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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: **MAR 31 2014**

OFFICE: CALIFORNIA 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,

*for Michael T. Kelly*  
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 (AAO) 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 software consulting company<sup>1</sup> that was established in 2008. In order to employ the beneficiary in what it designates as a "Marketing Campaign QA Analyst" position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).<sup>2</sup>

The director denied the petition, finding that the evidence in the record of proceeding failed to establish the existence of an employer-employee relationship between the petitioner and the beneficiary as needed to establish the petitioner as a U.S. employer as defined in the H-1B regulations.

The record of proceeding before the AAO 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.

Upon review of the entire record of proceeding, the AAO finds that the evidence of record as supplemented by the submissions on appeal does not overcome the director's grounds for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

#### I. Evidentiary Standard

As a preliminary matter, and in light of counsel's references to the requirement that the AAO apply the "preponderance of the evidence" standard, the AAO affirms that, in the exercise of its appellate review in this matter, as in all matters that come within its purview, the AAO follows 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:

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<sup>1</sup> On the Labor Condition Application (LCA) submitted with the petition, the petitioner provided a North American Industry Classification System (NAICS) Code of 541511, which corresponds to "Computer Systems Design and Related Services." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "541500 Computer Systems Design and Related Services," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

<sup>2</sup> The record indicates that the beneficiary currently holds F-1 status and seeks to change his nonimmigrant status to H-1B under this petition.

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.

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

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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.*

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In doing so, the AAO applies the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon its review of the present matter pursuant to that standard, however, the AAO finds 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 approved.

Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, the AAO finds that the director’s determinations in this matter were correct. Upon its 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, the AAO finds 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 the AAO to believe that the petitioner’s claims are “more likely than not” or “probably” true.



## II. Factual and Procedural History

### A. General Overview

The record of proceeding presents five (5) entities as connected to some degree or other with arranging the work cited as the basis of the petition. These are: (1) [REDACTED]

The petition identifies [REDACTED] as the business entity generating project work that would require the beneficiary's services at its [REDACTED] offices. The petitioner asserts that such project work will constitute a specialty-occupation level position for the beneficiary as a computer systems analyst working under the job title "Marketing Campaign Analyst."

According to the petition, [REDACTED] contracted with [REDACTED] to handle the project work to which the beneficiary would be assigned. According to the [REDACTED] letter of March 28, 2013, the beneficiary would work onsite at [REDACTED] offices on a project entitled "Service marketing database, [REDACTED]". The letter further claimed that the beneficiary's salary would be paid by the petitioner, and that the beneficiary would at all times be operating under the management and supervision of the petitioner.

We will next state certain preliminary findings that we have made in reviewing the evidence of record. They are an integral part of our overall analysis of the merits of the appeal, and they should therefore be regarded as so incorporated, whether or not we mention them again.

The AAO finds that, although [REDACTED] project work is supposedly the basis of the specialty occupation claim, the record of proceeding lacks any documentary evidence from [REDACTED] that (1) provides any information about any project or projects upon which the beneficiary would work; (2) provides any information about any terms of any contract under which [REDACTED] would accept assignment of the beneficiary; (3) in any way corroborates any of the petition's claims regarding the beneficiary's assignment to work at [REDACTED]

We also observe that, despite the fact that the director's RFE and denial decision clearly conveyed the relevance of such contractual documentation, the petitioner provided none to which [REDACTED] was a party.

We also note that the record does not indicate that the petitioner would have any other personnel at that asserted Michigan work location, let alone supervisory or management personnel at that location who would exercise substantive control over either the beneficiary's day-to-day work assignments or over the means and instrumentalities that the beneficiary would use or how he would use them.

Next, not only does the record show that the petitioner is geographically remote from [REDACTED] that entity to which the beneficiary would be assigned, but the record contains no documentary evidence



that the petitioner was a party to any discussions, negotiations, or contractual documents setting the scope of the project to which it is said the beneficiary would be assigned.

Also, the AAO finds that the absence of relevant documentary evidence from the end-client (such as, for instance, contracts, statements of work, contract specifications and conditions, or other documents delineating the specific work to be done in pursuit of the much-referenced [REDACTED] project) is in this case a material deficiency that precludes an adequate factual foundation for the AAO to identify, assess, and weigh enough employer-employee indicia for a reasonable determination that the petitioner has the requisite employer-employee relationship with the beneficiary.

Likewise, we also find that, within this particular record of proceeding, the absence of evidence from the end-client [REDACTED] relating to the substantive nature of whatever work the beneficiary would perform for it constitutes a material deficiency, as does the absence of evidence regarding whatever minimal educational requirements - if any - that [REDACTED] may have specified for such work. Further, those deficiencies are not overcome by any of the petitioner's assertions about the specialty-occupation nature of what the beneficiary would do on the assignment to [REDACTED]. 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. 1972)). 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).

#### B. Additional Details of the Record of Proceeding

In a letter of support dated March 28, 2013, the petitioner claims that it "provides professional software services to meet a customer's short-term or long-term needs." Specifically, it stated that its consultants are experienced software designers, developers, and implementers, and it also claimed that, by working with users, the petitioner designs and implements systems to meet client requirements.

As already noted, the petitioner stated that the beneficiary would be employed as a marketing campaign analyst, and would be assigned to work onsite at the offices of [REDACTED] on a project entitled [REDACTED] campaign implementation." The petitioner described this project as follows:

Design of a vehicle-centric database to build business campaigns using raw SQL and the Unica tool. In addition, the position entails the redesign of legacy service marketing campaigns running on mainframes on the Unica tool. Finally, the project will require the collaboration with marketing managers and business analysts to construct and deliver new email and direct mail campaigns according to business intent.

The petitioner further claimed that the beneficiary would perform the following duties:

- Resolve network and infrastructure issues to the Unica tool

- Consult with marketing managers to discuss the targeting of marketing campaigns
- Provide insight about the various segmentation available in data
- Work with various cross-functional teams: database, marketing, print vendors
- Optimize queries and performance of large campaigns with SQL optimization and flowchart optimization
- Access customer data and build marketing campaigns on Unica Campaign
- Generate ROI and KPI reports for the service campaigns
- Analyze data after the SPSS and reporting the data discrepancies
- End user testing
- Create documentation for the guidelines to use the Unica Tool for campaign analysis

The petitioner further claimed that the beneficiary was qualified to perform the duties of the proffered position based on his master's degree in electrical and computer engineering from the [REDACTED] and his bachelor's degree in electrical and electronics engineering from [REDACTED]

The petitioner also submitted a letter from [REDACTED] dated March 28, 2013. In this letter, [REDACTED] confirmed that the beneficiary would be assigned to the [REDACTED] project, and affirmed the statement of duties provided by the petitioner and also confirmed that the petitioner would compensate and control the beneficiary during the course of his assignment.<sup>3</sup>

Finally, the petitioner submitted a certified Labor Condition Application (LCA), which states that the proffered position is a "Marketing Campaign Analyst " position, and that it corresponds to Standard Occupational Classification (SOC) code and title 15-1121, Computer Systems Analysts from the Occupational Information Network (O\*NET). Both the LCA and the visa petition state that the beneficiary would work at [REDACTED] location at [REDACTED] Michigan.

The director issued an RFE on April 19, 2013. Specifically, the director noted that the record contained insufficient evidence to demonstrate the contractual relationship between the petitioner and the end-client, [REDACTED]. The director noted that the record contained no evidence establishing the nature of the relationship between the petitioner and the intermediate vendor [REDACTED] and further noted that the record was devoid of evidence establishing the nature of the work agreement for the beneficiary's services at [REDACTED]. The director requested documentation to establish the nature of this relationship, as well as additional documentation demonstrating the petitioner's right to control the work of the beneficiary while working onsite at [REDACTED].

In a letter dated July 8, 2013, the petitioner responded to the director's request. The petitioner resubmitted the letter from [REDACTED] dated March 28, 2013, claiming that the statements contained

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<sup>3</sup> The petitioner also submitted various documents pertaining to the beneficiary's educational background. As the beneficiary's qualifications are not at issue in this proceeding, they will not be discussed further.



therein with regard to the petitioner's compensation and supervision of the beneficiary clearly established its right to control the beneficiary during his assignment with [REDACTED]. Regarding the contractual relationship of the petitioner and [REDACTED], the petitioner relied on newly-submitted evidence in response to the RFE, such as: (1) a copy of a Professional Services Agreement dated March 30, 2012 between [REDACTED]; (2) a copy of a Vendor Agreement dated October 24, 2011 between [REDACTED]; (3) a copy of a Preferred Vendor Agreement dated October 31, 2011 between [REDACTED] and the petitioner; (4) a copy of the beneficiary's ID badge with [REDACTED]; (5) copies of the beneficiary's timesheets from [REDACTED]; (6) copies of emails between the beneficiary and [REDACTED] as well as emails sent from the beneficiary's [REDACTED] email account to the petitioner; (7) a copy of the Employment Agreement between the petitioner and the beneficiary dated March 7, 2013; (8) a copy of an Offer Letter from the petitioner to the beneficiary dated March 21, 2013; (9) a copy of the beneficiary's Performance Evaluation Review dated April 5, 2013; (10) a copy of the petitioner's organizational chart; and (11) a copy of a January 8, 2010 memorandum issued by USCIS.

The director denied the petition on July 16, 2013, finding that submitted documentation was insufficient to establish eligibility for the benefit sought. On appeal, counsel submitted a brief and additional evidence and contends that the findings of the director were erroneous.

### III. Analysis

The issue for consideration is 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). As already stated, the AAO finds that the record of proceeding is fundamentally incomplete with regard to the employer-employee issue. The record lacks copies of the keystone documents that would best show both the relative extent of the petitioner's supervision and control over the beneficiary and also the substantive nature of the beneficiary's work. Consequently, the record of proceeding lacks an adequate evidentiary basis to support reasonable findings that the petitioner more likely than not has the requisite employer-employee relationship with the beneficiary.

The AAO will now discuss why it has concluded that the petitioner has not 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." *Id.*

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

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

The term "United States employer" is defined 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 legacy Immigration and Naturalization Service ("INS") nor USCIS defined the terms "employee" or "employer-employee relationship" by regulation for purposes of the H-1B visa classification, even though the regulation describes H-1B beneficiaries as being "employees" who must have an "employer-employee relationship" with a "United States employer." *Id.* Therefore, for purposes of the H-1B visa classification, these terms are undefined.

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

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

*Darden*, 503 U.S. at 323-324 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. at 751-752); see also *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 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.<sup>4</sup>

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<sup>4</sup> 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



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.<sup>5</sup>

Therefore, in the absence of an express congressional intent to impose broader definitions, both the "conventional master-servant relationship as understood by common-law agency doctrine" and the *Darden* construction test apply to the terms "employee" and "employer-employee relationship" as used in section 101(a)(15)(H)(i)(b) of the Act, section 212(n) of the Act, and 8 C.F.R. § 214.2(h).<sup>6</sup>

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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).

<sup>5</sup> 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))).

<sup>6</sup> 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).



In considering whether or not one will be an "employee" in an "employer-employee relationship" with a "United States employer" for purposes of H-1B nonimmigrant petitions, USCIS must focus on the common-law touchstone of "control." *Clackamas*, 538 U.S. at 450; *see also* 8 C.F.R. § 214.2(h)(4)(ii) (defining a "United States employer" as one who "has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise *control* the work of any such employee . . . ." (emphasis added)).

The factors indicating that a worker is or will be an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. *Darden*, 503 U.S. at 323-324; *Clackamas*, 538 U.S. at 445; *see also* *Restatement (Second) of Agency* § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. *See Clackamas*, 538 U.S. at 445; *see also* *New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1) (adopting a materially identical test and indicating that said test was based on the *Darden* decision); *see also* *Defensor v. Meissner*, 201 F.3d 384, 388 (5th Cir. 2000) (determining that hospitals, as the recipients of beneficiaries' services, are the "true employers" of H-1B nurses under 8 C.F.R. § 214.2(h), even though a medical contract service agency is the actual petitioner, because the hospitals ultimately hire, pay, fire, supervise, or otherwise control the work of the beneficiaries).

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

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

In the case before us, the petitioner claims that it has an employer-employee relationship with the beneficiary. In its aforementioned March 28, 2013 letter, the petitioner claims that its management has the right to control the beneficiary's employment. Specifically, the petitioner stated:

As with all our employees, the beneficiary will be operating at all times under the direction and control of [the petitioner's] management. All activities, including administrative, managerial, supervisory, paying, hiring, and firing decisions, as well as performance evaluations and tax treatment, are controlled by [the petitioner]. This is the complete position description, function, and itinerary for the beneficiary's work. No other locations are currently anticipated.

The letter from [redacted] dated March 28, 2013 also makes the same claims with regard to the control of the beneficiary.

In addition, the petitioner submitted copies of two email messages from [redacted] employees in support of the contention that the petitioner is in fact the beneficiary's employer based on its exclusive right to control the beneficiary's work. These email messages, however, are insufficient to establish an employer-employee relationship is required herein. For example, the first email submitted in response to the RFE, is from [redacted] Manager – Marketing Relationship Management, and is dated May 23, 2013. This email states simply as follows:

To whom it may concern:

[The beneficiary] is a member of my team who's services are required by [redacted]  
Sales & Marketing Application area at the [redacted] located on [redacted]  
[redacted]

Regards,  
Tim

Despite the petitioner's claim to the contrary, this email message provides no evidence establishing that [redacted] was obliged to accept the beneficiary's services at all or that [redacted] was not free to hire, terminate, control and pay for the beneficiary's services on whatever contractual terms it found to its liking.

The second email submitted on appeal, dated August 8 2013, is from [redacted] Customer Relations manager, and is addressed to the beneficiary. This message, like the letters from the petitioner and [redacted] discussed above, also states that the petitioner has the right to control the beneficiary and claims that the beneficiary will at all times be under the petitioner's control.

The AAO, however, accords no probative weight to the assertions set forth in this email or in either of the letters discussed above. These documents contain no documentary evidence of the contractual terms of the beneficiary's assignment with [redacted] nor do they substantiate what control, if any, the petitioner would maintain over the beneficiary in relation to the [redacted] project. Aside from a conclusory, uncorroborated, and therefore unpersuasive statement proclaiming that the



petitioner will control the beneficiary's work, the record is not supported by documentary evidence to corroborate this assertion. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

The petitioner also relies on the Employment Agreement, dated March 7, 2013, and the Offer Letter, dated March 21, 2014, and claims these documents, coupled with the documentation discussed above establish that an employer-employee relationship exists between the parties. Although these documents outline some basic terms of the beneficiary's employment with the petitioner such as salary and benefits, these documents alone do not establish an employer-employee relationship as contemplated by the regulations. The AAO acknowledges that the payment of wages can be a pertinent factor to determining the petitioner's relationship with the beneficiary. However, while such items as wages, social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., where will the work be located, who will provide the instrumentalities and tools, who will oversee and direct the work of the beneficiary, 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.<sup>7</sup> However, as already noted, the evidence of record lacks sufficient evidence to establish most of what we referred to above as those "other incidents of the relationship."

The AAO has considered these assertions within the context of the record of proceeding. However, as will be discussed, there is insufficient probative evidence in the record to support these assertions and, contrary to counsel's contentions, the claims set forth in response to the RFE and again on appeal are not supported by independent, objective evidence. Once again, we note that 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. Applying the *Darden* and *Clackamas* tests to this matter, the petitioner has not established that it will be a "United States employer"

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<sup>7</sup> In response to the RFE and again on appeal, the petitioner cites to a January 8, 2010 memorandum issued by USCIS (the "Neufeld memo"). See Memorandum from Donald Neufeld, Acting Director, Service Center Operations, U.S. Citizenship and Immigration Services, Department of Homeland Security, *Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements*, HQ 70/6.2.8 (Jan. 8, 2010). According to the petitioner, eligibility has been established under the Neufeld memorandum based on the "totality of the circumstances" and thus the petition should be approved. We disagree with the petitioner's analysis. We find that the petitioner's claims as to the sufficiency of evidence to prevail on the weighing of the indicia noted in the Neufeld memo is not supported by evidence of record and therefore have no merit. In this regard, we also find that the same evidentiary deficiencies that we have detailed in this decision also equally apply to the application of the memo's methodology. Accordingly, the petition fails both under the common-law test enunciated by the Supreme Court and also by application of the employer-employee indicia specified in the memo – and this record establishes very few such indicia for consideration.



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). Although the record contains an Employment Agreement and Offer Letter between the petitioner and the beneficiary, agreed upon and signed by both parties on March 7, 2013 and March 21, 2013, respectively, these documents do not provide any level of specificity as to the beneficiary's duties and the requirements for the position. While an employment agreement may provide some insights into the relationship of a petitioner and a beneficiary, it must be noted again that 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.

As previously noted, when making a determination of whether the petitioner has established that it has or will have an employer-employee relationship with the beneficiary, the AAO looks at a number of factors, including who will provide the instrumentalities and tools required to perform the duties; the provision of employee benefits; and the beneficiary's role in hiring and paying assistants. Upon review of the record of proceeding, the petitioner did not provide probative evidence on these issues.

Further, upon review of the record, the AAO notes that the petitioner has not established the exact relationship between the parties, and the duration of that claimed relationship. The petitioner repeatedly claims throughout the record that the beneficiary will be employed on [REDACTED] project work for the duration of the requested validity period, and depicts the path of this contractual relationship as follows:

[REDACTED]

The record contains the following documents pertinent to this claim:

- Preferred Vendor Agreement between the petitioner and [REDACTED] dated October 31, 2011, stating that the agreement will "be in force and effect for a term of one year, after which the agreement will be automatically renewed unless cancelled."
- Vendor Agreement between [REDACTED] dated October 24, 2011, which does not state a termination date and indicates that the agreement can be cancelled at any time upon fifteen days' notice from with party;
- Professional Services Agreement between [REDACTED] dated March 30, 2012 and accepted by [REDACTED] on May 23, 2012, indicating that the duration of the agreement shall be one year from the date of signing unless terminated earlier.

However, the record does not contain a written agreement between [REDACTED] or the petitioner and [REDACTED] establishing that H-1B caliber work exists for the beneficiary for the

duration of the requested period. Although the March 28, 2013 letters from both the petitioner and [REDACTED] claim that the beneficiary will work onsite at [REDACTED] and there are some indications, as we noted, of the beneficiary's presence at [REDACTED] there is no [REDACTED] contract or other [REDACTED] evidence supporting this claim.

The director noted further deficiencies in his denial, pointing out that by virtue of the terms set forth in the agreements between the petitioner and [REDACTED] and [REDACTED] and [REDACTED] these agreements appeared to have expired prior to October 1, 2013, the start of the requested validity period. On appeal, the petitioner asserts that the director's conclusions regarding these documents were erroneous.

First, the petitioner notes that its agreement with [REDACTED] dated October 31, 2011, states that the agreement will "automatically renew unless cancelled." The AAO takes note of this language and concurs with the petitioner's assertions regarding the impact of this agreement, and consequently withdraws the director's comments to the contrary regarding this document.<sup>8</sup>

Regarding the agreement between [REDACTED] and [REDACTED] dated March 30, 2012 and accepted by [REDACTED] on May 23, 2012, the director found that this agreement had also expired prior to the requested start date in this petition. Specifically, the AAO notes this conclusion was based on the agreement's language which provides that the term of the agreement "shall be one year from the date of signing unless terminated earlier." On appeal, the petitioner submits a renewed Professional Services Agreement entered into by [REDACTED] and [REDACTED] on April 1, 2013.<sup>9</sup> The petitioner asserts that this renewed agreement, coupled with the fact that the original agreement submitted does not provide for automatic termination, establishes the continued contractual relationship between [REDACTED] and [REDACTED]. Upon review, the AAO concurs with the petitioner's contentions and finds that the record contains a valid professional services agreement between [REDACTED] and [REDACTED] that was valid at the time the petition was filed. The AAO will also withdraw the director's comments with regard to this contractual relationship.

Regardless of the fact that the petitioner has established by a preponderance of evidence the continued existence of the contractual agreements between the petitioner and [REDACTED] and [REDACTED] and [REDACTED] the relevant issues here, which remain unresolved, are (1) whatever contractual terms and conditions to which [REDACTED] is a party governs the [REDACTED] project work and (2) whatever on-the-job factors of control over the beneficiary, the beneficiary's work, and the means and instrumentalities of that work are operative during the beneficiary's day-to-day job performance at [REDACTED]. Again, the petitioner claims the beneficiary will be employed onsite at [REDACTED] offices, and seeks to establish an employer-employee relationship with the beneficiary through the following contractual path:

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<sup>8</sup> The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

<sup>9</sup> It is noted that, in this renewed agreement, the location of [REDACTED] offices changed from [REDACTED] Pennsylvania to [REDACTED] New Jersey.



Petitioner → [REDACTED]

The record contains sufficient evidence establishing contractual agreements between the following entities:

Petitioner → [REDACTED]

However, to establish an employer-employee relationship in this matter, the petitioner must provide for USCIS consideration the role and reach of the prime mover in the whole scenario, namely, [REDACTED] the entity generating the project work and ultimately determining what is to be done, by whom, on what schedule, on what terms, and at what costs.

In fact, aside from the two email messages discussed earlier in which we find no probative value, and the unsupported claims of the petitioner and [REDACTED] in the letters dated March 28, 2013, there is no evidence in the record demonstrating that a contractual agreement for the beneficiary's services exists between [REDACTED] and the petitioner, or [REDACTED] and any of the above vendors.

It is noted that, on appeal, the petitioner submits for the first time an undated document entitled "PURCHASE ORDER – Addendum/Extension" between the petitioner and [REDACTED]. Specifically, this purchase order identifies the beneficiary as the consultant for the following client/location:

[REDACTED]

The purchase order further states that this agreement will be effective from October 1, 2013 through September 30, 2015 "with further extension possible."

Again, as discussed above, the AAO does not dispute that the petitioner has established a contractual agreement with [REDACTED] and subsequent agreements through the intermediate vendors [REDACTED] and [REDACTED] by virtue of its agreement with [REDACTED]. However, despite the submission of a purchase order for the beneficiary's services with [REDACTED] on appeal, the record is devoid of any evidence establishing the manner in which the beneficiary's services were ultimately recruited and required by [REDACTED].

Moreover, the purchase order contains little to no probative value, and contains contradictory information that casts further doubt with regard to the legitimacy of the petitioner's claims in this matter. First, the document provides no information regarding the nature or specific requirements of the project. More importantly, however, the client/location in this purchase order is identified as [REDACTED] Illinois. As discussed throughout the record, the claimed work location of the beneficiary for the duration of the requested validity period, as evidenced on the Form I-129 petition and the certified LCA, is [REDACTED] Michigan. There is no evidence in the record to demonstrate that the beneficiary would be working in Illinois, nor are any of the vendors involved in this agreement located in Illinois. 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).



Additionally, although not in itself a decisive factor, we find that this [REDACTED] address which has no apparent relationship to any entity mentioned by the petitioner or in its submissions casts doubt on the credibility of the petition.

In addition, a key element in this matter is who would have the ability to hire, fire, supervise, or otherwise control the work of the beneficiary for the duration of the H-1B petition. The AAO observes that in the RFE, the director specifically requested that the petitioner provide documentation to clarify the petitioner's employer-employee relationship with the beneficiary. The director provided a list of the types of evidence that would be relevant, which included a request that the petitioner submit an organizational chart, and a brief description of who will supervise the beneficiary along with the person's duties and/or other similarly probative documents.<sup>10</sup> However, the petitioner failed to provide specific information regarding the beneficiary's supervisor (e.g., job title, duties, location).

Again and lastly, the petitioner briefly claims in the March 28, 2013 letter that it has the right to control the beneficiary. Again, despite the numerous contractual agreements submitted into the record, the petitioner did not provide any information regarding how work and performance standards are established, the methods for assessing and evaluating the beneficiary's performance, who will prepare the reports, the criteria for determining bonuses and salary adjustments, et cetera. Although the record contains a copy of an "Employee Performance Review" for the beneficiary dated April 5, 2013, which is completed by [REDACTED] there is no detail regarding the nature of the project being evaluated and insufficient evidence to demonstrate that this is the manner in which the beneficiary would be supervised and evaluated during the requested validity period. Moreover, the document submitted is vague, generic, and provides little information as to how evaluations are performed and who will actually assess the beneficiary's work beginning in October 2013. Moreover, the beneficiary's timesheets, submitted in response to the RFE, are managed by [REDACTED] not the petitioner. Most importantly, there are no substantiated statements as to how the day-to-day work of the beneficiary will be evaluated, supervised and/or overseen – but we do again note the absence of evidence of any management or supervisory personnel of the petitioner at the [REDACTED] work location.

Finally, beyond the decision of the director, the evidence submitted fails to establish non-speculative employment for the beneficiary for the entire period requested. Although the petitioner requested, on the Form I-129, that the beneficiary be granted H-1B classification from October 1, 2013 to September 11, 2016, there is insufficient documentation regarding work for the beneficiary for the duration of the requested period. The record contains two documents that pertain to the beneficiary's work during the requested validity period: (1) the undated purchase order

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<sup>10</sup> Although the petitioner submitted an organizational chart in response to the RFE, which indicated that the beneficiary would be one of a number of employees under the supervision of [REDACTED] Unica Specialist, who in turn was supervised by [REDACTED] there is no additional information regarding the nature of the beneficiary's supervision. Moreover, there is no explanation with regard to [REDACTED] and whether this represents another entity with whom the petitioner has a contractual relationship for consulting services.

submitted for the first time on appeal; and (2) the email message from [REDACTED] also submitted for the first time on appeal.

The purchase order states that the [REDACTED] project will commence on October 1, 2013 and continue for 24 months, or through September 30, 2015, with "further possible extension." As discussed above, this document is not probative here, since it identifies a project location that does not correspond to the claimed project location in the petition. Nevertheless, if this document were deemed probative by the AAO, it would likewise be insufficient since the requested validity period in this matter continues through September 11, 2016. The only official document pertaining to any work assignment for the beneficiary, therefore, covers only 24 months of the requested three-year validity period. Moreover, while the email message from [REDACTED] dated August 8, 2013, states that "this project is ongoing and expected to extend to at least September 11, 2016, there is no independent documentation to support this claim. In addition, the email refers to a [REDACTED] project in [REDACTED] Michigan and not [REDACTED] Illinois as set forth in the purchase order. Again, 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. at 591-92. 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.

The petitioner submitted insufficient and contradictory evidence regarding the work assignments for the beneficiary during the requested validity period. Moreover, if the purchase order discussed above was probative in that it identified the correct work location and was supported by contractual documentation establishing that an agreement for the beneficiary's services did in fact exist with [REDACTED] it nevertheless did not cover the entire requested validity period. Based on these deficiencies, 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.<sup>11</sup>

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<sup>11</sup> 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



The evidence of record does not establish that the petitioner would act as the beneficiary's U.S. employer as defined in the H-1B regulatory context. Despite the director's specific request for evidence on this issue, and the content of the director's decision, the petitioner still has not submitted sufficient evidence to corroborate its claim. It bears repeating that 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.

As related above, the evidence of record is just too skeletal for the petitioner to establish that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii). Furthermore, the petition must also be denied due to the petitioner's failure to establish eligibility at the time of filing and to proffer non-speculative employment to the beneficiary.

Beyond the decision of the director, the petitioner has also failed to establish that 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:

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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).

*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 387. To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), USCIS consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484



F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

The AAO notes that, as recognized by the court in *Defensor, supra*, where, as here, 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 legacy Immigration and Naturalization Service 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.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not rely simply upon a proffered position's title. The specific duties of the position, combined with the nature of the petitioning entity's business operations, are factors to be considered to determine whether the position qualifies as a specialty occupation. USCIS must examine the extent and substance of whatever documentary evidence is provided with regard to the substantive nature of the specific work that the end-client (in this case, [REDACTED] may require as the ultimate employment of the beneficiary. See generally *Defensor v. Meissner*, 201 F. 3d at 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.

The AAO finds that the critical, decisive evidence for determining the specialty occupation issue in this appeal is the extent and quality of the evidence that the record of proceeding presents with regard to both particular substantive work that the beneficiary would actually perform, and also the nature and educational level of substantive knowledge in a specific specialty that the beneficiary would have to practically and theoretically apply in order to perform that work.

As reflected in the earlier discussions herein regarding the petitioner's assertions and the documentary evidence contained in the record, it appears that the actual, day-to-day work to be performed by the beneficiary would be ultimately determined by [REDACTED] the end-client, or by [REDACTED] in consultation with [REDACTED] based upon whatever [REDACTED] contractual obligations to [REDACTED] would be. As reflected in the discussions and analyses throughout this decision, the record lacks sufficient evidence from these entities - and from the most critical entity, [REDACTED] - to establish the

actual nature of the beneficiary's duties and the educational level of substantive knowledge in any specific specialty that the beneficiary would have to employ.

Again the AAO notes first that the record of proceeding is devoid of a copy of any contractual documentation between [REDACTED] and [REDACTED] the entity identified as requiring the beneficiary's services. Such documentation is material for an understanding of the nature and requirements of the asserted project in which the beneficiary would be involved.

Regarding the claimed duties of the beneficiary, the letter from [REDACTED] dated March 28, 2013, stated that they would be as follows:

- Resolve network and infrastructure issues to the Unica tool
- Consult with marketing managers to discuss the targeting of marketing campaigns
- Provide insight about the various segmentation available in data
- Work with various cross-functional teams: database, marketing, print vendors
- Optimize queries and performance of large campaigns with SQL optimization and flowchart optimization
- Access customer data and build marketing campaigns on Unica Campaign
- Generate ROI and KPI reports for the service campaigns
- Analyze data after the SPSS and reporting the data discrepancies
- End user testing
- Create documentation for the guidelines to use the Unica Tool for campaign analysis<sup>12</sup>

We find that the evidence of record does not establish whatever substantive work would be involved, and what associated level of training, work experience, or educational level of specialized knowledge in a computer-related specialty would be required to perform such work. The statement of duties provided by [REDACTED] and again repeated by a representative of [REDACTED] is vague, generalized, and fails to specifically identify the exact nature of the duties the beneficiary will perform. Phrases such as "access customer data and build marketing campaigns" and "consult with marketing managers to discuss the targeting of marketing campaigns" do not identify duties typically associated with those of a computer systems analyst. The AAO further observes that neither this [REDACTED] letter nor any other portion of the record provides substantive details about the Unica Project for [REDACTED]. Further, there is no persuasive evidence in the record of proceeding that establishes that taken at face value the duties as described in this [REDACTED] letter would comport with those of the Computer Systems Analyst occupational classification for which the petition was filed.

Finally, based upon our review of the totality of this record's vague overview of the proffered position, we find no reasonable evidentiary basis for determining that the proffered position would even fall within the Computer Systems Analyst occupational category asserted by petitioner as central to its specialty occupation claim.

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<sup>12</sup> It is noted that [REDACTED] email from [REDACTED] dated August 8, 2013, contains the identical description of duties stated above, and contains language that is virtually identical to the body of [REDACTED] letter in general.



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

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

#### IV. 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 appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate 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; *see e.g., Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The appeal is dismissed.