

(b)(6)



U.S. Citizenship
and Immigration
Services

DATE: JUL 17 2014

OFFICE: VERMONT SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner: [REDACTED]

Beneficiary: [REDACTED]

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

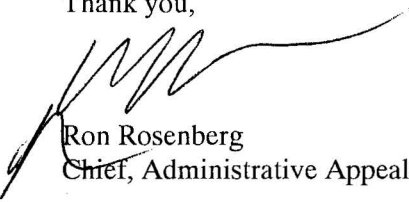
ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The service center director ("the 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.

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a "Software Development and Services" company established in 2002, with 41 employees. In order to employ the beneficiary in what it designates as a "Systems Analyst" position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition determining that: (1) the petitioner failed to establish an employer-employee relationship; and (2) the beneficiary failed to maintain status.

The record of proceeding before us contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's requests for evidence (RFE); (3) the petitioner's responses to the RFEs; (4) the director's notice of decision; and (5) the petitioner's Form I-290B, Notice of Appeal or Motion, and supporting documentation. We reviewed the record in its entirety before issuing our decision.

Upon review of the entire record of proceeding, we find that the petitioner has failed to overcome the director's grounds for denying this petition.¹ Accordingly, the director's decision will not be disturbed. The appeal will be dismissed and the petition will remain denied.

We will also address additional, independent grounds, not identified by the director's decision, that we find also precludes approval of this petition. Specifically, we find that, beyond the decision of the director, the evidence in the record of proceeding does not establish that: (1) 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; and (2) the proffered position is a specialty occupation.

I. PROCEDURAL AND FACTUAL BACKGROUND

In this matter, the petitioner indicated in the Form I-129 and supporting documentation that it seeks the beneficiary's services in a position that it designates as a Systems Analyst to work on a full-time basis at a salary of \$60,736 per year. In addition, the petitioner indicated that the beneficiary would be employed at [REDACTED] as well as at its main office located in [REDACTED] NJ. The petitioner stated that the dates of intended employment are from October 1, 2013 to August 30, 2016.

The petitioner appended the requisite Labor Condition Application (LCA) to the petition, which indicates that the occupational classification for the position is "Computer Systems Analyst" SOC

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

(ONET/OES) Code 15-1121, at a Level I (entry-level) wage. The petitioner listed the [REDACTED] NJ and the [REDACTED] VA work locations as the beneficiary's places of employment on the LCA.

In a letter dated March 27, 2013, and submitted with the initial petition, the petitioner stated that a Systems Analyst "researches analyze [sic] and designs computer based solutions for defined business, scientific or engineering problem." The petitioner provided a two paragraph general overview of a systems analyst position.

The petitioner stated that the requirements for a systems analyst position are "a bachelors [sic] degree in computer science, management information systems, or engineering" with additional experience. The petitioner footnoted that it would also accept a field of study which involved "extensive use of computational and mathematical sciences such as mathematics, statistics, economics, finance, accounting etc."

The petitioner further stated that the beneficiary will "work for our end client [REDACTED] through [REDACTED],"

The petitioner also provided the following documentation:

- A list of job duties to be performed by the beneficiary at the [REDACTED] NJ location listed in the LCA.
- An itinerary for the beneficiary for the period of time requested.
- An employment agreement dated March 18, 2013 and signed by both parties.

The itinerary shows the "primary location of work" for the beneficiary at [REDACTED] NJ and the secondary location as [REDACTED] VA. The petitioner stated that the beneficiary is currently working at the end-client [REDACTED] and provided the contact information for [REDACTED] "Director," at [REDACTED]. The petitioner stated that the beneficiary "will report to our office in case the above project is not extended or not assigned to another project" and provided the contact information for [REDACTED] "Project Coordinator."

Regarding the beneficiary's placement at the [REDACTED] VA work location, the petitioner provided a letter dated March 28, 2013 from [REDACTED], co-worker, confirming that the beneficiary has been working as a contractor onsite at [REDACTED]. The letter is not on company letterhead and states that "due to H.R. policies [REDACTED] is not providing official letter to the contractors."

The petitioner also provided a letter from [REDACTED] the intermediate client, dated March 23, 2013. The letter is signed by [REDACTED] Partner. The letter stated that the beneficiary is currently working as a "Microstrategy Analyst" with [REDACTED] and is assigned to [REDACTED] project at [REDACTED]. The letter provided a description of the beneficiary's daily activities. The letter also stated that the beneficiary "is not an employee of [REDACTED] and that the petitioner retains authority to "pay, hire, fire, change project, provide Workers Compensation/General/Professional insurances and/or supervise" the beneficiary. The record also included:

- A copy of the beneficiary's identification badge listing the companies [REDACTED] and "[REDACTED]"
- Copies of hourly work reports for the beneficiary identified as [REDACTED]
- A copy of the Master Services Agreement between the petitioner and [REDACTED] effective as of April 1, 2013. The agreement is signed by the petitioner and dated April 1, 2013. The agreement is not signed by [REDACTED] and is dated May 1, 2013 under the blank signature line.
- A copy of Addendum A to the contract, a Purchase Order dated April 1, 2013, which identifies the beneficiary as the consultant with an expected start date of April 1, 2013 and expected end date of December 31, 2013. The Purchase Order is signed and dated by both parties as of April 1, 2013.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on April 23, 2013. The petitioner was asked to submit evidence that a valid employer-employee will exist with the beneficiary for the duration of the requested H-1B employment period, and that the petitioner will have the right to control the beneficiary's work.

In response to the director's RFE, the petitioner submitted a letter dated May 22, 2013. The petitioner stated again that the beneficiary will be working at [REDACTED] VA through the vendor [REDACTED] and submitted letters from each entity. The petitioner stated the following regarding its clients' contracts:

The contracts with our clients may or may not specifically describe the job duties as these are not Statements of Work or Outsourcing contracts. These contracts merely establish the relationship between the petitioner and the petitioner's client...

The petitioner also stated that the following factors establish the employer-employee relationship: the right to assign the beneficiary to any client project as needed; the right to terminate his employment at will; the beneficiary is claimed as an employee for tax purposes; he is paid an annual salary and bonus by the petitioner; and the petitioner provides medical, dental, and paid vacation time.

As evidence of the petitioner's right to control and maintain the employer-employee relationship, the petitioner submitted the following:

- Copy of a letter from [REDACTED] dated May 8, 2013 and signed by [REDACTED] Director, Data Analytics. The letter states that the beneficiary "is contracted through [REDACTED] as a Contractor with [REDACTED] from March 2012." The letter also provides job duties for the beneficiary.
- Copy of training certifications received by the beneficiary while at [REDACTED]
- Copy of the letter from [REDACTED] submitted with the initial petition.
- Copy of the agreement between [REDACTED] and the petitioner submitted with the

initial petition. This agreement, however, is now signed by [REDACTED] and dated May 1, 2013. The agreement includes the same purchase order from the initial petition dated April 1, 2013.

- Sample performance evaluation form from the petitioner.

The director issued a second RFE on June 7, 2013 requesting evidence that the beneficiary was maintaining status at the time of filing. The petitioner responded on August 14, 2013 with a letter and additional evidence.

Based on the record, the director denied the petition finding that the petitioner failed to establish an employer-employee relationship and also determining that the beneficiary failed to maintain status. The director noted in his decision, among other things, that the MSA was not validly signed until after the filing date, and that there is doubt cast on the authenticity of the end-client letter as USCIS was unable to verify the [REDACTED] letter with the author, and the beneficiary is not included in the petitioner's tax documents.

On appeal, counsel for the petitioner asserts that the evidence clearly establishes an employer-employee relationship. Counsel contends that although the MSA was not signed, the position existed at the time of filing "as evidenced by all of the documents and conduct of the parties." Furthermore, the MSA was in effect as of the start-date of the requested employment. Regarding the [REDACTED] verification letter, counsel asserts that the [REDACTED] representative responded to the USCIS's inquiries. Counsel submits a document with no letterhead allegedly signed by the [REDACTED] representative stating that he has responded to USCIS's calls and emails regarding the beneficiary. Regarding the tax treatment of the beneficiary, counsel claims that since the beneficiary is on CPT unemployment withholdings are not required and provides pay stubs and a W-2 as evidence of the beneficiary's past employment.

Counsel for the petitioner avers further that maintenance of status is not a valid reason for denying the H-1B petition and that should a determination be made that the beneficiary did not maintain status, then the change of status should be denied and not the H-1B petition itself.

II. LAW AND ANALYSIS

A. Maintenance of Status

As a preliminary matter, we note that issues relating to the beneficiary's change of status are outside the scope of our jurisdiction. *See* 8 C.F.R. §§ 248.3(a) and 248.3(g). We have no jurisdiction over such matters, as issues surrounding a beneficiary's maintenance of nonimmigrant status are within the sole discretion of the director. Accordingly, we will not address the change of status request.

B. Lack of Standing to File the Petition as a United States Employer

We will now discuss whether the petitioner has established that it meets the regulatory definition of a "United States employer" and whether the petitioner has established that it will have "an

employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee" as set out at 8 C.F.R. § 214.2(h)(4)(ii).

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

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

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

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.²

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 318-319.³

Accordingly, in the absence of an express congressional intent to impose broader definitions, both the "conventional master-servant relationship as understood by common-law agency doctrine" and the *Darden* construction test apply to the terms "employee" and "employer-employee relationship" as used in section 101(a)(15)(H)(i)(b) of the Act, section 212(n) of the Act, and 8 C.F.R. § 214.2(h).⁴

² 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).

³ 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))).

⁴ 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

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 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."

The record does not contain evidence such as contracts, work orders, and statements of work which provide sufficient detail of the nature and scope of the beneficiary's intended employment with the end-client. Specifically, the petitioner claims that the beneficiary will be working at [REDACTED] through the intermediary client, [REDACTED]. The petitioner has not provided any contracts, statements of work, or work orders between [REDACTED] and [REDACTED] for the period of work requested. Accordingly, we cannot review whatever restrictions or conditions have been placed on the beneficiary's assignment by [REDACTED] through [REDACTED].

In addition, while the petitioner claimed that the beneficiary will be assigned to work for [REDACTED], the record does not include sufficient confirmation from [REDACTED] that the beneficiary will be working as a Systems Analyst for it as the end-client. The letter allegedly signed by a [REDACTED] representative at most confirms that the beneficiary is working at [REDACTED] as of May 8, 2013, prior to the requested start date. We note further that the record contains conflicting information as to the validity of the letter and find that the letter has not been verified. However, even if the contents of the letter were verified, the letter does not provide any information regarding the details of the contract between [REDACTED] and [REDACTED] and whether the beneficiary will continue to be assigned to [REDACTED] for the period of time requested in the petition. Additionally, the letter lists tasks completed by the beneficiary as of May 8, 2013. The letter does not detail what the beneficiary's duties would be, if any, during a future assignment with [REDACTED] commencing October 1, 2013.

We have also reviewed the letter from [REDACTED] dated March 23, 2014 stating that the beneficiary's project is "currently scheduled till 2015 and is highly likely to get extended/renewed." The petitioner also included a list of job duties for the beneficiary. As stated above, however, the petitioner has not provided any documentation to verify the initial terms and dates of the agreement between [REDACTED] and [REDACTED] or, whether the agreement will in fact be extended/renewed through the 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. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). The record, therefore, does not support a finding that the beneficiary will continue to be employed full-time at [REDACTED] for the period requested.

Although the petitioner provided a copy of the MSA with [REDACTED] effective as of April 1, 2013, the contract provided in response to the RFE was not signed by [REDACTED] until May 1, 2013. Whether or not the parties were in "negotiation" at the time of filing, the unsigned contract fails to establish that the position existed when the petition was filed. While the purchase order described below was in fact signed as of the date of filing, any outstanding terms and conditions of the beneficiary's assignment, including control of the beneficiary's work, pursuant to the purchase order cannot be verified without the finalized MSA. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. See 8 C.F.R. § 103.2(b)(1). A visa petition may not be

approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

We have also reviewed the purchase order attached to the contract as an addendum for the beneficiary's services which is signed by both parties as of April 1, 2013. The purchase order has a start date of April 1, 2013 and an end date of December 31, 2013, three months after the requested employment start date set out in the petition. We observe that the petitioner has requested H-1B approval through August 30, 2016. Thus, the submitted purchase order between the petitioner and [REDACTED] does not cover the entire period of employment requested by the petitioner.

Furthermore, the petitioner stated in the response to the RFE that the contract "may or may not specifically describe the job duties as these are not Statements of Work or Outsourcing Contracts." In this matter, the purchase order does not identify the beneficiary's position, it does not describe the beneficiary's duties, and it does not identify the beneficiary's supervisor or team. As the purchase order does not include this information, the record does not include Statements of Work or Outsourcing Contracts that would in fact verify the job duties, terms, and conditions of the beneficiary's assignment at [REDACTED] or ultimately at the end-client, [REDACTED].

The petitioner also claimed in the submitted itinerary that the beneficiary "will report to our office in case the above project is not extended or not assigned to another project" and listed contact information for [REDACTED] "Project Coordinator." The petitioner, however, failed to provide any evidence or further description of what work the beneficiary would perform at the petitioner's headquarters. The petitioner's general list of duties for the beneficiary appear to be extracted from the beneficiary's resume, and not a true description of what work the beneficiary would perform should he be assigned to the petitioner's headquarters.

While social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are still relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary's employer. Without full disclosure of all of the relevant factors relating to the end-client, including evidence corroborating the beneficiary's actual work assignment, the beneficiary's supervisor(s), and who has the right or ability to affect the projects to which the beneficiary is assigned, we are unable to find that the requisite employer-employee relationship will exist between the petitioner and the beneficiary.

The evidence of record 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 - supervises the beneficiary does not establish that the petitioner exercises any substantial control over the beneficiary and the substantive work that he performs. The petitioner's reliance on evidence showing that it pays the beneficiary's salary, makes contributions to worker's

compensation, and withholds federal and state income tax as well as providing the beneficiary with certain health benefits, establishes in this matter only that the petitioner is providing an administrative function. In this matter, the record is devoid of any documentation indicating and/or corroborating that the beneficiary would be the individual assigned to perform services pursuant to any contract(s), work order(s), and/or statement(s) of work for the requested, three-year validity period at [REDACTED] or the petitioner's location. There is insufficient probative documentary evidence in the record corroborating what the beneficiary would do, where the beneficiary would work, and the availability of work for the beneficiary for the entire requested period of employment. The petitioner has not provided the necessary documentary evidence establishing that it provides the beneficiary's actual daily work and supervises him and his work. Without evidence supporting the petitioner's claims, the petitioner has not established eligibility in this matter. Again, 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).

Based on the above, 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). Accordingly, the appeal will be dismissed and the petition will be denied.

C. Speculative Employment

Moreover, beyond the decision of the director, the evidence submitted fails to establish that the petitioner has 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 August 30, 2016, there is a lack of substantive documentation regarding work for the beneficiary for the duration of the requested period. As stated above, the only purchase order submitted does not cover the entire period of employment requested by the beneficiary but rather ends December 31, 2013.

We find that the petitioner has not provided documentary evidence to establish the existence of work, and specifically specialty occupation work, available to the beneficiary as a systems analyst, for 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.⁵

D. Specialty Occupation

The petition must also be denied due to the petitioner's failure to establish that the proffered position qualifies 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 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 job duties to be performed by the beneficiary for that company. 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;

⁵ 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).

(4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

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

III. CONCLUSION

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

Moreover, when we deny a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that we abused our discretion with respect to all of our 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.