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



U.S. Citizenship
and Immigration
Services

DATE: **JUN 12 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. Z.
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.

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as an Information Technology Solutions and Services business established in 2011, with 57 employees. In order to employ the beneficiary in what it designates as a "Computer System Analyst" position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on the grounds that the petitioner failed to establish (1) that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions, and (2) that the petitioner has sufficient work for the beneficiary for the requested period of intended employment. The petitioner filed a timely appeal of the decision. On appeal, the petitioner's counsel contends that the director's basis for denial of the petition was erroneous. In support of this contention, counsel submits a brief.

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

For the reasons that will be discussed below, we agree with the director's decision 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.

We will also address an additional, independent ground, not identified by the director's decision, that we find also precludes approval of this petition.¹ Specifically, as a preliminary matter and beyond the decision of the director, the evidence in the record of proceeding does not establish that the petitioner will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary employee. For this additional reason, the petition may not be approved.

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 computer system analyst to work on a full-time basis at a salary of \$58,000 per year. In addition, the petitioner indicated that

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

the beneficiary would be employed at "Part 1² (and/or local clients) and [REDACTED] East Peoria, IL [REDACTED]" The petitioner stated on the Form I-129 that the dates of intended employment are from October 1, 2013 to September 17, 2016.

The petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. We note that the LCA designation for the proffered position corresponds to the occupational classification of "Computer Systems Analysts" – SOC (ONET/OES) Code 15-1121. The petitioner designated the proffered position as a Level I (entry level) position. In the LCA, the petitioner indicated that the beneficiary would work at the petitioner's location in Bloomington, IL (and local client sites) and at [REDACTED] East Peoria, IL [REDACTED].

In an undated letter submitted with the petition, counsel listed the documents that were submitted with the petition³ and stated the following:

[The petitioner's] existing and potential business levels indicate viability sufficient to support the subject Petition. Furthermore, and on the basis of the attached documentation, it is clear that the Beneficiary possesses expertise as a professional, who will significantly contribute to the Petitioner's projects.

In addition to the aforementioned letter, the documents filed with the Form I-129 included, among other things, the following:

- A copy of the beneficiary's diploma from [REDACTED] indicating that the beneficiary obtained a Master of Science degree in Electrical and Computer Engineering on August 6, 2011;
- Copies of the beneficiary's pay stubs issued by the petitioner for the period of November 2012 to January 2013;
- Copies of the beneficiary's Form W-2, Wage and Tax Statement for 2012, indicating employment by the petitioner;
- A copy of the petitioner's promotional materials;
- A copy of the petitioner's "Contract Employee Handbook"; and
- A copy of the "Change in Information Page" for the petitioner's insurance policy with [REDACTED] indicating that the number "of employees has been changed to 000003," effective February 13, 2012.

² Part 1 provides information about the petitioner's name and address.

³ Counsel stated that the petitioner's support letter and the beneficiary's credentials evaluation were part of the documents submitted; however, the record does not contain these documents.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on May 8, 2013. The director asked the petitioner to submit evidence to demonstrate that it will have an employer-employee relationship with the beneficiary.

In response to the director's RFE, the petitioner provided additional supporting evidence, including, among other things, the following:

- An undated letter from the petitioner's counsel that states "[t]he petitioner has been retained to provide its information technology solutions to [REDACTED]⁴ through [REDACTED]
- A copy of a letter, dated May 23, 2013, on [REDACTED]'s letterhead, from [REDACTED] (Work Director), addressed to "United States Citizenship and Immigration Service," which states in part:

[The beneficiary], employee of [the petitioner,] is working at [REDACTED] as an IT Analyst who performs support activities for high availability manufacturing execution and quality systems since August 6, 2012 at our site, located at [REDACTED] East Peoria, IL.

- Copies of the LinkedIn profiles of two individuals that are working at [REDACTED] one as a Senior IT Analyst and the other as an Information & Analysis Manager;
- A copy of a letter, dated May 23, 2013, on [REDACTED] letterhead, from [REDACTED] Senior Manager of Operations Support, which states that [REDACTED] is a "technical temporary staffing firm" and has entered into a Services Agreement with [REDACTED] [(the end-client)] to provide information technology consulting services." Ms. [REDACTED] further states:

[O]n certain occasions [REDACTED] engages the services of a sub-contractor ("Sub-Vendor") to provide to [REDACTED]' customers the technical, temporary resources because in a particular instance the Sub-Vendor ([the petitioner]) can provide the technical resource quicker than [REDACTED] can. When this occurs, [REDACTED] and the Sub-Vendor enter into a secondary supplier [a]greement ("SSA") which includes, in section 17, a provision that the Sub-Vendor agrees to follow the contractual obligations [REDACTED] must follow in the Agreement with their customers. Thus, the Agreement's provisions are flowed down to the Sub-Vendor through the SSA. The technical resource/professional is

⁴ The evidence in the record indicates that the end client is [REDACTED] rather than [REDACTED]

hired as an employee of Sub-Vendor, and the technical professional is assigned to Customer. The Sub-Vendor maintains responsibility for the statutory obligations of the technical professionals such as taxes and withholdings, workers compensation matters, and other employer related items, and the Sub-Vendor also shares with [REDACTED] Customer certain responsibilities in regard to the technical professional including the daily technical oversight of the technical professional.

In the letter, Ms. [REDACTED] states that the "project is expected to extend through September 17, 2016 with the opportunity for extensions" and lists "the product to be developed or the service to be provided," as follows:

- Design[,] development and testing of [REDACTED] applications using Java and J2EE technologies.
 - Java applications support, application servers (Tomcat, websphere, and standalone applications) supporting a 24x7 production environment.
 - Deep diving for root cause analysis for java applications.
 - Real time bug fix implementation.
 - Documentation for present system.
 - Facilitate monitoring system to alert to possible future concerns with easy fixes where coding solutions are not feasible.
- A copy of the "Sub-Vendor Agreement" made and entered into on January 25, 2012 between [REDACTED] and the petitioner, which states that the sub-vendor (the petitioner) "will receive a Work Order" indicating the acceptance of the petitioner's candidate. We note that a copy of the Work Order was not submitted into the record by the petitioner.

The Sub-Vendor Agreement states the following, in paragraph 5(a):

Sub-vendor is providing temporary staffing services to Customer through [REDACTED] with such services provided by Contract Workers under Customer's management and supervision at a facility or in an environment controlled by Customer.

- A copy of an undated organizational chart listing the petitioner's name under "Systems Analysts."
- A copy of an employment offer letter, dated February 17, 2012, from the petitioner to the beneficiary.
- A copy of an addendum to the petitioner's employment offer letter, dated September 16, 2012, indicating a decrease in the beneficiary's salary from \$62,000 to \$54,000. We note that the submitted copy of the addendum indicates

that the beneficiary did not sign the addendum.

On October 25, 2013, the director denied the petition finding that the petitioner failed to establish (1) that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions, and (2) that the petitioner has sufficient work for the beneficiary for the requested period of intended employment.

On appeal, counsel submits a brief stating that the evidence submitted "unequivocally proves that the industry standard mandates, at minimum, a Bachelor's degree, to work in the position of Computer Systems Analyst, and that a Bachelor's Degree in Computer Science, Information Technology, Engineering or a related discipline, is one that the industry standard also proves is relevant." Counsel also asserts that the director's RFE was not required and that "[n]owhere it is mentioned that valid agreements or contracts between the Vendor and the End Client describing job duties to be performed is mandatory. . . ."

II. LAW AND ANALYSIS

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

As a preliminary matter and beyond the director's decision, we will first discuss whether the petitioner has established that it meets the regulatory definition of a "United States employer" as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii). Specifically, we will determine whether the petitioner has established that it will have "an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." 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). 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 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.⁵

⁵ 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

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 318-319.⁶

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).⁷

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).

⁶ 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)).

⁷ 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"

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

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).

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, counsel states that "[t]he petitioner has been retained to provide its information technology solutions to [REDACTED] through [REDACTED]." However, the record does not contain any documentation from the petitioner and the end-client(s) listing the duties for the proffered position, the terms and conditions under which beneficiary would provide services to the end-client, the location of the employment, and the duration of the employment. Moreover, the preponderance of the evidence in the record indicates that the beneficiary would be providing services to [REDACTED] (as the end-client), rather than to [REDACTED] pursuant to a Services Agreement between [REDACTED] and [REDACTED]. No explanation was provided for the discrepancy relating to the identity of the end-client. 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).

While the record contains a copy of the Sub-Vendor Agreement between the petitioner and [REDACTED] the record does not contain evidence such as work orders or statements of work between [REDACTED] and the petitioner, which outline in sufficient detail the nature and scope of the beneficiary's intended employment with the end-client, [REDACTED]. We note that a copy of the Work Order that was referenced in the Sub-Vendor Agreement was not submitted into the record by the petitioner. Also, the petitioner did not submit any contractual agreement between the petitioner and Caterpillar. 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, there is insufficient 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. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Id.*

With respect to the control of the beneficiary's work, counsel asserts that the petitioner "is/will retain right of control over the work of the Beneficiary." Contrary to counsel's assertion, the "Sub-Vendor Agreement" between the petitioner and [REDACTED] states that contract workers (the beneficiary) provide services under the management and the control of [REDACTED] customer [REDACTED]. Therefore, the record does not support counsel's assertions. 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 Obaighbena, 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).

We note that the petitioner provided copies of beneficiary's Form W-2, Wage and Tax Statement for 2012, indicating employment by the petitioner and copies of some pay stubs that the petitioner issued to 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. Here, the record contains insufficient evidence to demonstrate that the petitioner will be overseeing and directing the work of 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 that the beneficiary is the petitioner's employee and that the petitioner - from its remote relationship to the end-client - will supervise the beneficiary does not establish that the petitioner will exercise any substantial control over the beneficiary and the substantive work that he will perform. Without evidence 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* at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

B. Speculative Employment and Failure to Establish Eligibility at the Time of Filing

Moreover, as noted by the director as a basis for the denial, the evidence submitted fails to establish that the petitioner has sufficient work for the beneficiary for the requested period of intended employment. Although the petitioner requested, on the Form I-129, that the beneficiary be granted H-1B classification from October 1, 2013 to September 17, 2016, there is a lack of substantive documentation regarding work for the beneficiary for the duration of the requested period. Rather, as stated above, the letter from [REDACTED] states that the "project is expected to extend through September 17, 2016," but does not list a start date for the project on which the beneficiary would be working. On the other hand, although the letter from [REDACTED] states that the beneficiary has been working at [REDACTED] as an IT Analyst since August 6, 2012, the letter does not state the duration for the project on which the beneficiary would be working. In addition, the offer letter from the petitioner to the beneficiary does not state the beginning or the end date of the employment. According to the offer letter, the employment of the beneficiary "shall begin when [the beneficiary] actually join[s] [the petitioner]."

We find that the petitioner has not provided documentary evidence to demonstrate that it would employ the beneficiary for the entire H-1B period and has failed to establish the existence of work available to the beneficiary as a computer system analyst for the requested H-1B validity period. The petitioner also did not submit documentary evidence regarding any additional work

for the beneficiary. 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, the petitioner has not demonstrated that it would maintain an employer-employee relationship with the beneficiary for the duration of the period requested.⁸

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. Failure to Establish that Proffered Position Qualifies as a Specialty Occupation

We will next address the director's other basis for the denial of the petition, namely whether the petitioner has established that the proffered position qualifies as a specialty occupation position.

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof

⁸ 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).

in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

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

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

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

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

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

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. See *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that

construction of language which takes into account the design of the statute as a whole is preferred); see also *COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. See *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this 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 computer system analyst position. However, to determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. See generally *Defensor v. Meissner*, 201 F.3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the 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 the specific specialty as the minimum for entry into the occupation, as required by the Act.

We note that, as recognized by the court in *Defensor, supra*, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. See *Defensor v. Meissner*, 201 F.3d at 387-388. The court held that the former INS had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. *Id.* at 384. Such evidence must be

sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work.

As a preliminary matter and 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. The petitioner did not submit any contracts, work orders, or statements of work from the end-client, [REDACTED] establishing the nature of the work that the beneficiary would perform at the end-client's location.

As previously noted, on appeal, counsel asserts that the director's RFE requesting additional evidence was not required and the submission of valid agreements or contracts describing the job duties to be performed by the beneficiary is not mandatory. We find counsel's assertion unpersuasive and counsel has submitted no authority for his contention. The regulations indicate that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary in the adjudication of the petition. *See* 8 C.F.R. §§ 103.2(b)(8); 214.2(h)(9)(i). The purpose of the RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1), (8), and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Here, the petitioner failed to submit the requested evidence.

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

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

We do not need to examine the issue of the beneficiary's qualifications, because the petitioner

has not provided sufficient documentation to demonstrate that the position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation.

As discussed in this decision, the petitioner has failed to establish that the proffered position requires a baccalaureate or higher degree in a specific specialty or its equivalent. Therefore, we need not and will not address the beneficiary's qualifications further.

III. CONCLUSION

An application or petition that fails to comply with the technical requirements of the law may be denied by us 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.⁹ 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.

⁹ As the grounds discussed above are dispositive of the petitioner's eligibility for the benefit sought in this matter, we will not address and will instead reserve our determination on the additional issues and deficiencies that we observe in the record of proceeding with regard to the approval of the H-1B petition.