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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: **MAR 10 2014**

OFFICE: VERMONT SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner:

Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,

N.B.
for

Ron Rosenberg
Chief, Administrative Appeals Office

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

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as an information technology services business established in 2002, with 14 employees.¹ In order to employ the beneficiary in what it designates as a "Computer Programmer" position, the petitioner seeks to classify her 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 that it will have a valid employer-employee relationship with the beneficiary. The petitioner, through counsel, filed a timely appeal of the decision. On appeal, counsel for the petitioner contends that the director's basis for denial of the petition was erroneous. In support of this contention, counsel submits a brief and additional evidence.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's notice of decision; (5) the petitioner's Form I-290B, Notice of Appeal or Motion, and supporting documentation; (6) the AAO's Notice of Derogatory Information (NDI) and RFE (hereinafter, NDI/RFE); and (7) the petitioner's response to the AAO's NDI/RFE. The AAO reviewed the record in its entirety before issuing its decision.

For the reasons that will be discussed below, the AAO agrees with the director'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.

As a preliminary matter, the AAO will also address additional, independent grounds, not identified by the director's decision, that the AAO finds also precludes approval of this petition.² Specifically, beyond the decision of the director, the evidence in the record of proceeding does not establish (1) that the statement of facts contained in the petition is accurate, (2) that the petitioner would employ the beneficiary in the capacity specified in the petition, (3) that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions, and (4) 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. For these additional reasons, the petition may not be approved.

¹ In contrast, on the Form I-290B, the petitioner asserts that the beneficiary is the petitioner's sole employee. No explanation was provided for this discrepancy.

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

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 programmer to work on a full-time basis at a salary of \$60,000 per year. In addition, the petitioner indicated that the beneficiary would be employed at [REDACTED]. The petitioner stated on the Form I-129 that the dates of intended employment are from October 12, 2012 to September 4, 2015.

Among the documents submitted with the Form I-129 is an October 12, 2012 letter with the introductory heading, "I-129 Transfer Petition Employment of H1B Temporary Worker" (hereinafter, the letter of support). This letter is on the petitioner's letterhead and is signed by the petitioner's president. In the second sentence on the first page of the letter of support, the petitioner states that it "seeks to employ [the beneficiary] as a Computer Programmer Analyst." Later, in the second paragraph (in bold) on the first page, the petitioner refers to the proffered position as "Computer Programmer." However, in two instances in the first complete paragraph on the second page of the letter, the petitioner refers to "software engineers." Also, in various instances in the letter, the petitioner refers to the female beneficiary by the masculine pronoun.

In a letter of support dated October 12, 2012, the petitioner stated that the beneficiary will be responsible for the following duties:

1. Designing, programming and implementing software applications & package customized to meet specific client needs;
2. Reviewing, repairing and modifying software programs to ensure technical accuracy & reliability of programs;
3. Analyze the communications, informational, database and programming requirements of clients; plan, develop, test and implement appropriate information systems; [and],
4. Review existing information systems to determine compatibility with projected or identified client needs; research and select appropriate systems, including ensuring forward compatibility of existing systems; [t]rain clients on use of information systems and provide technical and de-bugging.

The AAO notes that the documents filed with the Form I-129 also include another letter, which is dated October 3, 2012 and is also signed by the petitioner's president. This letter, on the petitioner's letterhead, states "Employment offer letter." In contrast to the petitioner's president's other letter, this one refers to the proffered position as that of a "Programmer Analyst."

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

- A copy of a document entitled “Employment Agreement, Confidentiality Agreement and Non-Competition Agreement,” made and entered into on October 3, 2012, between the petitioner and the beneficiary;
- A copy of a 6-page document on [REDACTED] letterhead entitled “Contractor Service Agreement,” dated “04th day of 2012,”³ between the petitioner and [REDACTED] (hereinafter, the [REDACTED] Agreement). This [REDACTED] Agreement calls for the petitioner to provide [REDACTED] with “data processing systems and programming or any other services in accordance with [the] Work Order annexed hereto for the duration specified.” Page 6 of the [REDACTED] Agreement is entitled “Work Order,” and was signed by [REDACTED] Vice President, [REDACTED] and the petitioner’s president on October 4, 2012 (hereinafter, [REDACTED] Work Order). The [REDACTED] Work Order states that the beneficiary will be providing services at the end client, [REDACTED], starting on October 1, 2012⁴ with an end date to be determined. The [REDACTED] Work Order further states that the “[s]cope of effort and services to be performed” is “[a]s per the client[']s direction.”
- A copy of a letter on [REDACTED] letterhead from [REDACTED] Project Manager, addressed to “To whom it may concern,” dated October 9, 2012, stating that “[t]he purpose of this letter is to confirm the assignment of [the beneficiary] who is an employee of [the petitioner]. [The beneficiary] [is] assigned as [a] Programmer Analyst on the [REDACTED] project through [the petitioner].” The letter further states, under the heading “JobSummary,” [sic] that the beneficiary “is responsible for the Programmer Analyst [sic], testing and maintenance.” Also, the letter states that the beneficiary is expected to:
 - Be a main player in the team, responsible for understanding the business, business flow, design, development and unit testing for all the modules.
 - Participate in several design sessions in order to create common development strategies.
 - Design and develop several Servlets, JSP’s and Java classes for presentation layer.
 - Responsible for writing business rule and accessing the web services from other system[s] such as CIIS.
 - Responsible for writing Oracle SQL queries/Stored Procedures using SQL/PLSQL.
 - Responsible for code reviews, testing, debugging.
 - Responsible for integration of all the modules using Tomcat web server[.]
 - Marinating [sic] live application Automated Record Error Correspondence (AREC)[.]
 - Bug fixing and enhancement for the application AREC.

³ The AAO notes that the month in the date section is missing.

⁴ The start date of October 1, 2012 listed in the [REDACTED] Work Order predates the start date of October 12, 2012 listed on the Form I-129.

Finally, the letter states the following:

[The beneficiary] is an employee of [the petitioner], whom [sic] has the right to pay, hire, fire, [and] supervise their employee[.] At all times, [the petitioner] has [the] right to control the work of [the beneficiary], regardless of weather [sic] that right [is] exercised, through the duration of this contract. Any benefits, compensation, and performance reviews [the beneficiary] receives [will be] from [the petitioner]. As [the beneficiary] is an employee of [the petitioner], our company does not have the ability to assign [her] to any other project or to independently alter the terms of [her] assignment.

- A copy of an undated document entitled (in the upper left-hand corner) “[REDACTED]”, which lists a table with the following headings: task name, duration, start and finish [dates], and resource names. The AAO notes that the only resource named is the beneficiary and that some of the “start” and “finish” dates are dates that will occur either before or after the requested period of intended H-1B employment as listed on the Form I-129.
- A copy of the petitioner’s quarterly federal tax returns for the first three quarters of 2012;
- A copy of the petitioner’s marketing materials; and
- A 12-page document entitled “Our Software Development Process.”

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on November 6, 2012. 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:

- The petitioner’s letter in response to the RFE, dated December 3, 2012, in which the petitioner stated that it “retains the sole ability to hire, fire, and pay[,] reviews the performance of, and maintain supervision over [the beneficiary];”
- A copy of a letter on [REDACTED] letterhead, dated November 16, 2012, signed by [REDACTED] Training Manager Design, Human Resources, [REDACTED] addressed to “To whom it may concern,” stating that the beneficiary “is required in Learning Services department on the [REDACTED] project . . . pursuant to a cont[r]act between [REDACTED] and [REDACTED]”
- A copy of a letter on [REDACTED] letterhead, dated November 7, 2012, signed by [REDACTED] Project Manager, addressed to “To whom it may concern,” stating, among other things, that

the beneficiary "is assigned as a Programmer Analyst on the [REDACTED] project through our contract with [the petitioner.]" The letter further states, under the heading "JobSummary," [sic] that the beneficiary "is responsible for the Programmer Analyst [sic], testing and maintenance." Also, the letter states that the beneficiary is expected to:

- Be a main player in the team, responsible for understanding the business, business flow, design, development and unit testing for all the modules.
- Participate in several design sessions in order to create common development strategies.
- Design and develop several Servlets, JSP's and Java classes for presentation layer.
- Responsible for writing business rule and accessing the web services from other system[s] such as CIIS.
- Responsible for writing Oracle SQL queries/Stored Procedures using SQL/PLSQL.
- Responsible for code reviews, testing, debugging.
- Responsible for integration of all the modules using Tomcat web server[.]
- Maintaining [sic] live application Automated Record Error Correspondence (AREC)[.]
- Bug fixing and enhancement for the application AREC.

Finally, the letter states the following:

[The beneficiary] is an employee of [the petitioner], whom [sic] has the right to pay, hire, fire, supervise their employee, at all times, [the petitioner] has [the] right to control the work of [the beneficiary], regardless of weather [sic] that right [is] exercised, through the duration of this contract. Any benefits, compensation, and performance reviews [the beneficiary] receives are from [the petitioner]. As [the beneficiary] is an employee of [the petitioner], our company does not have the ability to assign her to any other project or to independently alter the terms of her assignment.

- A copy of the petitioner's undated organizational chart, listing the beneficiary in a box on the chart under the heading "Senior Developer's."
- Copies of various documents with the words "Weekly Timesheet" in the upper right-hand side corner and with the petitioner's name on the upper left-hand side corner, signed by the beneficiary as "Employee," and by [REDACTED] as "Manager,"⁵ for dates starting from

⁵ The AAO notes that this individual is not listed on the petitioner's organizational chart.

October 8, 2012⁶ through November 19, 2012.

- A copy of the beneficiary's paystubs from the petitioner for the weeks ending on October 15, 2012, November 1, 2012, and November 30, 2012.
- A copy of a document entitled "Foreign Academic Credentials Equivalency Evaluation," dated November 2012, rendered by [REDACTED] which states that the beneficiary's foreign degree in commerce and foreign postgraduate diploma in management information systems and computer applications equates to a U.S. Bachelor of Science degree in Management Information Systems and Computer Applications.

On December 20, 2012, the director denied the petition finding that the petitioner failed to establish 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) and therefore, that it will have a valid employer-employee relationship with the beneficiary.

On appeal, the petitioner provided additional supporting evidence, including, among other things, the following:

- A copy of a 5-page document on [REDACTED] letterhead entitled "Contractor Service Agreement," dated "04th day of November 2012," between the petitioner (referred to as "Contractor" therein) and [REDACTED] (The AAO will hereinafter refer to this document as the [REDACTED] Agreement.)⁷
- A copy of page 5 of the 5-page [REDACTED] Agreement entitled "Work Order," signed by [REDACTED] Vice President, [REDACTED] and the petitioner's president on November 4, 2012 (hereinafter, [REDACTED] Work Order). The [REDACTED] Work Order states, *inter alia*, that the vendor is the petitioner and that the consultant is the beneficiary, the company name where the services are to be provided is "[REDACTED]" that the "auth. start date" is October 1, 2012⁹ and that the "est. end date" is "TBD." The [REDACTED] Work

⁶ The AAO notes that this date predates the starting date of intended H-1B employment with the petitioner (October 12, 2012) attested to on the petition. The AAO further notes that the signatures for [REDACTED] seem uncannily similar to the signatures attributed to the petitioner's president.

⁷ The [REDACTED] Agreement is dated and was signed subsequent to the date of filing of the petition.

⁸ The signatures of Mr. [REDACTED] on the [REDACTED] Agreement and on the [REDACTED] Agreement are distinct and do not match. No explanation was provided for this distinction. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591.

⁹ The start date of October 1, 2012 listed in the [REDACTED] Work Order predates the start date of October 12, 2012 listed on the Form I-129.

Order further states that the “[s]cope of effort and services to be performed” is “[a]s per client[']s direction.”

- A copy of a letter on [REDACTED] letterhead from [REDACTED] Project Manager, addressed To whom it may concern, dated December 23, 2012, stating that “[t]he purpose of this letter is to confirm the assignment of [the beneficiary] who is an employee of [the petitioner]. [The beneficiary] [is] assigned as [a] Programmer Analyst on the [REDACTED] project through [the petitioner].” The letter further states, under the heading “JobSummary,” [sic] that the beneficiary “is responsible for the Programmer Analyst [sic], testing and maintenance.” Also, the letter states that the beneficiary is expected to:
 - Be a main player in the team, responsible for understanding the business, business flow, design, development and unit testing for all the modules.
 - Participate in several design sessions in order to create common development strategies.
 - Design and develop several Servlets, JSP’s and Java classes for presentation layer.
 - Responsible for writing business rule and accessing the web services from other system[s] such as CIIS.
 - Responsible for writing Oracle SQL queries/Stored Procedures using SQL/PLSQL.
 - Responsible for code reviews, testing, debugging.
 - Responsible for integration of all the modules using Tomcat web server[.]
 - Maintaining [sic] live application Automated Record Error Correspondence (AREC)[.]
 - Bug fixing and enhancement for the application AREC.

Finally, the letter states the following:

[The beneficiary] is an employee of [the petitioner], whom [sic] has the right to pay, hire, fire, [and] supervise their employee[.] At all times, [the petitioner] has [the] right to control the work of [the beneficiary], regardless of whether [sic] that right [is] exercised, through the duration of this contract. Any benefits, compensation, and performance reviews [the beneficiary] receives [will be] from [the petitioner]. As [the beneficiary] is an employee of [the petitioner], our company does not have the ability to assign [her] to any other project or to independently alter the terms of [her] assignment.

- A copy of the beneficiary’s paystubs from the petitioner for the weeks ending on October 15, 2012, November 1, 2012, November 30, 2012, and December 31, 2012.
- A copy of two notarized documents entitled, in part, “Affidavit of Statement” and dated January 4, 2013 (hereinafter, the Affidavits). The individuals making the statements in both

Affidavits claim that they have worked with the beneficiary at [REDACTED] from January 2011 until the present, that the beneficiary is a “contract worker at [REDACTED] and is the employee of [the petitioner],” and that the beneficiary “is employed in the position of Developer.”

During the course of its *de novo* review, the AAO noted that the content of the 12-page document entitled “Our Software Development Process,” that the petitioner had submitted into the record of proceeding as its own work-product and as representative of the range and quality of its services, appeared to have been taken, wholesale, and without attribution, from a copyrighted “White Paper” document authored by Dr. [REDACTED]. Consequently, the AAO issued a NDI/RFE and requested that the petitioner:

1. Provide (a) complete copies of relevant contracts and also (b) copies of the petitioner’s own related work-products, sufficient to establish that at the time when the petitioner submitted the “Our Software Development Process” document into the record of proceeding, the petitioner:
 - A. Was a firm engaged in (1) “management consulting,” (2) “training,” and (3) “research”; and
 - B. Included among its “[c]ore services” each of the following:
 - (1) “organizational project management maturity assessments”;
 - (2) “Strategic Project Office deployment and enhancement”;
 - (3) “methodology development”;
 - (4) “corporate training”;
 - (5) “project management technology integration”;
 - (6) “project portfolio management,” as well as
 - (7) “professional staffing and outsourcing services.”
2. Provide independent documentary evidence to rebut the AAO’s analysis and comments regarding the “Our Software Development Process” document if the petitioner thinks they are incorrect.
3. Provide evidence that the petitioner obtained permission from the author and the copyright holder of the original document.

Counsel responded to the AAO’s NDI/RFE. As supporting documents for its response to the AAO’s NDI/RFE, the petitioner, through counsel, submitted the following:

- A copy of what counsel claims is the petitioner’s updated company profile and marketing materials;
- Copies of several service, supplier, and consulting agreements;

- A copy of the “Employment Agreement, Confidentiality Agreement and Non-Competition Agreement,” made and entered into on October 3, 2012, between the petitioner and the beneficiary (previously submitted); and
- A copy of the “Employment offer letter” from the petitioner to the beneficiary dated October 3, 2012 (previously submitted).

II. LAW AND ANALYSIS

A. Inaccuracies and Inconsistencies in the Petition

Upon review of the entire record of proceeding and the totality of the evidence presented, the AAO notes, as a preliminary matter, that there are numerous inconsistencies and discrepancies in the petition and supporting documents, which undermine the petitioner's credibility. When a petition includes numerous errors and discrepancies, those inconsistencies raise serious concerns about the veracity of the petitioner's assertions. Accordingly, the AAO will discuss some of these issues.

Specifically, as previously discussed, the record of proceeding contains a 12-page document entitled “Our Software Development Process,” which the petitioner submitted into the record of proceeding as its own work-product and as representative of the range and quality of its services. The AAO noted that the document appeared to have been taken, wholesale, and without attribution, from a copyrighted “White Paper” document authored by another author.

As discussed above, the AAO issued a NDI/RFE requesting that the petitioner provide, among other evidence, “independent documentary evidence to rebut the AAO’s analysis and comments regarding the “Our Software Development Process” document if the petitioner thinks they are incorrect.” In its letter in response to the AAO’s NDI/RFE dated January 6, 2014, counsel for the petitioner states the following:

The use of copyrighted material was to no fault of the beneficiary.¹⁰ The company was attempting to promote Quality Assurance methodology and the documentation presented was not meant to infringe on copyrighted information. All marketing materials have been revised and no longer contain any copyrighted information. [Emphasis in the original.]

Upon review of counsel’s response to the AAO’s NDI/RFE, the AAO finds that the petitioner does not dispute that the petitioner used copyrighted material and presented it as its own work product and as representative of the range and quality of its services. Thus, it appears more likely than not that the petitioner transcribed verbatim the copyrighted document, without attribution to the original author. In addition, the petitioner’s document purports to be the petitioner’s work product; purports

¹⁰ The regulation at 8 C.F.R. § 103.3(a)(1)(iii)(B) specifically states that a beneficiary of a visa petition is not an affected party and does not have legal standing in such a proceeding.

to discuss the petitioner's own "Software Development Process"; implies that the work methodologies presented in Dr. [REDACTED] White Paper are methodologies that the petitioner employs and that the beneficiary would undertake for the petitioner; and implies that the content of the petitioner's "Our Software Development Process" document reflects the petitioner's (and not Dr. [REDACTED]) research, range of knowledge, experience, expertise, and corresponding Information Technology abilities. An inaccurate statement anywhere on the Form I-129 or in the evidence submitted in connection with the petition mandates its denial. *See* 8 C.F.R. § 214.2(h)(10)(ii); *see also* 8 C.F.R. § 103.2(b)(1). Thus, for this reason, the appeal will be dismissed and the petition will be denied.

Furthermore, the AAO finds that there are various inconsistencies in the record of proceeding. For instance, on the Form I-129, the petitioner stated that it has 14 employees. The petitioner's organizational chart appears to indicate that the petitioner employs 11 individuals. In contrast, on the Form I-290B, the petitioner asserts that "[the beneficiary] is the *sole employee* of [the petitioner] and has been for several years." [Emphasis added.] Moreover, it appears that the beneficiary was working for another employer prior to the filing of the instant petition, so it is unclear how the beneficiary "has been [the petitioner's employee] for several years." The record contains no explanation for these discrepancies. 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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

Also, as previously noted, on the Form I-129, the petitioner designates the proffered position as a "Computer Programmer," whereas in the second sentence on the first page of the letter of support, the petitioner states that it "seeks to employ [the beneficiary] as a Computer Programmer Analyst." Later, in the second paragraph (in bold) on the first page of the letter of support, the petitioner refers to the proffered position as "Computer Programmer." Later, in two instances in the first complete paragraph on the second page of the letter of support, the petitioner refers to "software engineers." Also, in various instances in the same letter, the petitioner refers to the female beneficiary with the masculine pronoun. No explanation was provided for the inconsistencies.

In addition, the petitioner filled out the "Trade Agreement Supplement to Form I-129" and, in Section 1, checked box (e), requesting Free Trade status based on "Free Trade, Other." It is unclear why the petitioner checked this designation and the petitioner provided no explanation.

Moreover, the record contains two letters from [REDACTED] on different company letterheads. One is a letter dated October 9, 2012 on [REDACTED] letterhead. The second letter, dated December 23, 2012, appears identical in content, but is on [REDACTED] letterhead. The petitioner provided no explanation as to why [REDACTED] wrote identical letters on the letterheads of what appear to be two different companies. Also, while in the brief on appeal, dated January 9, 2012, counsel

states that "there is no relationship between [REDACTED] and [REDACTED], as they are one and the same company," the petitioner did not submit any evidence that [REDACTED] and [REDACTED] are the same company. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The record also contains two service agreements and work orders that are signed by [REDACTED] one of which is between the petitioner and [REDACTED] dated November 4, 2012, and the other is between the petitioner and [REDACTED] signed on October 4, 2012. When compared, the two signatures of [REDACTED] are noticeably different from one another, thereby casting doubt as to the authenticity of the signatures and corresponding documents. Again, the petitioner provided no explanation for the discrepancy. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591.

Finally, the AAO finds that there are various inconsistencies in the record of proceeding with regard to the beneficiary's dates of intended employment. For instance, in the Labor Condition Application (LCA), the petitioner indicates that the dates of intended employment for the proffered position are September 5, 2012 to September 4, 2015. The Form I-129 indicates that the dates of intended employment are October 12, 2012 to September 4, 2015. However, the work order, signed on November 4, 2012 by the vice president of [REDACTED] and the president of the petitioner states that the authorized start date will be October 1, 2012 and does not list an end date. The employment offer letter, dated October 3, 2012 states that the beneficiary's employment would start on October 12, 2012 and indicates no end date for this employment. The record contains no explanation with respect to these inconsistencies.

Here, the inaccuracies and discrepancies catalogued above so undermine the credibility of the petition as to preclude its approval. The petitioner has failed to adequately address and explain the significant inaccuracies and inconsistencies in the record to establish eligibility for the benefit sought. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591. 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. *Id.* at 591-92.

Thus, the AAO finds that, fully considered in the context of the entire record of proceedings, the petitioner has failed to credibly establish that it offers the services specified in the petition and it is unclear what duties the beneficiary will perform for the end-client, [REDACTED]. Consequently, the petitioner has failed to sufficiently establish that it will be a "United States employer" having a valid employer-employee relationship with the beneficiary and that it will provide qualifying H-1B

employment to the beneficiary in accordance with the applicable statutory and regulatory provisions. Moreover, the petitioner has not sufficiently established that it would employ the beneficiary in the capacity specified in the petition and it has not established that the statement of facts contained in the petition is accurate. Accordingly, the appeal will be dismissed and the petition will be denied.

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

Nevertheless, the AAO will next discuss the director's decision, namely 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). The AAO will now review the record of proceeding to 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) (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.¹¹

¹¹ While the *Darden* court considered only the definition of "employee" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(6), and did not address the definition of "employer," courts have generally refused to extend the common law agency definition to ERISA's use of employer because "the definition of 'employer' in ERISA, unlike the definition of 'employee,' clearly indicates legislative intent to extend the definition beyond the traditional common law definition." *See, e.g., Bowers v. Andrew Weir Shipping, Ltd.*, 810 F. Supp. 522 (S.D.N.Y. 1992), *aff'd*, 27 F.3d 800 (2nd Cir.), *cert. denied*, 513 U.S. 1000 (1994).

However, in this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. Instead, in the context of the H-1B visa classification, the term "United States employer" was defined in the regulations to be even more restrictive than the common law agency definition. A federal agency's interpretation of a statute whose administration is entrusted to it is to be accepted unless Congress has spoken directly on the issue. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-845 (1984).

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

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 318-319.¹²

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).¹³ 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*

¹² 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))).

¹³ 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).

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."

For H-1B classification, the petitioner is required to submit written contracts between the petitioner and the beneficiary, or if there is no written agreement, a summary of the terms of the oral agreement under which the beneficiary will be employed. See 8 C.F.R. § 214.2(h)(4)(iv)(A) and (B). While the record of proceeding contains a copy of an employment agreement between the petitioner and the beneficiary, the petitioner indicated that the beneficiary will be assigned to work for another company, [REDACTED]

Prior to the denial decision, the petitioner had provided a copy of the [REDACTED] Agreement and copies of letters on [REDACTED] letterhead. In the RFE-response letter, the petitioner stated that it had attached a "[c]opy of our client contract and client letter," and attached a copy of the [REDACTED] Agreement and a copy of a second letter on [REDACTED] letterhead. The petitioner did not allude to [REDACTED] or suggest that it was a relevant party in this matter. In the denial decision, the director noted the petitioner had "not established that [the petitioner] or [its] vendor, [REDACTED] has a work arrangement with [REDACTED] to provide the beneficiary's services to [REDACTED]. The AAO notes that, on appeal, for the

first time, the petitioner, now acting through counsel, provided a copy of the [REDACTED] Agreement and a letter on [REDACTED] letterhead, and counsel stated that “[the beneficiary] will be working at the end client site [REDACTED] on a project through [REDACTED] (same company as [REDACTED]).” However, without documentary evidence to support the claim that [REDACTED] and [REDACTED] are the same company, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N at 534; *Matter of Laureano*, 19 I&N Dec. at 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

The AAO notes that the provisions in the [REDACTED] Agreement and [REDACTED] Agreement are essentially identical, and that the letters on [REDACTED] letterhead and the letter on [REDACTED] letter are mostly identical and contain the same grammatical errors. The AAO further notes that the address listed for [REDACTED] and [REDACTED] are the same address, and that both the [REDACTED] Agreement and [REDACTED] Agreement were signed by the same individual (although, as previously noted, the signature of this individual appears distinct on each agreement, thereby casting doubt as to the authenticity of the signatures and corresponding documents). Moreover, the AAO notes that the information in the [REDACTED] Work Order and in the [REDACTED] Work Order is essentially identical. However, the AAO must question why the petitioner did not mention [REDACTED] and provide a copy of the [REDACTED] Agreement and [REDACTED] letter in response to the director's RFE. Moreover, as noted above, no documentary evidence has been submitted by the petitioner and counsel to substantiate that [REDACTED] and [REDACTED] are the same company. 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)).

Furthermore, the November 16, 2012 letter signed by [REDACTED] Training Manager Design and Human Resources at [REDACTED] states that the beneficiary “works under [his] supervision.” The AAO notes that on appeal, counsel asserts that “the language of the [REDACTED] letter was taken out of context by the Service” and that Mr. [REDACTED] “position in human resources would be one in which he oversees [the beneficiary] in her capacity of [sic] a contract worker.” However, the AAO is not persuaded by counsel's assertions. The letter does not specify that Mr. [REDACTED] supervises the beneficiary solely in her capacity as a contract worker and the AAO will not read into the letter the words suggested by counsel that are not contained therein. Thus, upon a review of the plain language of the letter by [REDACTED] it is evident that the letter clearly states that the beneficiary works under Mr. [REDACTED] supervision. Moreover, the AAO finds that the petitioner has failed to establish that it exerts any substantial control over the beneficiary and the work she would perform while on assignment to its customer's client, [REDACTED].

Next, the AAO notes that both the [REDACTED] Work Order and [REDACTED] Work Order state that the “[s]cope of effort and services to be performed” are “[a]s per the client[']s direction.” Thus, the language on the work orders is indicative of day-to-day control by the end-client, [REDACTED].

Upon review of the aforementioned letter from [REDACTED] and both work orders, the AAO finds that the end-client, [REDACTED] – and not the petitioner – will exercise the most immediate and substantial control

over the beneficiary and the beneficiary's day-to-day work, and make determinations regarding the performance requirements and acceptability standards that would dictate the substantive nature of the beneficiary's daily work.

Further, the AAO finds materially significant the absence of any mention by the [REDACTED] representative of any measure of control by the petitioner over the specifications or performance requirements of the actual work to be performed by the beneficiary while assigned to [REDACTED]. In fact, the [REDACTED] representative only mentions [REDACTED] in his letter and it appears that he is unaware of the petitioner's involvement in the provision of personnel to perform the services at [REDACTED].

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 indicates that the end-client will be overseeing and directing the work of the beneficiary, rather than the petitioner.

The evidence of record, therefore, is insufficient to establish that the petitioner qualifies as a "United States employer," as defined by 8 C.F.R. § 214.2(h)(4)(ii). Merely claiming in its letters that the beneficiary is the petitioner's employee and that the petitioner - from its remote relationship to the end-client - supervises the beneficiary does not establish that the petitioner exercises any substantial control over the beneficiary and the substantive work that she performs. 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*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190).

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

Moreover, beyond the decision of the director, the evidence submitted fails to establish non-speculative employment for the beneficiary for the entire period requested. Although the petitioner requested, on the Form I-129, that the beneficiary be granted H-1B classification from October 12, 2012 to September 4, 2015, there is a lack of substantive documentation regarding work for the beneficiary for the duration of the requested period. Rather, the employment offer letter from the petitioner to the beneficiary, dated October 3, 2012, indicates that the employment start date is October 12, 2012 and does not list an end date. Likewise, work order agreements with [REDACTED] dated October 4, 2012, and [REDACTED] dated November 4, 2012, do not list an end date for the contracted work. Moreover, the [REDACTED] letter, dated November 16, 2012, indicates the end date of the project as January 30, 2014 (with a possibility of extension), which is significantly sooner than the requested H-1B duration.

Moreover, the date listed on the [REDACTED] Agreement indicates that it was entered into as of November 4, 2012, a date subsequent to the date that the petition was filed. Thus, the agreement between the petitioner and [REDACTED] was not in effect at the time the petition was filed and does not establish the availability of work for the beneficiary at the petition's filing date.

Upon review of all of the documentation in the record of proceeding, the AAO finds that the petitioner has not established the existence of work for the beneficiary from the date the petition was filed through the end of the requested period of H-1B employment. 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, even if it were found that the petitioner would be the beneficiary's United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii), the petitioner has not demonstrated that it would maintain such an employer-employee relationship with the beneficiary for the duration of the period requested.¹⁴

Based on the above, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary

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

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

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

"employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the appeal will be dismissed and the petition will be denied.

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

Moreover, even if it were determined that the petitioner had overcome the director's grounds for denying this petition (which it has not), the petition still could not be approved.

Beyond the decision of the director, the AAO will now address whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof 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 illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

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

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.

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. Moreover, in this matter, there are numerous inaccuracies and inconsistencies in the petition and supporting documents, which undermine the petitioner's credibility and fail to establish the nature of the work that the beneficiary would perform.

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 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.

The AAO does 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, the AAO 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 the AAO even if the service center does not identify all of the grounds for denial in the

initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed. The petition is denied.