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



U.S. Citizenship
and Immigration
Services

DATE: **JUN 30 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 in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Michael T. Kelly
for Ron Rosenberg
Chief, Administrative Appeals Office

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

On the Form I-129 visa petition, the petitioner describes itself as an IT development and consulting firm. In order to employ the beneficiary in what it designates as a "Programmer Analyst" position,¹ the petitioner seeks to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner had failed to demonstrate that the proffered position qualifies for classification as a specialty occupation.

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

For the reasons that we will discuss in this decision's analysis of the evidence of record as it relates to the statutory and regulatory framework governing the H-1B specialty-occupation program, we have determined that the director's determination to deny the petition on the basis specified in her decision was correct. Accordingly, the appeal will be dismissed, and the petition will be denied.

I. EVIDENTIARY STANDARD ON APPEAL

As a preliminary matter, and in light of counsel's references to the requirement that we apply the "preponderance of the evidence" standard, we affirm that, in the exercise of our appellate review in this matter, as in all matters that come within its purview, we follow the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010). In pertinent part, that decision states the following:

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

* * *

The "preponderance of the evidence" of "truth" is made based on the factual circumstances of each individual case.

¹ The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for the SOC (O*NET/OES) Code 15-1131, the associated Occupational Classification of "Computer Programmers," and a Level II prevailing wage rate.

* * *

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

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

Id.

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In doing so, we apply the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon our review of the present matter pursuant to that standard, however, we find that the evidence in the record of proceeding does not support counsel's contentions that the evidence of record requires that the petition at issue be reopened or reconsidered.

Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, we find that the director's determinations in this matter were correct. Upon review of the entire record of proceeding, and with close attention and due regard to all of the evidence, separately and in the aggregate, submitted in support of this petition, we find that the petitioner has not established that its claims are "more likely than not" or "probably" true. As the evidentiary analysis of this decision will reflect, the petitioner has not submitted relevant, probative, and credible evidence that leads us to believe that the petitioner's claims are "more likely than not" or "probably" true.

II. STATUTORY AND REGULATORY FRAMEWORK

To meet its burden of proof with regard to the specialty occupation issue, 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 at 387. 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.

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

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.

III. INTRODUCTORY OVERVIEW

Here, the petition's specialty-occupation claim resides in the work that the petitioner claims the beneficiary will provide per contractual agreement between the petitioner and another entity, or entities. Thus, to meet its burden of proof, it is incumbent upon the petitioner to provide evidence of the pertinent contractual requirements that is sufficient to show that their actual performance would require the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty – in compliance with the "specialty occupation" definition at section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii). Further, the petitioner must establish that the petition was filed on the basis of definite, non-speculative employment that had been secured for the beneficiary by the time the petition was filed. 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). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). For the reasons we shall now discuss, the evidence of record is insufficient to meet either of these requirements.

As previously noted, the petitioner indicated on the Form I-129 and in supporting documentation that it seeks the beneficiary's services in a position titled "Programmer Analyst," to work on a full-time basis at a salary of \$62,733 per year.

One consideration that is necessarily preliminary to, and logically even more foundational and fundamental than the issue of whether a proffered position qualifies as a specialty occupation, is whether the petitioner has provided substantive information and supportive documentation sufficient to establish that, in fact, the beneficiary would be performing services for the type of position for which the petition was filed (here, a programmer analyst). Another such fundamental preliminary consideration is whether the petitioner has established that, at the time of the petition's filing, it had secured non-speculative work for the beneficiary that corresponds with the petitioner's claims about the nature of the work that the beneficiary would perform in the proffered position. We find that the petition has failed in each of these regards.

As discussed above, the record does not establish that, by the petition's filing, the petitioner had secured any work that would require the beneficiary to perform the duties of the proffered position for the period specified in the petition. Although the petitioner has established a contractual relationship with [REDACTED] the claim in this petition is that the beneficiary will work for a third-party employer through that agreement with [REDACTED]. The fact that the petitioner may in fact have had its own direct agreement in the past with [REDACTED] the third-party employer here, is irrelevant, since the ultimate terms and scope of the beneficiary's employment and placement onsite at [REDACTED] are governed by the agreement between [REDACTED] and [REDACTED] which has not been submitted here.

Additionally, we find that the record is devoid of any documentation establishing in-house work that would require the beneficiary to perform the duties and responsibilities that the petitioner has attributed to the proffered position.

While we note counsel's submission of an updated purchase order on appeal, with a delivery date of January 1, 2014, the fact remains that the record contains no evidence establishing the true nature of the beneficiary's employment during the requested validity period. This purchase order document, and those submitted prior to the service center's adjudication, provides no details regarding potential tasks of the beneficiary, and there is no documentation establishing the true nature of the duties the beneficiary would actually perform.

Accordingly, as the petitioner has not provided documentary evidence substantiating the beneficiary's actual work, we cannot conclude that the petitioner established that it would employ the beneficiary in a specialty occupation.

IV. FACTUAL AND PROCEDURAL BACKGROUND

In the petition signed on March 19, 2013, the petitioner indicated that it is seeking the beneficiary's services as a programmer analyst on a full-time basis at the rate of pay of \$62,733 per year. In its March 25, 2013 letter of support, the petitioner stated that it provides "cost effective and quality consultancy and out sourcing services worldwide."

Regarding the proffered position, the petitioner stated that the beneficiary will be working onsite at the offices of its end client, [REDACTED] in St. Louis, Missouri, via agreements between the petitioner and its intermediate client [REDACTED]. The petitioner further asserted that the contracts with [REDACTED] and [REDACTED] "are extendible indefinitely into the future," and that "there are no future unanticipated worksites at this time."

As noted previously, the LCA which the petitioner submitted had been certified for a job prospect within the occupational classification of "Computer Programmers" - SOC (ONET/OES Code) 15-1131, at a Level II wage.

The documents filed with the Form I-129 also included: (1) a copy of the petitioner's offer-of-employment letter to the beneficiary dated March 25, 2013; (2) a copy of a letter from [REDACTED] dated March 15, 2013, outlining the nature of [REDACTED] agreement with the petitioner; (3) a copy of a document from [REDACTED] entitled "WOI terms and conditions;" (4) a copy of a document from [REDACTED] entitled [REDACTED] standard purchase order terms and conditions;" (5) an evaluation of the beneficiary's foreign academic credentials; and (6) a copy of the petitioner's 2011 federal tax return.

The petitioner stated described the proposed duties as follows:

- 1) Perform in-depth analysis of business and technical requirements
- 2) Developing BTEQ scripts and SQL's
- 3) Developing informatica mappings and workflows
- 4) Developing Fastload, Multiload, FastExport scripts
- 5) Developing UNIX shell scripts
- 6) Writing unit test cases and unit testing developed code in dev environment
- 7) identifying the approach to fix the issues/defects (in Higher environments) after finding the Root cause
- 8) Performing and monitoring of loads
- 9) Participating in daily and weekly status calls and provides the status updates to the Project Management
- 10) Interacting with the Business analysts and documenting the Development Process and Business Knowledge on various Systems

However, it serves no purpose for us to address those duties, as nowhere in the record does [REDACTED] or that matter, [REDACTED] client ([REDACTED]) confirm, endorse, adopt, or in any way acknowledge those duties as comprising the work that the beneficiary would perform for any period.

With regard to the documentation from [REDACTED] we note that the March 15, 2013 letter did not identify the beneficiary by name, and further did not specify the exact duration of the agreement under which the beneficiary would work, aside from simply claiming that "the project is expected to last for three years." Specifically, the letter states:

In order to fulfill this Purchase Order, [the petitioner] will select professionals. We expect at least thirty employees to be used in order to fulfill these WOIs [Web Order Invoices] and POs [Purchase Orders]. Although [the petitioner] will select all professionals, in our opinion, we believe that all positions require a Bachelor's Degree in Engineering, Information Technology, Business or a similar discipline.

In addition, the documents outlining the terms and conditions of [REDACTED] Web Order Invoices and Purchase Orders appear to be no more than templates of forms that [REDACTED] routinely uses. They are not signed by any party. Their content does not mention either the beneficiary or the petitioner. Moreover, these documents appear to be printed directly from [REDACTED] website, and they appear to be representative samples of the standard forms that [REDACTED] uses as part of its contractual dealings with companies like the petitioner that would be providing services for [REDACTED]. As such, these documents have no material bearing upon the appeal before us and they are not probative evidence toward satisfying any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The director found the evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on July 12, 2013. The petitioner was asked to submit probative evidence to establish that a specialty occupation position exists for the beneficiary, and that the petitioner would maintain the requisite employer-employee relationship with the beneficiary. Noting the nature of the petitioner's business, the director requested specific evidence, such as contracts and work orders with the claimed end-client, [REDACTED] demonstrating that specialty occupation work was available for the beneficiary for the entire requested validity period.

On October 1, 2013, counsel for the petitioner responded to the RFE. Counsel clarified that the beneficiary would be working onsite for [REDACTED] via the petitioner's agreement with [REDACTED] and submitted additional documentation in support of this contention.

Those various agreement documents submitted in response to the RFE deserve some separate comments at this point, and we will address them in the order in which they appear as exhibits in the RFE response.

Counsel submitted a copy of a "Technical Services Agreement" between [REDACTED] and the petitioner, also referred to as the "Base Agreement," dated July 17, 2007. The agreement was signed by the petitioner on July 31, 2007 and by [REDACTED] on January 2, 2008. The introductory paragraph of the agreement stated that the Base Agreement "establishes the basis for a multinational procurement relationship under which [the petitioner] will provide [REDACTED] the Deliverables and Services described in SOWs and/or WAs issued under this Base Agreement."

Counsel also submitted a copy of a document entitled "Master Application Development and Maintenance Agreement" dated May 19, 2004 between the petitioner and [REDACTED] as well as some subsequent amendments. According to Section 2 of this agreement, entitled "Services," the petitioner was required to provide information technology services to [REDACTED] "on a project-by-project basis pursuant to written Statements of Work upon written request by [REDACTED] for such services." The agreement further stated that "[t]he Services to be performed by the [petitioner] at [REDACTED] request will be described in a Statement of Work that must be signed by officers of both parties." Moreover, the agreement specifies that:

Each Statement of Work will state the name of a project manager for [REDACTED] (the [REDACTED] Project Manager"), who will be authorized to act as [REDACTED] primary contact for [the petitioner] with respect to the parties' obligations under the Statement of Work, and the names of [the petitioner's] key project personnel, including (1) the name of a project manager for [the petitioner] who will be authorized to act as [the petitioner's] primary contact for [REDACTED] with respect to the parties' obligations under the Statement of Work, and (2) the names of any other key project personnel, if any (collectively, the "Key Employees") [and the percentage of each Key Employee's time that will be dedicated to the project covered by the Statement of Work]. Each statement of Work shall be consecutively numbered.

Whether entitled "Technical Services Agreement," "Base Agreement," or "Master Application Development and Maintenance Agreement," the language of these documents indicates that they consist of terms and conditions that would be automatically incorporated into any particular agreement for specific work that would fall within its scope. That is to say that, without follow-on contractual commitments for specific work in such forms as Statements of Work, Schedules, or Purchase Orders, these Agreement documents do not indicate that the petitioner has secured any definite work to be performed for any particular period. The sample Web Order Invoice and Purchase Order documents previously submitted were generic in nature and appeared to be representative samples of a typical agreement between [REDACTED] and a client. They were unsigned and nowhere referenced the petitioner. We find that, while the documents discussed above indicate that the petitioner has had business relationships with both [REDACTED] and [REDACTED] they do not establish that those relationships actually had generated work that the beneficiary would perform in accordance with the duties and responsibilities that the petitioner ascribed to the proffered position.

In addition to the above agreement documents, counsel also submitted a document entitled "Purchase Orders" printed from [REDACTED] website for the beneficiary's services. This document provides little to no detail regarding the nature of the agreement upon which it is based or the nature of the assignment it covers. Rather, it simply indicates that [REDACTED] is the "Buying Company" and the petitioner is the "Supplier." The project account name is identified as [REDACTED] " and the document states as follows:

The [REDACTED] Company recently entered into an agreement to outsource certain areas of its information technology services to [REDACTED] a division of the [REDACTED]. Under the contract, [REDACTED] will be responsible for processing [REDACTED]

work at their existing locations. [REDACTED] will assume responsibility for administering certain [REDACTED] contracts pertaining to such computer operations including making payments to the vendors on behalf of, and as an agent for [REDACTED]

This document further indicates that the beneficiary will work on this project for [REDACTED] with a start date of March 21, 2013 and an end date of March 31, 2014.

According to the inferences drawn from this document and the claims of counsel, the petitioner seeks to employ the beneficiary onsite at [REDACTED] offices through the mid-vendor, [REDACTED]. Although the record above demonstrates that the petitioner has previously had contractual relations with [REDACTED] as evidenced by the "Master Application Development and Maintenance Agreement" submitted in response to the RFE, this relationship is irrelevant here, since the petitioner claims to be providing personnel to work for [REDACTED] through a contractual agreement with [REDACTED]. The purchase order submitted in response to the RFE clearly states that in this particular case, the beneficiary's services will be provided to [REDACTED] via an outsourcing agreement that [REDACTED] a division of the [REDACTED] recently entered into with [REDACTED].

The director reviewed the information provided by the petitioner and counsel to determine whether the petitioner had established eligibility for the benefit sought. The director determined that the petitioner failed to establish that specialty occupation work existed for the beneficiary for the duration of the requested validity period. The director denied the petition on November 20, 2013. On appeal, counsel for the petitioner submitted a brief and contends that the director's findings were erroneous, and submits an updated purchase order for the beneficiary's services in support of this contention.

V. LAW AND ANALYSIS

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

As a preliminary matter and beyond the decision of the director, we will first 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).²

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

² We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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.³

³ While the *Darden* court considered only the definition of "employee" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(6), and did not address the definition of "employer," courts have generally refused to extend the common law agency definition to ERISA's use of employer because "the definition of 'employer' in ERISA, unlike the definition of 'employee,' clearly indicates legislative intent to extend the definition beyond the traditional common law definition." See, e.g., *Bowers v. Andrew Weir Shipping, Ltd.*, 810 F. Supp. 522 (S.D.N.Y. 1992), *aff'd*, 27 F.3d 800 (2nd Cir.), *cert. denied*, 513 U.S. 1000 (1994).

However, in this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. Instead, in the context of the H-1B visa classification, the term "United States employer" was defined in the regulations to be even

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 318-319.⁴

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).⁵

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

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).

⁴ To the extent the regulations are ambiguous with regard to the terms "employee" or "employer-employee relationship," the agency's interpretation of these terms should be found to be controlling unless "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359, 109 S.Ct. 1835, 1850, 104 L.Ed.2d 351 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945))).

⁵ That said, there are instances in the Act where Congress may have intended a broader application of the term "employer" than what is encompassed in the conventional master-servant relationship. *See, e.g.*, section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F) (referring to "unaffiliated employers" supervising and controlling L-1B intracompany transferees having specialized knowledge); section 274A of the Act, 8 U.S.C. § 1324a (referring to the employment of unauthorized aliens).

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."

We note the petitioner's assertion that the beneficiary will work at the offices of [REDACTED] in St. Louis, Missouri, and further note the petitioner's contentions that at all times it will maintain an employer-employee relationship with the beneficiary. However, the record of proceeding simply does not establish what project(s) would require the beneficiary to perform the duties and responsibilities that the petitioner ascribed to the proffered position. In this regard we here incorporate our earlier comments and findings with regard to the documentary evidence that the petitioner submitted as indicia of its business relationships with various companies. As there reflected, the record of proceeding does not contain persuasive evidence that any of the agreements

referenced by the petitioner had actually produced projects that would engage the beneficiary in the proposed duties and responsibilities during the period of requested employment.

First, the record lacks evidence corroborating the claimed contractual path that would result in the beneficiary's placement onsite at the offices of [REDACTED]. While we do not dispute that the petitioner has engaged in direct contractual relationships with both [REDACTED] and [REDACTED] in the past, the record as currently constituted does not establish the contractual path through which [REDACTED], as the mid-vendor in this instance, will place the beneficiary onsite to work for [REDACTED]. The issue here, therefore, is the absence of the contractual agreement between [REDACTED] and [REDACTED] which is referred to in the "purchase orders" document submitted in response to the RFE. That document indicates that [REDACTED] recently elected to outsource some of its information technology projects to [REDACTED] and pursuant to that agreement, [REDACTED] would provide resources, including the petitioner, to work on [REDACTED] projects. However, absent evidence of this contractual agreement, we are unable to determine (1) whether such an agreement actually exists; and (2) the nature and associated tasks of the claimed projects upon which the beneficiary would ultimately be assigned. More importantly, absent contracts between [REDACTED] and [REDACTED] the ultimate end-client, we are unable to determine the actual terms of employment and who in fact will control the beneficiary's work.

The record lacks relevant Statements of Work, Schedules, Wrappers, Purchase Orders, or any like documents that would establish the existence of a project that would engage the beneficiary to perform the duties that the petitioner ascribes to the proffered position. Further, we also note that the evidence of record does not establish how any actually existing project requires the beneficiary to perform the duties and responsibilities that the petitioner ascribes to the proffered position. Again, while the petitioner submitted copies of various master agreements and sample overviews of terms and conditions governing [REDACTED] projects, there is no evidence in the record establishing the nature of the beneficiary's proposed employment for the requested period.

In addition, despite the petitioner's contentions to the contrary, the record contains various other documents that suggest that the beneficiary's ultimate assignments, and supervisors, may vary. For example, the purchase order submitted in response to the RFE indicates that the end date of the claimed assignment with [REDACTED] via [REDACTED] is March 31, 2014. Although both counsel and the petitioner contend that the contracts with [REDACTED] and [REDACTED] "are extendible indefinitely into the future," this statement is not persuasive, since it refers to the petitioner's direct agreements with [REDACTED] and [REDACTED] and not the agreement between [REDACTED] and [REDACTED] that is at issue here. Again, there is no evidence of a contractual agreement between [REDACTED] and [REDACTED] and, therefore, there is no evidence sufficiently outlining the nature and duration of any particular project upon which the beneficiary would work during the requested validity period.

We find, therefore, that the evidence of record does not establish that, by the date of the filing of the petition, the petitioner had yet secured definite, non-speculative work for the beneficiary for the period of employment specified in the petition. In this respect, we also find that the record does not support a finding that the beneficiary's services would be required as a programmer analyst. The record of proceeding simply lacks documentary evidence of the existence of, or details regarding, any particular project to which the beneficiary would be assigned. 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). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). Consequently, we cannot reasonably conclude that the petitioner is engaging the beneficiary to perform work in the United States – as the existence of such work for the beneficiary has not been established.

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. While we have considered the petitioner's attestations that it alone would control the beneficiary and his work, because the evidence of record does not establish either an actual project that would require the beneficiary's services, or the actual scope of such services that would be required, or the contractual terms set by whatever client would generate such a project, we cannot conclude that it is more likely than not that the petitioner - and not a client or intermediate party between the petitioner and the client - would have the requisite employer-employee relationship. In short, we will not speculate about relevant indicia of control in a case, as here, where the actual work to be performed has not been established. Without full disclosure of all of the relevant factors relating to the end-client, including evidence corroborating the beneficiary's actual work assignment, we are unable to find that the requisite employer-employee relationship will exist between the petitioner and the beneficiary; and such disclosure is precluded where there is no definite employment.

The evidence of record, therefore, is insufficient to establish that the petitioner qualifies as a "United States employer," as defined by 8 C.F.R. § 214.2(h)(4)(ii). Merely claiming in its letters that the beneficiary is the petitioner's employee does not establish that the petitioner exercises any substantial control over the beneficiary and the substantive work that he performs. Nor do clauses in overarching agreements such as the Technical Services Agreement or the Master Application Development and Maintenance Agreement carry probative weight in the absence, as here, of specific contractual documents that bring such agreements into play with regard to work for which it is shown that the beneficiary would be employed.

The petitioner's reliance on claims that it would pay the beneficiary's salary, provide health and employment benefits, and withhold federal and state income tax is misplaced. First of all, as we have noted, the existence of actual work for the beneficiary has not been established. As the record of proceeding before us does not document actual work that a particular project would generate for the beneficiary, the terms and conditions of such work, and the supervisory lines that would determine, evaluate, and control the beneficiary's day-to-day work, we do not have before us a sufficiently comprehensive record to identify and weigh all of the indicia of control that should be assessed to determine the employer-employee issue. We will not speculate where those indicia would lie.

Additionally, as we already noted, the evidence of record does not establish the petitioner as performing the essential U.S. Employer function of engaging the beneficiary to come to the United States for actual work established for the beneficiary at the time of the petition's filing.

In short, the petitioner has not provided documentary evidence sufficient to establish actual work that the beneficiary would do and the actual nature of any business relationship that would exist between the beneficiary and the petitioner with regard to such 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). For this reason, the petition may not be approved.

For the above-discussed failure of the evidence of record to establish the requisite employer-employee relationship between the petitioner and the beneficiary, the petition must also be denied.

B. Failure to Establish the Proffered Position as a Specialty Occupation

As reflected in the preceding section's discussion and findings, a materially determinative aspect of the evidence of record is its failure to establish that, at the time of the petition's filing, the petitioner had secured definite, non-speculative employment for the beneficiary. Thus, we concur with the director's determination that the evidence submitted fails to establish non-speculative employment for the beneficiary for the period specified in the petition.

This feature of the evidence of record is also a determinative factor in our concluding that the evidence of record fails to establish the proffered position as a specialty occupation.

Now, to meet its burden of proof with regard to the specialty occupation issue, 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 at 387. 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.

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

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 previously noted, the petitioner indicated on the Form I-129 and in supporting documentation that it seeks the beneficiary's services in a position titled "Programmer Analyst," to work on a full-time basis at a salary of \$62,733 per year.

Although the petitioner requested, on the Form I-129, that the beneficiary be granted H-1B classification from October 1, 2013 to September 12, 2016, there is a lack of substantive documentation regarding particular work for the beneficiary for that period. The record contains no contracts, statements of work, work orders, or other contractual documents that are sufficiently detailed to establish the substantive nature work that the beneficiary is to perform, let alone that the performance of that work would require the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty.

We find then that the petitioner has not provided documentary evidence sufficient to establish the existence of the work claimed in the petition as specialty occupation work for the beneficiary 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 period requested.⁶ 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).

One consideration that is necessarily preliminary to, and logically even more foundational and fundamental than the issue of whether a proffered position qualifies as a specialty occupation, is whether the petitioner has provided substantive information and supportive documentation sufficient to establish that, in fact, the beneficiary would be performing services for the type of position for which the petition was filed (here, a programmer analyst). Another such fundamental preliminary consideration is whether the petitioner has established that, at the time of the petition's filing, it had secured non-speculative work for the beneficiary that corresponds with the petitioner's claims about the nature of the work that the beneficiary would perform in the proffered position. We find that the petition has failed in each of these regards.

As discussed above, the record does not establish that, at the petition's filing, the petitioner had secured any work for the period of intended employment that would require the beneficiary to perform the duties of the proffered position for the period specified in the petition.

Although the petitioner has established a contractual relationship with [REDACTED] the claim in this petition is that the beneficiary will work for a third-party entity - [REDACTED] through that

⁶ 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).

agreement with [REDACTED]. However, the ultimate terms and scope of the beneficiary's employment and placement onsite at [REDACTED] are governed by the agreement between [REDACTED] and [REDACTED] which has not been submitted here.

Additionally, we find that the record is devoid of any documentation establishing in-house work that would require the beneficiary to perform the duties and responsibilities that the petitioner has attributed to the proffered position.

While we note counsel's submission of an updated purchase order on appeal, with a delivery date of January 1, 2014, the fact remains that the record contains no evidence establishing the true nature of the beneficiary's employment during the requested validity period. This document, and those submitted prior to adjudication, provides no details regarding potential tasks of the beneficiary; and there is no documentation establishing the substantive nature of the duties the beneficiary would actually perform.

Accordingly, as the petitioner has not provided documentary evidence substantiating the beneficiary's actual work, we cannot conclude that the petitioner established that it would employ the beneficiary in a specialty occupation.

That is, the petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under 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 entry into 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. Thus, the petitioner has failed to establish that the proffered position is a specialty occupation under the applicable provisions.⁷

For the reasons related in the preceding discussion, we find that the petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it

⁷ It is noted that, even if the proffered position were established as being that of a programmer analyst, a review of the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook* (the *Handbook*) does not indicate that, simply by virtue of its occupational classification, such a position qualifies as a specialty occupation in that the *Handbook* does not state a normal minimum requirement of a U.S. bachelor's or higher degree in a specific specialty or its equivalent for entry into the occupation of programmer analyst. See U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Computer Systems Analysts," <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-4> (last visited June 10, 2014). As such, absent evidence that the position of programmer analyst satisfies one of the alternative criteria available under 8 C.F.R. § 214.2(h)(4)(iii)(A), the instant petition could not be approved for this additional reason.

cannot be found that the proffered position qualifies as a specialty occupation. Accordingly, the petition cannot be approved for this additional reason.

VI. 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 we conduct 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.