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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: **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)

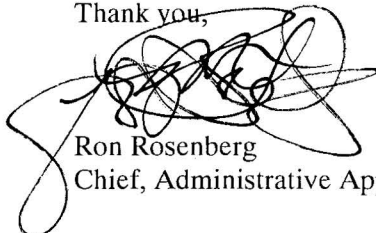
ON BEHALF OF PETITIONER:

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.

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the California Service Center on April 1, 2013. In the Form I-129 visa petition, the petitioner describes itself as an information technology (IT) consulting company established in 2010.<sup>1</sup> In order to employ the beneficiary in what it designates as a statistical programmer 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 July 8, 2013 finding that the petitioner failed to establish that it will be a United States employer having an employer-employee relationship with the beneficiary as an H-1B temporary employee. The director further found that the petitioner did not: (1) establish that it will have an employer-employee relationship with the beneficiary; (2) establish that the proffered position is a specialty occupation; and (3) submit a valid Labor Condition Application (LCA) for all work locations. On appeal, the petitioner, through counsel, asserts that the director's bases for denial of the petition are erroneous and contends that the petitioner satisfied all evidentiary requirements. In support of this assertion, counsel submits a brief and supporting evidence.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the petitioner's 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 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.

## I. FACTUAL AND PROCEDURAL BACKGROUND

In this matter, the petitioner states in the Form I-129 petition that it is an IT consulting company and that it seeks the beneficiary's services as a statistical programmer to work on a full-time basis at a rate of pay of \$72,000 per year. According to the petitioner, the beneficiary will work off-site. The petitioner reports that the dates of intended employment are from October 1, 2013 to September 13, 2016.

In a letter dated March 25, 2013, the petitioner provided the following description of the proffered position:

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<sup>1</sup> On the Form I-129, the petitioner indicates that it has 15 employees, but did not provide its gross annual income and its net annual income, stating "contact company." No explanation was provided for failing to provide the requested information.

The specialty occupation position of Statistical Programmer with [the petitioner] requires as a minimum a Bachelor's degree in Statistics, Science, or related field.

[The beneficiary] will perform his duties at the following client-site: [redacted] Corp., [redacted] CA [redacted] ... As his employer, [the petitioner] will be responsible for paying, hiring, firing, supervising, and controlling [the beneficiary] from our corporate headquarters located in [redacted] NC.<sup>3</sup>

\* \* \*

As a Statistical Programmer, [the beneficiary] will:

- Create and derive the datasets, listings and summary tables for Phase-I, II, III of clinical trials;
- Use the Base SAS (MEANS, FREQ, SUMMARY, TABULATE, REPORT, etc.) and SAS/STAT procedures (REG, GLM, ANOVA, UNIVARIATE, etc.) for summarization, tabulations, and statistical analysis purposes;
- Prepare reports and listings in accordance with client specifications, analysis plans, and industry guidelines;
- Map and integrate external study data to a CDISC-compliant proprietary analysis data system (SDTM);
- Perform Table Programming for Integrated Summary of Efficacy (ISE) and Safety (ISS); and
- Conduct data analysis, statistical analysis, generating reports, listings, and graphs using SAS Tools-SAS/Base, SAS/Macros and SAS/Graph, SAS/SQL, SAS/Connect, SAS/Access.

The petitioner provided copies of the beneficiary's academic credentials to establish that the beneficiary received a Master of Science degree in Pharmacy Administration from [redacted]. In addition, the petitioner submitted a copy of the beneficiary's foreign diploma and transcript.

Moreover, the petitioner submitted a LCA in support of the instant H-1B petition. The LCA designation for the proffered position corresponds to the occupational category "Statisticians" – SOC (ONET/OES Code) 15-2041. The petitioner designated the proffered position as a Level I (entry level) position. In the LCA, the petitioner indicated that the beneficiary would work at the

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<sup>3</sup> The petitioner further states that it provides off-site supervision to the beneficiary through daily and weekly emails and telephone calls. Later in the letter, the petitioner indicates that it has constant contact with the beneficiary's on-site supervisors to receive updates on his work.



petitioner's location in [REDACTED] NC and also at [REDACTED] CA [REDACTED].

In addition, the petitioner submitted a letter dated March 21, 2013 from [REDACTED]. The letter also states that the beneficiary will work off-site at [REDACTED] California.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on April 18, 2013. The director outlined the evidence to be submitted. Counsel for the petitioner responded to the RFE by submitting the following documents:

- The petitioner's employee handbook.
- A Subcontract between [REDACTED] Inc. in [REDACTED] PA and the petitioner. It is dated January 15, 2013.
- The petitioner's organizational chart.

The director reviewed the evidence but determined that the petitioner failed to establish eligibility for the benefit sought. The director denied the petition on July 8, 2013. Counsel for the petitioner submitted an appeal of the denial of the H-1B petition.

## II. STANDARD OF REVIEW

On appeal, counsel asserts that "[f]rom the evidence of the record, it is clear that the Petitioner has shown by a preponderance of the evidence that the Beneficiary will be engaged in specialty occupation work, that the Petitioner maintains an employer-employee relationship with the Beneficiary, and that the work location listed in the Labor Condition Application is accurate."

With respect to the preponderance of the evidence standard, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010), states in pertinent part the following:

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

\* \* \*

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case.

\* \* \*

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.

The "preponderance of the evidence" standard does not relieve the petitioner from satisfying the basic evidentiary requirements set by regulation. The standard of proof should not be confused with the burden of proof. Specifically, the petitioner bears the burden of establishing eligibility for the benefit sought. A petitioner must establish that it is eligible for the requested benefit at the time of filing the petition. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). As will be discussed, in the instant case, that burden has not been met.<sup>4</sup>

### III. LAW AND ANALYSIS

#### A. United States Employer

The AAO reviewed the record of proceeding in its entirety. The AAO will first discuss 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).

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<sup>4</sup> On appeal, counsel repeatedly asserts that the director's RFE did not request additional evidence pertaining to the beneficiary's specialty occupation or work location, and the petitioner was not afforded an opportunity to submit further documentation.

There is no requirement for USCIS to issue an RFE or to issue an RFE pertinent to a ground later identified in the decision denying the visa petition. Title 8 C.F.R. § 103.2(b)(8) clearly permits the director to deny a petition for failure to establish eligibility without having to request evidence regarding the ground or grounds of ineligibility identified by the director. Even if the director had erred as a procedural matter in not issuing an RFE or Notice of Intent to Deny relative to the petitioner's failure to establish the proffered position as a specialty occupation and/or the beneficiary work location, it is not clear what remedy would be appropriate beyond the appeal process itself. The petitioner has in fact supplemented the record on appeal, and therefore it would serve no useful purpose to remand the case simply to afford the petitioner yet another additional opportunity to supplement the record with new evidence. The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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 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.

8 C.F.R. § 214.2(h)(4)(ii) (emphasis added); *see also* 56 Fed. Reg. 61111, 61121 (Dec. 2, 1991).

Although "United States employer" is defined in the regulations at 8 C.F.R. § 214.2(h)(4)(ii), it is noted that the terms "employee" and "employer-employee relationship" are not defined for purposes of the H-1B visa classification. Section 101(a)(15)(H)(i)(b) of the Act indicates that an alien coming to the United States to perform services in a specialty occupation will have an "intending employer" who will file a Labor Condition Application with the Secretary of Labor pursuant to section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1) (2012). The intending employer is described as offering full-time or part-time "employment" to the H-1B "employee." Subsections 212(n)(1)(A)(i) and 212(n)(2)(C)(vii) of the Act, 8 U.S.C. § 1182(n)(1)(A)(i), (2)(C)(vii) (2012). Further, the regulations indicate that "United States employers" must file a Petition for a Nonimmigrant Worker (Form I-129) in order to classify aliens as H-1B temporary "employees." 8 C.F.R. § 214.2(h)(1), (2)(i)(A). Finally, the definition of "United States employer" indicates in its second prong that the petitioner must have an "employer-employee relationship" with the "employees under this part," i.e., the H-1B beneficiary, and that this relationship be evidenced by the employer's ability to "hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer").

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



"United States employer." *Id.* Therefore, for purposes of the H-1B visa classification, these terms are undefined.

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

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

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

In this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. See generally 136 Cong. Rec. S17106 (daily ed. Oct. 26, 1990); 136 Cong. Rec. H12358 (daily ed. Oct. 27, 1990). On the contrary, in the context of the H-1B visa classification, the regulations define the term "United States employer" to be even more restrictive than the common law agency definition.<sup>5</sup>

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<sup>5</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



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>6</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>7</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

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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).

<sup>6</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>7</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).

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

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

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

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

In the instant case, the petitioner has failed to adequately establish several basic elements of the beneficiary's employment. 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 is required to submit written contracts between the petitioner and beneficiary, or if there is no written agreement, a summary of the terms of the oral agreement under which the beneficiary will be employed. The regulation at 8 C.F.R. § 214.2(h)(4)(iv) states, in pertinent part, the following:

(A) General documentary requirements for H-1B classification in a specialty occupation. An H-1B petition involving a specialty occupation shall be accompanied by:



\* \* \*

(B) Copies of any written contracts between the petitioner and beneficiary, or a summary of the terms of the oral agreement under which the beneficiary will be employed, if there is no written contract.

Further, 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.

Upon review of the record of proceeding, the petitioner indicated that the beneficiary was serving in proffered position through his F-1 optional practical training (OPT). In the instant case, the petitioner did not submit an employment agreement; however, the petitioner provided a copy of its employment handbook. The employment handbook identifies the offered position as a statistical programmer, and was signed by the beneficiary and the petitioner on January 28, 2013 (several months before the H-1B petition was submitted to USCIS). However, the petitioner did not include the employment handbook with its initial submission to USCIS.

The employment handbook does not identify the location of the beneficiary's employment, but rather states that "the parties agree that the Employees shall perform their duties at locations as directed from time to time by the Employer." According to the handbook, the beneficiary may be placed at various locations and not necessarily in [REDACTED], California as stated in the instant petition. The handbook does not indicate that the beneficiary is currently or will be assigned to the [REDACTED] Corporation project, nor does it indicate an intention by the petitioner to employ the beneficiary at the [REDACTED] Corporation facility for the duration of the requested H-1B period.

The handbook states that the petitioner shall provide the employee with medical insurance, a mobile telephone, and a car park (presumably, a parking space). However, a substantive determination cannot be made or inferred regarding these "benefits" as additional information regarding them was not provided to USCIS, including specific eligibility requirements and terms, as well as documentation establishing whether or not these benefits had been or would be provided to the beneficiary.

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 specialty occupation. In a letter dated March 25, 2013, the petitioner claims that it provides such instruments and tools. However, upon review of the record of proceeding, the petitioner did not provide any further information on this matter, such as a description of the instrumentalities and tools that are required to perform the duties. Although the beneficiary was serving in the proffered position (at the time of the RFE response) and the petitioner was given an opportunity to clarify the source of instrumentalities and tools to be used by the beneficiary, it failed to further address or submit probative evidence on the issue.



The AAO acknowledges that the method of payment of wages can be a pertinent factor to determining the petitioner's relationship with the beneficiary. Here, the petitioner states that it pays the beneficiary his salary and claims him for tax purposes; however, the petitioner did not submit documentation (such as pay statements or Quarterly Wage Reports) to support its statements.

Through the RFE, the director provided the petitioner an opportunity to submit documentation regarding the beneficiary's role in hiring and paying assistants. In the instant case, the petitioner did not address this issue or provide any documentation regarding the beneficiary's role in hiring and paying assistants.

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] Corp. in [REDACTED] CA. However, the petitioner has not submitted documentation from the claimed end-client, [REDACTED] Corp. Rather, the petitioner submitted a letter dated March 21, 2013 from [REDACTED]. The letter does not contain the name and job title of the writer and the signature is illegible. While the letter contains the general contact information for the company, it does not provide any specific contact information for the writer of the letter.

The letter states, in pertinent part, the following:

This letter is to verify that [the beneficiary], a contractor of [REDACTED] Inc. is needed at our client [REDACTED] Corp located at [REDACTED] CA [REDACTED]. He is on a project from January 28, 2013 extended indefinitely. He is working as a contractor at this location.

\* \* \*

Currently [the beneficiary] is working as a Statistical Programmer (Contractor) whose duties essentially fit the job title (frequently referred to as "Developer" and similar terms in industry shorthand) and that by normal industry standards these services require at least a Bachelor Degree or equivalent in a relevant technology field.

\* \* \*

[REDACTED] Inc. and [REDACTED] do not have the ability to assign [the beneficiary] to a different employer or client. Only his employer [the petitioner] retains supervisory control and pays the salary and other benefits. [REDACTED] [sic] is the end-client receiving the services of [the beneficiary].

The letter states that the beneficiary will work off-site at [REDACTED] in [REDACTED] California and that his work has been arranged through contracts between (1) [REDACTED]

Inc., (2) and (3) Notably, the letter is from which is not listed as one of the parties to the contract arrangement. The letter does not identify the role of the company, nor does it provide the writer's basis for the information that he/she purports to verify.

In response to the RFE, the petitioner submitted a subcontract between Inc. in PA and the petitioner. The subcontract is dated January 15, 2013. No explanation was provided for not previously submitting the document to USCIS. The subcontract states that has an agreement with to provide staffing services, and that it desires to have the petitioner assist in the performance of the agreement. It includes a document entitled Schedule A, which indicates that the beneficiary will work in California and the assignment is anticipated to last 28 months.<sup>11</sup> The document does not provide such details as the beneficiary's role in the project, the duties of the proffered position, requirements for the position (if any), nature of the project, etc.

Upon review of the documents, the petitioner has not established the parties involved in the project and their role in the process. For instance:

- The letter dated March 21, 2013 is on a letterhead from located at UT
- The letter states that the beneficiary is a contractor of Inc. and that the beneficiary's work at has been arranged through contracts between Inc., and
- The subcontract indicates that is the Prime Contractor. The address for the company is reported as PA
- The subcontract states that has an agreement with to provide staffing services.

There is no evidence in the record to establish the relationship (if any) between: (1) Inc.; and (3) Further, the petitioner did not submit documentation from

<sup>11</sup> Thus, it appears that the project is expected to last until approximately May 14, 2015, which falls short of the petitioner's requested employment period on the Form I-129 of September 13, 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.



and/or from <sup>12</sup>

Further, it must be noted that 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 employee handbook indicates that the beneficiary reports to [REDACTED] and that the beneficiary's work commenced on February 1, 2013 (approximately two months prior to the H-1B submission). The petitioner states that the beneficiary will be physically located at the end-client's location in [REDACTED] CA, while the petitioner is located over 2,540 miles away in [REDACTED] NC. Accordingly, this raises questions as to who will supervise, control and oversee the beneficiary's work.

In response to the RFE, the petitioner provided an organizational chart. Although the beneficiary had served in the proffered position for approximately four months, the beneficiary was not included in the petitioner's organizational chart. No explanation was provided.

Based on the petitioner's organizational chart, all employees of the company are supervised by [REDACTED]. The organizational chart states that Mr. [REDACTED] serves as "manager." However, within the record of proceeding, Mr. [REDACTED] is identified as the president and CEO, as well as the signatory for this petition.

In the letter of support, the petitioner states that it provides off-site supervision to the beneficiary through daily and weekly emails and telephone calls. Although the beneficiary had served in the proffered position for several months, the record of proceeding does not contain evidence of any email correspondence or telephone calls between Mr. [REDACTED] and the beneficiary. The only evidence of any interaction between the petitioner and the beneficiary is the copy of the petitioner's employment handbook, which was signed by Mr. [REDACTED] and the beneficiary on January 28, 2013. Notably, the petitioner did not provide any information regarding Mr. [REDACTED]'s job duties or clarify basic aspects about his role (e.g., a brief job description, specific work location).

Later in the letter of support, the petitioner indicates that it has constant contact with the beneficiary's on-site supervisors to receive updates on his work. No further information regarding the on-site supervisors was provided to USCIS. Presumably, these "on-site supervisors" are not

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<sup>12</sup> The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation." Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. In addition, the regulations at 8 C.F.R. §§ 103.2(b)(8) and 214.2(h)(9)(i) provide the director broad discretionary authority to require evidence to establish that the services to be performed by the beneficiary will be in a specialty occupation during the entire period requested in the petition. USCIS examines each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence. The evidence submitted, however, fails to establish a valid employer-employee relationship under the applicable statutory and regulatory provisions. It must be noted that any failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).



employees of the petitioner based upon the petitioner's earlier statement. The petitioner did not submit any evidence regarding the identity, job title, role, and employer of the on-site supervisors. Moreover, the petitioner did not provide documentation to support its claim that it is in "constant contact" with such individuals.

Upon review, the AAO finds that there is insufficient documentary evidence in the record corroborating what the beneficiary would do, where the beneficiary would work, and the availability of work for the beneficiary for the entire requested period of employment. 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). Without full disclosure of all of the relevant factors, the AAO is unable to find that the requisite employer-employee relationship will exist between the petitioner and the beneficiary.

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

Based on the tests outlined 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). Accordingly, the director's decision must be affirmed and the petition denied on this basis.

#### B. Specialty Occupation

The AAO will now address the second basis of the director's decision, namely whether the petitioner has established that the proffered position qualifies as a specialty occupation position.

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof 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 387. To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing



supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

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

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

Further, to ascertain the intent of a petitioner, USCIS must look to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

In the instant case, the petitioner has provided inconsistent information regarding the requirements of the proffered position. For instance:

- In the letter of support, the petitioner states that the "specialty occupation position of Statistical Programmer within [the petitioner's business] requires a[t] a minimum a Bachelor's degree in Statistics, Science, or related field."
- The petitioner submitted a letter dated March 21, 2013 from [REDACTED]



The letter states that the proffered position requires "at least a Bachelor Degree or equivalent in a relevant technology field."

- The subcontract between [redacted] Inc. in [redacted] PA and the petitioner, which is dated January 15, 2013, does not state that the proffered position has any academic or professional requirements.

No explanation was provided by the petitioner.

Moreover, the AAO notes that the petitioner's assertion that the duties of the proffered position can be performed by a person with a degree in statistics, science or a related field suggests that the proffered position is not, in fact, a specialty occupation. More specifically, the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but such a degree in a *specific specialty* that is directly related to the position. See section 214(i)(1)(b) of the Act, 8 U.S.C. § 1184(i)(1)(b), and 8 C.F.R. § 214.2(h)(4)(ii).

Provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added).

In other words, while the statutory "the" and the regulatory "a" both denote a singular "specialty," the AAO does not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. See section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). This also includes even seemingly disparate specialties provided again, that the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

Again, the petitioner states that its minimum educational requirement for the proffered position is a bachelor's degree in "statistics, science, or [a] related field." Absent evidence to the contrary, the fields of statistics and science (including any and all science disciplines) are not closely related specialties, and the petitioner fails to establish how these fields are directly related to the duties and responsibilities of the proffered position. Accordingly, as such evidence fails to establish a minimum requirement of at least a bachelor's degree *in a specific specialty* or its equivalent for entry into the occupation, it does not support the proffered position as being a specialty occupation.

Moreover, the AAO notes that, as recognized by the court in *Defensor, supra*, where the work is to be performed for entities other than the petitioner, evidence of the client company's job requirements is critical. *See Defensor v. Meissner*, 201 F.3d at 387-388. That is, it is necessary for the end-client to provide sufficient information regarding the proposed job duties to be performed at its location in order to properly ascertain the minimum educational requirements necessary to perform those duties. *Id.* at 387-388. The court held that the former INS had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. *Id.* at 384. Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work.

In the instant case, the record of proceeding is devoid of substantive information from the end-client regarding not only the specific job duties to be performed by the beneficiary, but also information regarding whatever the end-client may or may not have specified with regard to the educational credentials of persons to be assigned to its projects. The record of proceeding does not contain documentation on this issue from, or endorsed by, the actual end-client, the company that has been or will be utilizing the beneficiary's services as a systems analyst (as stated by the petitioner).

The AAO finds that 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 reason, the appeal will be dismissed and the petition denied.

#### C. Beneficiary's Qualifications

The AAO does not need to examine the issue of the beneficiary's qualifications because the petitioner has not provided sufficient evidence to demonstrate that the proffered position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation.

#### D. Work Locations



The director found that the petitioner failed to establish specifically where the beneficiary will be employed. The AAO notes that the itinerary requirement at 8 C.F.R. § 214.2(h)(2)(i)(B) states the following:

*Service or training in more than one location.* A petition that requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with USCIS as provided in the form instructions. The address that the petitioner specifies as its location on the Form I-129 shall be where the petitioner is located for purposes of this paragraph.

The itinerary language at 8 C.F.R. § 214.2(h)(2)(i)(B), with its use of the mandatory "must" and its inclusion in the subsection "Filing of petitions," establishes that the itinerary as there defined is a material and necessary document for an H-1B petition involving employment at multiple locations, and that such a petition may not be approved for any employment period for which there is not submitted at least the employment dates and locations.<sup>15</sup>

In the Form I-129, the petitioner indicated that the beneficiary would be employed at the [REDACTED] Corp. facility in [REDACTED] California. In the LCA, the petitioner indicated that the beneficiary would be employed in [REDACTED] North Carolina, and [REDACTED] California. The petitioner did not indicate how the beneficiary's time would be allocated between the work sites or the frequency with which the beneficiary would be physically at either location. The petitioner did not submit an itinerary with the dates and places of the beneficiary services as required by 8 C.F.R. § 214.2(h)(2)(i)(B).

As previously mentioned, the evidence in the record contains inconsistencies regarding the project end-date, and the petitioner did not provide evidence of any additional projects or work for the beneficiary. Upon review, the petitioner has not established that it has H-1B caliber work for the beneficiary for the duration of the requested period in the location designated on the Form I-129.

#### 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 (noting that the AAO conducts appellate review on a *de novo* basis).

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<sup>15</sup> The instructions to the Form I-129 also state that a petition for a beneficiary to perform services, labor, or training in more than one location must include an itinerary with the dates and locations where the services or training will take place. *See Instructions for Form I-129, Petition for a Nonimmigrant Worker*, on the Internet at <http://www.uscis.gov/sites/default/files/files/form/i-129instr.pdf>. The H-1B petition must be executed and filed in accordance with the form instructions, with the instructions being incorporated into the regulations. 8 C.F.R. § 103.2(a)(1).

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; *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.