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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: **MAY 01 2014**

Office: CALIFORNIA SERVICE CENTER File: [REDACTED]

IN RE:

Petitioner: [REDACTED]

Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg  
Chief, Administrative Appeals Office

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

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a software training, development and IT services business established in 2008, with 10 employees. In order to employ the beneficiary in what it designates as a "Business Systems Analyst" position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

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

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; and (5) the petitioner's Notice of Appeal or Motion (Form I-290B), and supporting documentation. 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.

The AAO will also address an additional, independent ground, not identified by the director's decision, that the AAO finds also precludes approval of this petition.<sup>1</sup> As a preliminary matter, the evidence submitted fails to establish that the petitioner will be a United States employer having an employer-employee relationship with the beneficiary as an H-1B temporary employee.

#### 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 business systems analyst to work on a full-time basis at a salary of \$67,621 per year. In addition, the petitioner indicated that the beneficiary would be employed at "[REDACTED] CA [REDACTED]". The petitioner stated on the Form I-129 that the dates of intended employment are from October 1,

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

2013 to September 1, 2016.

The petitioner also submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification of "Computer Systems Analysts" – SOC (ONET/OES Code) 15-1121. The petitioner designated the proffered position as a Level I (entry level) position. In the LCA, the petitioner indicated that the beneficiary would work at (1) the petitioner's location; (2) [REDACTED] CA [REDACTED] and (3) [REDACTED] CA [REDACTED]

In a letter of support dated April 1, 2013, the petitioner stated that the beneficiary will be responsible for the following duties:

1. Expand or serve on new system and improve the work flow;
2. Maintain and check computer programs systems;
3. Develop and revise the system procedures to meet the standards requirements;
4. Modify, analyze and correct the performance indicators to locate system problems;
5. Support the system to help the company to increase the compatibility and information [that] can be shared with clients;
6. Consult with management to ensure agreement on system principles[.]

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

- A copy of the beneficiary's diploma indicating that he completed a Master of Science in Software Engineering degree at [REDACTED] in California;
- A copy of a document titled "Professional Service Agreement" effective as of January 16, 2013, by and between [REDACTED] and the petitioner; and
- A copy of the Exhibit A, Statement of Work (SOW) dated March 22, 2013, entered into pursuant to the Professional Service Agreement. The SOW indicates that the consultant resource is the beneficiary, the start date is October 1, 2013 and the end date is "December 31, 2014 extendible."

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on April 30, 2013. The director asked the petitioner to submit evidence to demonstrate that it will have an employer-employee relationship with the beneficiary and that the proffered position is a specialty occupation.

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

- A letter from the petitioner's counsel, dated July 18, 2013, stating that "the petitioner will have the sole right to control the beneficiary's work, which includes the ability to hire, fire, and supervise the beneficiary. These elements will continue to exist throughout the duration of the requested H-1B validity period, from October 1, 2013 to September 1, 2016."

Counsel also provided a table indicating the difficulty levels for the proffered position's tasks, as shown below:

SN	TASKS	DIFFICULTY LEVEL
1	Analyze, implement and improve systems requirement and data processing problems[.]	4.5
2	Analyze user requirements, procedures and problems to automate or improve existing systems and review computer system capabilities workflow and scheduling limitations.	5.0
3	Install, expand, improve and recommend new software[.]	5.0
4	Maintain and check programs systems for any flaw and ensure its smooth work process[.]	4.0
5	Develop and revise the system procedures to meet standard requirements; support systems functionality and consult with management team to ensure work continuity[.]	4.0
TOTAL		22.5/25= 90%

#### NOTES ON DIFFICULTY LEVEL

1	Novice
2	Some Exposure
3	Familiarity with subject
4	Having gained College Degree
5	Master Degree

Counsel stated that "only a person who is having a Bachelors Degree and something less than being a Master Degree will be able to perform the job of a Business Systems Analyst. This thus qualifies it for the job of a specialty occupation."



- <sup>2</sup> The petitioner submitted a copy of the "Professional Service Agreement" effective as of January 16, 2013, by and between [REDACTED] Inc. and the petitioner. In this letter, Mr. [REDACTED] refers to the "Primary Sourcing Agreement" (Sourcing Agreement) effective January 16, 2013. The Sourcing Agreement was not submitted into the record. It is unclear whether this is the same agreement as the Professional Service Agreement. No explanation was provided for the discrepancy.

<sup>2</sup> The petitioner submitted a copy of the "Professional Service Agreement" effective as of January 16, 2013, by and between [REDACTED] Inc. and the petitioner. In this letter, Mr. [REDACTED] refers to the "Primary Sourcing Agreement" (Sourcing Agreement) effective January 16, 2013. The Sourcing Agreement was not submitted into the record. It is unclear whether this is the same agreement as the Professional Service Agreement. No explanation was provided for the discrepancy.

- Analyze user requirements, procedures and problems to automate or improve existing systems and review computer system capabilities workflow and scheduling limitations[;]
  - Install, expand, improve and recommend new software;
  - Maintain and check programs systems for any flaw and ensure its smooth work process;
  - Develop and revise the system procedures to meet standard requirements;
  - Support systems functionality;
  - Consult with management team to ensure work flow;
  - Other incidental responsibilities not mentioned hereinabove.
- A copy of the petitioner's organizational chart;
- A copy of the beneficiary's paystubs from the petitioner for May and June 2013;
- A copy of the beneficiary's Form W-2 Wage and Tax Statement for 2012, issued by the petitioner;
- A promotional document for the client, [REDACTED];
- A copy of an evaluation of the beneficiary's educational credentials by Dr. [REDACTED] from [REDACTED];
- An employment offer letter from the petitioner to the beneficiary, dated September 24, 2012; and
- An employment agreement between the petitioner and the beneficiary, dated October 1, 2012.

On August 6, 2013, the director denied the petition finding that the petitioner failed to establish (1) that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions; and (2) that it has sufficient work for the beneficiary for the requested period of intended employment.

On appeal, the petitioner provided a brief dated September 3, 2013. The petitioner did not submit any additional evidence.

## II. LAW AND ANALYSIS

### A. 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 various inconsistencies in the record of

proceeding with regard to the beneficiary's dates of intended employment. When a petition includes numerous errors and discrepancies, those inconsistencies raise serious concerns about the veracity of the petitioner's assertions.

For instance, in the LCA, the petitioner indicates that the dates of intended employment for the proffered position are September 2, 2013 to September 1, 2016. The Form I-129 indicates that the dates of intended employment are October 1, 2013 to September 1, 2016. However, the employment offer letter dated September 24, 2012 states that the beneficiary's employment will be from October 1, 2013 to September 30, 2016. A document titled "Project Description and Itinerary" identifies the beneficiary as the consultant for the project and indicates project dates from October 2013 to December 2016. The record contains no explanation with respect to these inconsistencies.

The record also contains inconsistencies regarding the location where the beneficiary would be working. On the Form I-129, the petitioner checked the box on page 4, at Part 5, indicating that the beneficiary would work off-site at [REDACTED] CA [REDACTED]. However, in the LCA, the petitioner identified three work locations:

1. [REDACTED] CA [REDACTED] (the petitioner's address);
2. [REDACTED], CA [REDACTED], and
3. [REDACTED] CA [REDACTED]

In a support letter, dated April 1, 2013, the petitioner stated that the beneficiary "will work from [the] client office at [REDACTED] CA [REDACTED]." On the other hand, the client, [REDACTED], stated in a letter dated July 19, 2013 that the beneficiary will "work at [the] contractor location at [REDACTED] and [REDACTED] CA [REDACTED] and does not list its location as one of the beneficiary's work places. Finally, in contrast to its support letter, the petitioner stated, in a letter dated July 2, 2013, that "[t]he beneficiary will work from out [sic] locations at [REDACTED] CA [REDACTED] and [REDACTED] CA [REDACTED]. The beneficiary will occasionally go and have meetings with the client at [REDACTED] CA [REDACTED]." However, as noted above, on the Form I-129 the petitioner indicated that the beneficiary would only work at the client's location at [REDACTED] CA [REDACTED]. Thus, it is unclear where the beneficiary will actually be working.

The record contains no explanation with respect to these inconsistencies. 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.



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

Nevertheless, the AAO will next discuss, as a preliminary issue, 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 an LCA with the Secretary of Labor pursuant to section 212(n)(1) of the



Act, 8 U.S.C. § 1182(n)(1). The intending employer is described as offering full-time or part-time "employment" to the H-1B "employee." Subsections 212(n)(1)(A)(i) and 212(n)(2)(C)(vii) of the Act, 8 U.S.C. § 1182(n)(1)(A)(i), (2)(C)(vii). Further, the regulations indicate that "United States employers" must file a Petition for a Nonimmigrant Worker (Form I-129) in order to classify aliens as H-1B temporary "employees." 8 C.F.R. § 214.2(h)(1), (2)(i)(A). Finally, the definition of "United States employer" indicates in its second prong that the petitioner must have an "employer-employee relationship" with the "employees under this part," i.e., the H-1B beneficiary, and that this relationship be evidenced by the employer's ability to "hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer").

Neither the former Immigration and Naturalization Service (INS) nor U.S. Citizenship and Immigration Services (USCIS) defined the terms "employee" or "employer-employee relationship" by regulation for purposes of the H-1B visa classification, even though the regulation describes H-1B beneficiaries as being "employees" who must have an "employer-employee relationship" with a "United States employer." *Id.* Therefore, for purposes of the H-1B visa classification, these terms are undefined.

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

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

*Darden*, 503 U.S. at 323-324 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. at 751-752); see also *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440, 445 (2003) (hereinafter "*Clackamas*"). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).

In this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or

"employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. *See generally* 136 Cong. Rec. S17106 (daily ed. Oct. 26, 1990); 136 Cong. Rec. H12358 (daily ed. Oct. 27, 1990). On the contrary, in the context of the H-1B visa classification, the regulations define the term "United States employer" to be even more restrictive than the common law agency definition.<sup>3</sup>

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<sup>3</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 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.<sup>4</sup>

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).<sup>5</sup>

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

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<sup>4</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>5</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).

with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. See *Clackamas*, 538 U.S. at 445; see also *New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1) (adopting a materially identical test and indicating that said test was based on the *Darden* decision); see also *Defensor v. Meissner*, 201 F.3d 384, 388 (5th Cir. 2000) (determining that hospitals, as the recipients of beneficiaries' services, are the "true employers" of H-1B nurses under 8 C.F.R. § 214.2(h), even though a medical contract service agency is the actual petitioner, because the hospitals ultimately hire, pay, fire, supervise, or otherwise control the work of the beneficiaries).

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

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

Lastly, the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450. "Rather, . . . the answer to whether [an individual] is an employee depends on 'all of the incidents of the relationship . . . with no one factor being decisive.'" *Id.* at 451 (quoting *Darden*, 503 U.S. at 324).

Applying the *Darden* and *Clackamas* tests to this matter, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee."

The petitioner claims that it will have an employer-employee relationship with the beneficiary and that the beneficiary will work for the end client, [REDACTED]. The petitioner submitted (1) a copy of the Professional Service Agreement with [REDACTED] which states that the petitioner "will be responsible for paying, control performance and completion of daily tasks of the consultant(s)"; and (2) a copy of the SOW, entered into pursuant to the Professional Service Agreement, which names the beneficiary as the contractor (consultant resource), and lists the



start date as October 1, 2013 and the end date as "December 31, 2014 extendible."<sup>6</sup> The SOW does not provide such details as where the beneficiary will work, the beneficiary's role in the project, the duties of the proffered position, requirements for the position (if any), nature of the project, etc.

In response to the RFE, the petitioner submitted a letter from [REDACTED] that references a Primary Sourcing Agreement that does not appear to have been submitted into the record. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. 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 letter from [REDACTED] states the following, in pertinent part:

A Purchase order<sup>7</sup> to contractor [petitioner] has been issued to have [the beneficiary] work at contractor location at [REDACTED] [REDACTED] CA [REDACTED] and [REDACTED] CA [REDACTED]. This open ended purchase order is initially for a period of twelve months subject to annual renewal by mutual agreement depending on the needs of the company.

\* \* \*

[The beneficiary] has been assigned to work on the Mobile Advertising and & [sic] Campaign Management Solution Application Development as Business Systems Analyst under the overall direct supervision of [petitioner] officers, and the client site supervisor will be [REDACTED], VP Technology. [The beneficiary] will perform the following duties as listed in the purchase order.

However, the petitioner did not submit a copy of the Purchase Order into the record of proceeding. Further, the AAO notes that while the Professional Service Agreement states that the petitioner "will be responsible for paying, control performance and completion of daily tasks of the consultant(s)," in response to the director's RFE, the petitioner stated that "[t]he work of the employee will be supervised by the controlling officer [of the petitioner] and *at the client site by Mr. [REDACTED] COO [REDACTED]* (emphasis added), which indicates that while the beneficiary is at the client's site, [REDACTED] will supervise the beneficiary's work. The letter from [REDACTED] discussed above, states that "the client site supervisor will be [REDACTED] VP

<sup>6</sup> Thus, it appears that the project is expected to last until December 31, 2014, which falls short of the petitioner's requested employment end period on the Form I-129 of September 1, 2016. There is a lack of substantive documentation confirming work for the beneficiary for the duration of the requested period. The petitioner did not submit documentary evidence verifying any additional work for the beneficiary.

<sup>7</sup> The petitioner did not submit a copy of the Purchase Order into the record. While the petitioner submitted a SOW, the SOW does not list the work locations where the beneficiary will work.

Technology." As previously stated, the record is unclear as to the locations where the beneficiary would work and how long he would be working in each location. Therefore, the evidence in the record is insufficient to demonstrate that the petitioner would have control over the beneficiary's work when the beneficiary is at the client's site. 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. 190). Similarly, the assertions of counsel that the petitioner will have the sole right to control the beneficiary's work 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.

Furthermore, the petitioner submitted two monthly paystubs and Form W-2, Wage and Tax Statement for 2012 that it issued to the beneficiary. While social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are still relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary's employer. Based on a review of the evidence, the AAO is unable to find that the requisite employer-employee relationship will exist between the petitioner and the beneficiary. Here, the record indicates that [REDACTED] will be overseeing and directing the work of the beneficiary while the beneficiary is at the client's site 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 supervises the beneficiary does not establish that the petitioner exercises any substantial control over the beneficiary and the substantive work that he 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 at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

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

The AAO will next discuss one of the bases for the director's decision, namely that the petitioner has failed 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 1, 2016, there is a lack of documentation regarding any specific work for the beneficiary for the duration of the requested employment period. The SOW indicates the availability of work for the beneficiary from October 1, 2013 to December 31, 2014 extendible. The letter from [REDACTED] states that the "open ended purchase order is initially for a period of twelve months subject to annual renewal by mutual agreement



depending on the needs of the company." Upon review of all of the documentation in the record of proceeding, the AAO finds that while the SOW with [REDACTED] may be renewable, 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 employment period requested in the petition.<sup>8</sup>

In conclusion and for the reasons discussed 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 "employee." 8 C.F.R. § 214.2(h)(4)(ii). Furthermore, the petition may not be approved based on the petitioner's inaccurate statements in the petition. See 8 C.F.R. § 214.2(h)(10)(ii); *see also* 8 C.F.R. § 103.2(b)(1). Moreover, the petition must also be denied due

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<sup>8</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 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).

to the petitioner's failure to establish eligibility at the time of filing and to proffer non-speculative employment to the beneficiary. Accordingly, for these reasons, the petition must be denied.

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

The AAO will next address the second basis of the director's decision, chiefly 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 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.

On the Form I-129, the petitioner stated that the beneficiary would be employed in a business systems analyst position. However, to determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. As previously mentioned, the specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. See generally *Defensor v. Meissner*, 201 F.3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the evidence in the record of proceeding establishes that performance of the particular proffered position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a

baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

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

Moreover, the AAO finds that, as reflected in the description of the position as quoted earlier in this decision, the petitioner describes the proposed duties in terms of generalized and generic functions that fail to convey sufficient substantive information to establish the relative complexity, uniqueness and/or specialization of the proffered position or its duties. The abstract level of information provided regarding the proffered position and its constituent duties is exemplified by the petitioner's assertion in its support letter that the beneficiary will "[e]xpand and serve on new system and improve the work flow" and "[m]aintain and check computer programs systems."

Notably, however, the statements provide insufficient insight into the specific tasks that the beneficiary will perform. This is again illustrated by the petitioner's statement in the support letter that the beneficiary will "[d]evelop and revise the system procedures to meet the standards requirements." In response to the RFE, the petitioner provided revised job duties that are similarly abstract. This is exemplified by the petitioner's assertion that the beneficiary will "[a]nalyze Data processing problems" and "[s]upport systems functionality." The petitioner does not explain the beneficiary's specific role and how these duties will be conducted and/or applied within the scope of the petitioner's (or end-users') business operations. Thus, as so generally described, the description does not illuminate the substantive application of knowledge involved or any particular educational attainment associated with such application.

Accordingly, without further information, the petitioner has failed to credibly convey how it would be able to sustain an employee performing this duty at the level required for the H-1B petition to be granted for the entire period requested. That is, the overall responsibilities for the proffered position contain generalized functions without providing sufficient information regarding the particular work, and associated educational requirements, into which the duties would manifest themselves in their day-to-day performance within the petitioner's business operations. Furthermore, the petitioner did not provide sufficient documentation to substantiate the job duties and responsibilities of the proffered position.

Such generalized information does not in itself establish a necessary correlation between any dimension of the proffered position and a need for a particular level of education, or educational



equivalency, in a body of highly specialized knowledge in a specific specialty. The AAO also observes, therefore, that it is not evident that the proposed duties as described in this record of proceeding, and the position that they comprise, merit recognition of the proffered position as a specialty occupation. To the extent that they are described by the petitioner, the AAO finds, the proposed duties do not provide a sufficient factual basis for conveying the substantive matters that would engage the beneficiary in the actual performance of the proffered position for the entire three-year period requested, so as to persuasively support the claim that the proffered position's actual work would require the theoretical and practical application of any particular educational level of highly specialized knowledge in a specific specialty directly related to the demands of the proffered position.

Thus, based upon a complete review of the record of proceeding, the AAO finds that the petitioner has failed to establish (1) the substantive nature and scope of the beneficiary's employment; (2) the actual work that the beneficiary would perform; (3) the complexity, uniqueness and/or specialization of the tasks; and/or (4) the correlation between that work and a need for a particular educational level of highly specialized knowledge in a specific specialty. Consequently, this precludes a determination that the petitioner's proffered position qualifies as a specialty occupation under the pertinent statutory and regulatory provisions.

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

For the reasons related in the preceding discussion, the AAO finds that the petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. Accordingly, for this additional reason, the petition cannot be approved.

### 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.