - Responsible for operational and performance tuning, disaster recovery, and patch/release management for all **middleware** systems. (55%)
 - Maintain a multi-site Linux and VMware ESX environment to meet appropriate service levels. Plan, test, tune, and configure Operating System. (15%)
 - Technical infrastructure support for the Application teams on site troubleshooting of infrastructure, environment problems, etc[.] (20%)

The Employment Contract also states that "[the beneficiary's] duties may be reasonably modified at the [petitioner's] discretion from time to time" and that the "[t]erm of employment will be three (3) years, on a full-time basis. Employment shall begin on the [sic] **September 15, 2013 to September 15, 2016** and only upon the attainment of H-1b status under US immigration laws." (Emphasis in original)

We note that the description of the proffered position contained in the employment contract is inconsistent with the description and duties of the position that was provided in the petitioner's support letter.

2. An undated document entitled "H1B Itinerary for H-1B Nonimmigrant Worker" (hereinafter, the itinerary), signed by the petitioner's director. The itinerary indicates that the beneficiary will serve as a programmer analyst from October 1, 2013 to September 14, 2016 at [REDACTED] and that his duties will include:

IBM Websphere administration and upgrades for IT infrastructure[.]
Administration of IBM datapower, MQ message broker and Wily
Introscope[.] Create and administer Websphere/datapower[.] Create
shell/Jython scripts to automate some administrative tasks in
Solaris/AIX/Websphe related issues and support application/DB teams[.]

3. A copy of a printout from the [REDACTED] listing the beneficiary as a contractor and indicating that the beneficiary has a [REDACTED] email address. The screen print is dated March 12, 2013.
4. A copy of a document entitled "Exhibit B Work Order" (hereinafter, the Work Order). The Work Order was signed by the CEO & President of [REDACTED] (hereinafter [REDACTED]) and by the petitioner's HR Manager on February 1, 2013. It states:

This Work Order is issued under and subject to all of the terms and conditions of the Master Service Agreement dated as of August 1st, 2012 (Date on which agreement Made) between [REDACTED] and [the petitioner] ("Service Provider") located at [REDACTED]

The Work Order specifically names the beneficiary as a consultant, states that the project duration is 24 months (February 6, 2013 to February 5, 2015 with possible extension), and that the client will be [REDACTED], located at [REDACTED]

The AAO notes that although the Work Order refers to a Master Service Agreement between [REDACTED] and the petitioner, dated August 1, 2012, the record does not contain a copy of this agreement.

5. A copy of a letter dated March 25, 2013, from the Program Manager and the Contracts and Compliance Manager of [REDACTED] addressed to "To whom it may concern," regarding the "Placement of [the beneficiary]." The addressee portion of the letter is addressed to the beneficiary at [REDACTED] address, as follows:

[REDACTED]

The letter also states:

With this letter [REDACTED] confirms that [REDACTED] and [REDACTED] have entered into a Supplier Agreement where [REDACTED] and [REDACTED] are parties to a Master Services Agreement pursuant to which [REDACTED] has agreed to provide centralized management services to [REDACTED] in connection with its use of contract workers.

The letter also contains the following subsections, transcribed verbatim below:

Consultant's Employer

[REDACTED] and [REDACTED] are not responsible for the following tasks. Rather, these are the sole responsibility of [the beneficiary's] employer, [REDACTED]

- Filing H-1B visa and taking care of all immigration-related matters;
- Filing all tax returns;

² The exact relationship between [REDACTED] and [REDACTED] is unclear. In the submitted letter, the authors, whose signature includes [REDACTED] appear to use the two names interchangeably.

- Payment of wages, hiring, firing, and providing benefits; and
- Compliance with worker's compensation and other applicable laws for their employees.

Duration

The project is expected to last through August 5th, 2015 and has an opportunity for an extension subject to continuing business necessity, successful performance evaluations and continuation of the terms and conditions of [REDACTED] between [REDACTED] and [REDACTED]. [REDACTED] will be responsible for the terms of [the beneficiary's] assignment as directed, reviewed and supervised by the [REDACTED] manager, [manager's name].

Job Duties

As part of this Assignment, [the beneficiary] is performing the following duties:

- Direct programmers and analysts to make changes to existing databases and database management systems.
- Direct others in coding logical and physical database descriptions.
- Review project requests describing database user needs to estimate time and cost required to accomplish project.
- Review and approve database development and determine project scope and limitations.
- Approve, schedule, plan and supervise the installation and testing of new products and improvements to computer systems.
- Implement security measures to safeguard information in computer files against accidental or unauthorized damage, modification or disclosure.
- Develop standards and guidelines to guide the use and acquisition of software and to protect vulnerable information.

. . .

Work Site

The Assignment location is the [REDACTED] Inc office located at [REDACTED]. [REDACTED] does not have the ability to assign [the beneficiary] to another company as part of this assignment. [REDACTED] also has the ability to assign additional duties to [the beneficiary] and will be reviewing the performance of [the beneficiary] during the assignment. . . .

We note that this letter identifies [REDACTED] and not the petitioner, as the beneficiary's employer. Furthermore, this document is a letter and not an actual contract or service agreement showing a contractual agreement or relationship between [REDACTED] and [REDACTED]. The letter does not constitute documentary evidence that such a relationship exists nor does it establish the existence of work for the beneficiary.

Furthermore, the job duties discussed in this letter are inconsistent with the duties described by the petitioner in its support letter and the duties described in the Employment Contract.

6. A copy of a letter dated March 18, 2013 from the President of [REDACTED] addressed to "To Whom It May Concern." The letter states that the beneficiary is subcontracted as a "Middleware Administrator" to their client [REDACTED]. The letter further states:

Compensation will be paid by [the petitioner], who will be [the beneficiary's] actual employer. [The beneficiary] will be operating at all times under the control of [the petitioner's] management and all activities, including managerial supervision and hiring and firing decisions, as well as performance evaluations are controlled by [the petitioner]. In summary, [REDACTED] will have no managerial authority over [the petitioner's] employees.

Here again, this document is a letter and not an actual contract or service agreement showing a contractual agreement or relationship between [REDACTED] and [REDACTED]. The letter does not constitute documentary evidence that such a relationship exists nor does it establish the existence of work for the beneficiary.

Moreover, the letter states that the beneficiary will be contracted as a "Middleware Administrator." As the letter does not describe the duties of this position, it is unclear how this position relates to the position described by the petitioner in its support letter, the position detailed in the Employment Contract or the position that was described in the [REDACTED] letter.

On May 6, 2013, the director issued an RFE, requesting, among other things, evidence to establish that the petitioner would have an employer-employee relationship with the beneficiary, including the right to control the manner and means by which the product or services are accomplished, for the full duration of the requested H-1B validity period.

On July 3, 2013, in response to the director's RFE, counsel for the petitioner submitted its RFE-response brief and, among other things, the following evidence:

1. A copy of an updated letter from the CEO & President of [REDACTED] dated June 10, 2013. The letter states that the beneficiary is "currently working at [REDACTED] as a contractor through [REDACTED] as primary vendor." The letter also states:

As per the agreements between [REDACTED] and [REDACTED] in any letters in reply to Employment Verification Letter, [REDACTED] or [REDACTED] cannot include [the beneficiary] as an employee of [the petitioner]. For this reason any layer above [REDACTED] cannot include any actual employer of the consultant after [REDACTED]. So [REDACTED]

[redacted] confirms that [the petitioner] is the employer of [the beneficiary] and he is contracted to [redacted] through [redacted] as primary vendor.

[The petitioner] is responsible for payment of wages, hiring, providing benefits and other applicable laws. Also[,] [redacted] or any other vendor in the chain above cannot assign [the beneficiary] to a different position or project.

2. A letter from the Client Service Coordinator of [redacted] dated June 4, 2013. The letter states:

This letter is to confirm that [redacted] will not be providing an end client letter to contractors. . . . [I]t is against company policy to supply end client letters to contractors. Consider this is an official letter stating the reason why [redacted] is not able to provide end client letter, as the Program Office at [redacted] has requested the correspondence be handled directly through [redacted] on behalf of [redacted]

[The beneficiary] is currently working at [redacted] as a contractor through [redacted] as primary vendor. As part of the agreement, individuals who are providing professional services to [redacted] are not [redacted] or [redacted] is the employer and is responsible for the payment of wages, hiring, firing, providing benefits, compliance with worker's compensation and other applicable laws for their employees.

We note that this letter identifies [redacted] and not the petitioner, as the beneficiary's employer.

3. Pictures of the beneficiary and the beneficiary's work badge, which counsel claims, show the beneficiary working at [redacted] office.

Counsel's brief in response to the RFE also asserts, for the first time, that the "petitioner is an agent performing the function of an employer," pursuant to 8 C.F.R. § 214.2(h)(2)(i)(F) and states that the employment arrangement is as follows:

[Petitioner] → Primary Middle Vendor [redacted] → 2nd Middle Vendor [redacted] and 3rd Vendor [redacted] and End-client [redacted]

However, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The record does not contain evidence to corroborate counsel's description of the business relationships. Such evidence would include copies of the requisite contracts or service

agreements documenting the relationships between the companies. Counsel further states that “[t]he actual purchase order between the middle vendor and end-client are confidential and not available to the Petitioner due to confidentiality.”

After reviewing the RFE response, the director denied the petition finding that (1) the evidence submitted into the record did not establish that the petitioner would be a “United States employer” having an “employer-employee relationship” with the beneficiary as an H-1B “employee,” and (2) the record failed to establish that the position offered to the beneficiary qualifies as a specialty occupation and that there is sufficient work for the requested period of intended employment. In the denial, the director specifically noted that the letters submitted provided contradictory information regarding whether the petitioner or [REDACTED] would be the beneficiary’s employer, that the itinerary provided was not signed by the end-client, and that there was no evidence in the record of the end-client agreeing to the project or affirming the existence of the project.

On appeal, counsel submitted a brief and a copy of an internet printout from the U.S. Citizenship and Immigration Services (USCIS) website printed on August 1, 2013, titled “Questions & Answers: USCIS Issues Guidance Memorandum on Establishing the ‘Employee-Employer Relationship’ in H-1B Petitions,” published on January 13, 2010, revised on August 2, 2011 and on March 12, 2012. In his brief on appeal, counsel asserts that the “preponderance of the evidence” standard is applicable in this matter and contends that the petitioner has established, by a preponderance of the evidence, that the petitioner has an employer-employee relationship with the beneficiary and that “there is specialty occupation work available.”

With respect to the preponderance of the evidence standard, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010), states in pertinent part the following:

Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.

* * *

The “preponderance of the evidence” standard requires that the evidence demonstrate that the applicant’s claim is “probably true,” where the determination of “truth” is made based on the factual circumstances of each individual case.

* * *

Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. *See INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004), and, in doing so, it applies the preponderance of the evidence standard as described above. As reflected in this decision, however, the AAO finds that the petitioner has not met its burden by a preponderance of the evidence.

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

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 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).

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

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

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

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

Darden, 503 U.S. at 323-324 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. at 751-752); *see also Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. at 440 (hereinafter "*Clackamas*"). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be

assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).

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

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. §

³ 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).

The regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to employ persons in the United States, and to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee," "employed," "employment" or "employer-employee relationship" indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition." Therefore, in the absence of an intent to impose broader definitions by either Congress or USCIS, the "conventional master-servant relationship as understood by common-law agency doctrine," and the *Darden* construction test, apply to the terms "employee," "employer-employee relationship," "employed," and "employment" as used in section 101(a)(15)(H)(i)(b) of the Act, section 212(n) of the Act, and 8 C.F.R. § 214.2(h). That being said, there are instances in the Act where Congress may have intended a broader application of the term "employer" than what is encompassed in the conventional master-servant relationship. See, e.g., section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F) (referring to "unaffiliated employers" supervising and controlling L-1B intracompany transferees having specialized knowledge); section 274A of the Act, 8 U.S.C. § 1324a (referring to the employment of unauthorized aliens).

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 318-319.⁴

Therefore, in the absence of an express congressional intent to impose broader definitions, both the "conventional master-servant relationship as understood by common-law agency doctrine" and the *Darden* construction test apply to the terms "employee" and "employer-employee relationship" as used 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).⁵

Thus, 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

⁴ 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))).

⁵ 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).

medical contract service agency is the actual petitioner, because the hospitals ultimately hire, pay, fire, supervise, or otherwise control the work of the beneficiaries).

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

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

Lastly, the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450. "Rather, . . . the answer to 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."

In the instant case, the record does not contain evidence such as contracts, work orders, and statements of work which outline in sufficient detail the nature and scope of the beneficiary's intended employment with the end-client. The record also lacks the actual contractual agreements between the numerous parties involved in the beneficiary's employment. As was noted above, while the record contains a Work Order signed by the petitioner and [REDACTED] the petitioner failed to submit the Master Service Agreement of which the Work Order was a part. Also, the petitioner did not submit any contracts and relevant work orders and/or statements of work between the vendor(s) and the end-client. Finally, the letters submitted by [REDACTED] and [REDACTED] are not service agreements or contracts and therefore are not sufficient to establish the terms of the agreement between the parties for the purposes of these proceedings.

Furthermore, the record is inconsistent in regards to the petitioner's claim to be the beneficiary's employer. As was noted above, in its support letter, the petitioner states that it "is a consulting company which places workers at end-client locations through contractual agreements." The evidence in the record indicates that the end-client is [REDACTED] and that the beneficiary will work at [REDACTED] worksite. In the letter of support, the petitioner also stated that it "at[t]ests that [the] Beneficiary will perform all aforementioned duties under the direct control and supervision of

the employer at the employer's own worksite." Therefore, it appears that the petitioner is stating that the beneficiary will be under the direct control and supervision of the end-client, [REDACTED] at [REDACTED] own worksite. In addition, both the June 4, 2013 letter from [REDACTED] and the March 25, 2013 letter from [REDACTED] indicate that the beneficiary is employed by [REDACTED] and that it is [REDACTED] who hires, fires, and reassigns the beneficiary. Moreover, the March 25, 2013 letter from [REDACTED] also states that [REDACTED] will be responsible for the terms of [the beneficiary's] assignment as directed, reviewed and supervised by the [REDACTED] manager, [manager's name]." Finally, the evidence in the record establishes that the beneficiary will be working at [REDACTED] location, using a [REDACTED] email address, and using [REDACTED] instrumentalities and tools to perform the duties of the position.

Upon review of the totality of the evidence, the AAO finds that there is insufficient documentary evidence to demonstrate that the beneficiary will more likely than not work for [REDACTED] under the petitioner's control. While the petitioner claims that it will control the beneficiary, the submitted documentation indicates that, more likely than not, [REDACTED] will control the beneficiary.

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

The evidence of record, therefore, is insufficient to establish that the petitioner qualifies as a United States employer, as defined by 8 C.F.R. § 214.2(h)(4)(ii). Merely claiming in its letters that the beneficiary is the petitioner's employee and that the petitioner - from its remote relationship to the end-client - exercises control over the beneficiary, does not establish that the petitioner exercises or will exercise the requisite control over the beneficiary and the substantive work that he would perform. Without documentary evidence, such as evidence from the end-client, supporting the petitioner's claims, the petitioner has not established eligibility in this matter. 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)).

Thus, the petitioner has not established, by a preponderance of the evidence, 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).

Likewise, the petitioner is not a "United States agent" as defined by the regulations. The regulation at 8 C.F.R. § 214.2(h)(2)(i)(F) states the following, in pertinent part:

- (1) An agent performing the function of an employer must guarantee the wages and other terms and conditions of employment by contractual agreement with

the beneficiary or beneficiaries of the petition. The agent/employer must also provide an itinerary of definite employment and information on any other services planned for the period of time requested.⁶

First, in the documentation submitted with the petition, the petitioner indicated that it is a software consulting and staffing firm, but never asserted that it is an agent. Counsel first contends that the petitioner is an agent in response to the RFE. However, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Second, with the petition filing, the petitioner provided an Employment Contract between the petitioner and the beneficiary. The AAO notes that the Employment Contract states that the "Employer desires to employ the Employee. . . ." The Employment Contract does not state that the petitioner is an agent performing the function of an employer. Moreover, as will be discussed in more detail below, the evidence submitted fails to establish non-speculative employment for the beneficiary for the entire period requested. 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 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190). Thus, the petitioner cannot be considered an agent in this matter.

⁶ As opposed to an agent performing the function of a United States employer under 8 C.F.R. § 214.2(h)(2)(i)(F)(I), it does not appear possible for an agent as described under 8 C.F.R. §§ 214.2(h)(2)(i)(F)(2) and (3), who will not be the actual "employer" of a beneficiary, to file an H petition on behalf of the actual employer and the alien. A careful review of the regulations indicates that the representative agent filing exceptions in 8 C.F.R. §§ 214.2(h)(2)(i)(F)(2) and (3) do not apply to H-1B specialty occupation petitions. Specifically, while the regulations generally require at 8 C.F.R. § 214.2(h)(2)(i)(A) that "[a] United States employer . . . shall file" the H-1B, H-2A, H-2B, or H-3 petition, the more restrictive definition of the term United States employer is only defined under the H-1B section and remains undefined for the regulatory provisions applicable to H-2 and H-3 classifications. See 8 C.F.R. § 214.2(h)(2)(i)(A); 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer"); see generally 8 C.F.R. §§ 214.2(h)(5), 214.2(h)(6), and 214.2(h)(7).

As this definition requires the "United States employer" filing the petition to have an "employer-employee relationship" with respect to the H-1B specialty occupation "employees," it is clear that the employer-employee relationship must be between the petitioner and the beneficiary. In fact, the supplemental information included in the federal register publication of the final rule that added the definition of "United States employer" to 8 C.F.R. § 214.2(h)(4)(ii) specifically states that "only United States employers can file an H-1B petition," indicating again that the actual employer of the beneficiary must file the petition. See 56 Fed. Reg. 61111, 61112 (Dec. 2, 1991). In other words, if a petitioner is not a United States employer with an employer-employee relationship between itself and the beneficiary, it is not permitted to file an H-1B specialty occupation petition on behalf of that beneficiary. It is noted again, however, that this requirement is narrowly tailored to the H-1B specialty occupation category, thus permitting the filing of petitions by agents on behalf of employers in the H-2 and H-3 contexts. See 8 C.F.R. § 214.2(h)(2)(i)(A); 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer"); see generally 8 C.F.R. §§ 214.2(h)(5), 214.2(h)(6), and 214.2(h)(7).

Even if the petitioner was considered to be an agent acting as an employer, the regulations still require that the employer, i.e., the petitioner, be a United States employer as defined at 8 C.F.R. § 214.2(h)(4)(ii). To promote the U.S. worker protection goals of a statutory and regulatory scheme that allocates responsibilities sequentially between the U.S. Department of Labor (DOL) and the U.S. Department of Homeland Security, a prospective employer must file an LCA and receive certification from DOL before an H-1B petition may be submitted to USCIS. 8 C.F.R. § 214.2(h)(4)(i)(B)(1); 20 C.F.R. § 655.700(b)(2). Upon receiving DOL's certification, the prospective employer then submits the certified LCA to USCIS with an H-1B petition on behalf of a specific worker. 8 C.F.R. § 214.2(h)(2)(i)(A), (2)(i)(E), (4)(iii)(B)(1). DOL requires the United States employer to file the LCA. See ETA Form 9035CP – General Instructions, Section K, Declaration of Employer (stating that an "attorney or agent should not sign this section unless the attorney or agent is an employee of the employer and has authority to sign as the employer"). As the supporting LCA must be signed by a United States employer, and as all H-1B petitions must be accompanied by a certified LCA, the agency provisions do not exempt a petitioner from establishing that a United States employer exists and that the beneficiary will have the requisite employer-employee relationship with that United States employer.

In this matter, counsel claims that the petitioner is an agent acting as the employer, not as an agent representing the United States employer. In any event, the burden to establish the requisite employer-employee relationship, even with the end-employer, still lies with the petitioner. Here, the petitioner has not met its burden. See Memorandum from Donald Neufeld, Associate Director, Service Center Operations, to Service Center Directors, *Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements* (January 8, 2010), at page 7, footnote 11, stating, as counsel noted in the letter in response to the RFE, that "the fact that a petition is filed by an agent does not change the requirement that the end-employer have a valid employer-employee relationship with the beneficiary."

Finally, beyond the decision of the director, the evidence submitted fails to establish non-speculative employment for the beneficiary for the entire period requested. Although the petitioner requested, on the Form I-129, that the beneficiary be granted H-1B classification from October 1, 2013 to September 14, 2016, there is insufficient documentation regarding work for the beneficiary for the duration of the requested period. As previously noted, the March 25, 2013 letter from [REDACTED] states that the project the beneficiary is assigned to "is expected to last through August 5, 2015" and the Work Order between [REDACTED] and the petitioner states that the project duration is 24 months, running from February 6, 2013 to February 5, 2015, with possible extension. The AAO finds that, while the project may be extendable, it was not renewed prior to the date that the petition was filed. The petitioner also did not submit documentary evidence regarding any additional work for the beneficiary for the remainder of the requested H-1B validity period. Thus, the petitioner has failed to establish that the petition was filed for non-speculative work for the beneficiary that existed *as of the time of the petition's filing*, for the entire period requested. 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). 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 demonstrated that it would maintain such an employer-employee relationship with the beneficiary for the duration of the period requested.⁷

Based on the 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). Furthermore, the petition must also be denied due to the petitioner's failure to establish eligibility at the time of filing and to proffer non-speculative employment to the beneficiary. Accordingly, for all of these reasons, the petition must be denied.

The next issue before the AAO is whether the proffered position qualifies as a specialty occupation according to the pertinent regulations and statutes. 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. 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 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190). 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).

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

⁷ 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).

- (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 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in

accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

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

The petitioner stated on the Form I-129 that the beneficiary would be employed in a programmer analyst position. However, to determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. As previously mentioned, 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 evidence in the record of proceeding establishes that performance of the particular proffered 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 a specific specialty as the minimum for entry into the occupation, as required by the Act.

When determining whether a position is a specialty occupation, the AAO must look at the nature of the business offering the employment and the description of the specific duties of the position as it relates to the particular employer. To ascertain the intent of a petitioner, USCIS looks 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."

One consideration that is fundamental to the issue of whether a proffered position qualifies as a specialty occupation, is whether the petitioner has provided substantive information and supportive documentation to establish that the beneficiary would be performing services for the type of position for which the petition was filed (here, a programmer analyst). In the instant case, the proffered position has been inconsistently described throughout the record. The job

[REDACTED]

duties listed in the petitioner's support letter, Employment Contract, and the March 25, 2013 letter from [REDACTED] are inconsistent, with each document listing entirely different duties than are shown in the other documents. Additionally, the March 18, 2013 letter from [REDACTED] states that the beneficiary will be employed as a "Middleware Administrator," but does not describe what this position would entail. The AAO finds that the above noted differences with regard to the characterization of the proffered position are materially inconsistent and constitute attestations about the nature of the proffered position that are unreliable because of their materially conflicting information. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Also, 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. *Id.* at 591.

Furthermore, 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(s) in order to properly ascertain 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, [REDACTED], regarding the specific job duties to be performed by the beneficiary for that company. Specifically, there is no documentation or description of the position from [REDACTED] itself. The petitioner's repeated submission of the position description from the middle vendors is not sufficient to establish the nature of the position to be performed at the ultimate end-client, [REDACTED]. Moreover, contrary to counsel's assertions, the pictures of the beneficiary at his workstation and the printout from the [REDACTED] showing the beneficiary as a contractor, do not establish that the duties the beneficiary will perform at [REDACTED] qualify as a specialty occupation.

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.

Another such consideration that is fundamental to the issue of whether a proffered position qualifies as a specialty occupation, is whether the petitioner has established that, at the time of

the petition's filing, it had secured non-speculative work for the beneficiary that accords with the petitioner's claims about the nature of the work that the beneficiary would perform in the proffered position. Although the petitioner requested H-1B status for the beneficiary from October 1, 2013 to September 14, 2016, the record does not establish that sufficient work in a specialty occupation exists for the beneficiary for the full duration of the requested H-1B validity period. The March 25, 2013 letter from [REDACTED] states that the project the beneficiary is assigned to "is expected to last through August 5, 2015." The February 1, 2013 Work Order between [REDACTED] and the petitioner states that the project duration is 24 months, running from February 6, 2013 to February 5, 2015, with possible extension. Additionally, in his appeal brief, counsel states that the evidence in the record establishes that the "multiple intermediary parties have verified the existence of the project to last at least up to February 15, 2015 (with possible extension, according to [REDACTED] work order, and [REDACTED] letter stating it expects that project to last to August 5, 2015) . . ." Moreover, the AAO notes that the petitioner did not submit probative evidence establishing any additional projects or specific work for the beneficiary for the remainder for the requested H-1B validity period.

Therefore, the AAO finds that the record lacks evidence (1) corroborating that the petitioner has work that exists as an ongoing endeavor generating non-speculative employment for the beneficiary's services for the period of employment specified in the Form I-129; (2) establishing the nature and duties of the work that the beneficiary would perform; and (3) establishing that the beneficiary's duties, as described, would actually require the theoretical and practical application of at least a baccalaureate level of a body of highly specialized knowledge in a specific specialty, or its equivalent, as required by the Act.⁸

For the reasons related in the preceding discussion, the AAO finds that the petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. Accordingly, for this additional reason, the petition cannot be approved.

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

⁸ We note that even if the petitioner were to provide sufficient evidence to establish that it is offering the beneficiary *bona fide* non-speculative employment for the duration of the requested H-1B validity period in the requested classification of computer programmer, that there is insufficient evidence in the record of proceeding to support the broad proposition that a programmer analyst position constitutes an occupational category that qualifies as a specialty occupation, especially in light of the information in the DOL's *Occupational Outlook Handbook (Handbook)* that this is not the case. Furthermore, the evidence in the record is insufficient to support that this particular proffered position qualifies as a specialty occupation.

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

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative 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.