



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: **MAY 01 2014**

OFFICE: CALIFORNIA SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner:  
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

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,

*N. B.*  
*for*

Ron Rosenberg  
Chief, Administrative Appeals Office

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

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the California Service Center on April 8, 2013. On the Form I-129 visa petition, the petitioner describes itself as an information technology services business established in 2003. In order to employ the beneficiary in what it designates as a "Computer Programmer/Programmer Analyst" position, the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner failed to (1) demonstrate the existence of an employer-employee relationship between the petitioner and the beneficiary; (2) establish that the proffered position qualifies for classification as a specialty occupation; and (3) submit a Labor Condition Application (LCA) valid for all work locations when it filed the petition.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; (5) the Notice of Appeal or Motion (Form I-290B) and supporting materials. 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. The petition will be denied.

### **I. Factual and Procedural History**

The petitioner indicated on the Form I-129 that it wishes to employ the beneficiary as a computer programmer/programmer analyst from October 1, 2013 to September 30, 2016, on a full-time basis, and with an annual salary of \$60,000. In addition, the petitioner indicated on the petition that the beneficiary will work at either [REDACTED] Rolling Meadows, Illinois [REDACTED] or [REDACTED] San Antonio, Texas.

The petitioner also submitted a Labor Condition Application (LCA) in support of the instant petition. The petitioner indicated on the LCA that the beneficiary will work at the same two locations mentioned above. The LCA also states the occupational category is designated as "Computer Programmers," SOC (ONET/OES) Code 15-1131, at a Level I (entry) wage level, and that the period of intended employment is from September 1, 2013 to August 31, 2016.

In the petitioner's support letter dated March 27, 2013, the petitioner stated that the petitioner is "engaged in the business of computer software development for various large and mid-size organizations." The petitioner also stated that it "offers experienced IT Consultants to assist clients with any IT and Software Development services." The petitioner also stated that the beneficiary will perform the following duties in the proffered position:

The Computer Programmer/Programmer Analyst analyzes the data processing requirements to determine the computer software, which will best serve those needs. Thereafter, she will design a computer system using that software, which will process the data in the most timely and inexpensive manner, and implements that design by overseeing the installation of the necessary system software and its customization to the client's unique requirements. The actual computer programming may be performed with the assistance of the programmers.

Throughout this process, the Computer Programmer/Programmer Analyst must constantly interact with the management, explaining to it each phase of the system development process, responding to its questions, comments and criticisms, and modify the system so that the concerns raised by the clients are adequately addressed. Consequently, the Computer Programmer/Programmer Analyst must constantly revise and revamp the system as it is being created to respond to unanticipated software anomalies her[e] to fore undiscovered, to the extent that occasionally the system finally created bears seemingly little resemblance to that which was initially proposed.

[The beneficiary] will be involved in the designing and development of the application. The development of the system includes the following Phases:

PHASE	DESCRIPTION
1	Analysis of the existing system and user needs
2	Communication and interaction with current system users
3	Design and development of a new computerized system
4	Writing and testing of newly designed programs
5	Implementation of the newly developed system
6	Provide technical support after system implementation

The petitioner stated that the beneficiary's day-to-day responsibilities are as follows:

- Developed packages using SSIS and controlled its execution, by implementing the infrastructure that enables execution order, logging, variables, and event handling. % of Time: 20
- Created SSIS Packages to export and import data from CSV files, Text files and Excel Spreadsheets. % of Time: 20
- Effectively used SDLC methodologies to define the project, this included defining business and technical requirements and specs. % of Time: 20
- Worked as a developer in creating Stored Procedures, SSIS packages, tables and views and other SQL joins [sic] and statements for applications. % of Time: 10
- Worked with various tasks of SSIS that include Transform Data Task, Execute SQL Task, and Active Script Task. % of Time: 10
- This involves converting SQL Server 2000 DTS packages to SQL Server 2008R2 SSIS



Packages using Migration Wizard and DTS xChange. Packages have been validated and tested all packages on development server. % of Time: 20

The petitioner also stated that "[a]s with any Computer Programmer/Programmer Analyst, the usual minimum requirement for performance of the job duties is a Master's or Bachelor's of Science in any discipline in Engineering, or computer science or information systems or a related analytic or scientific discipline or its equivalent in education or work-related experience." The petitioner stated that it prefers a Master's Degree with one year of experience.

In the letter of support, the petitioner states that the "location/itinerary of services" is [REDACTED] Rolling Meadows, Illinois [REDACTED] and "other unanticipated client locations."

With the initial petition, the petitioner also submitted, among other things, the following documents:

- A copy of the petitioner's offer letter, dated January 17, 2013, extending employment to the beneficiary. The letter was signed by the petitioner's president and the beneficiary. The offer letter states the following in section 1, "Duties": "You shall use your best energies and abilities on a full time basis to perform, at [a] location designated by the Company and including customer offices, the employment duties assigned to you from time to time."
- A copy of a document entitled "Addendum to Employment Contract dated March 18, 2013 between [the petitioner] and [the beneficiary]," with a detailed description of the project phases and deliverables, and a breakdown of the time that the beneficiary will devote to her job duties.
- An organizational chart of the petitioner.
- Information regarding the petitioner's "Employee Benefits Package."

The petitioner also provided copies of several documents for a company bearing the name "[REDACTED]" located at [REDACTED] Schaumburg, Illinois [REDACTED] such as a domestic corporate certificate, articles of incorporation, online good standing certificate, occupational permit, Form 941, Forms W-2 for 2012 and tax forms.<sup>1</sup> There is no evidence in the record to establish the relationship (if any) between the petitioner and [REDACTED] Inc. 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).

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on May 2, 2013. The petitioner was asked to submit probative evidence to establish, in part, that a valid employer-employee relationship will exist between the petitioner and the beneficiary. The director outlined some of the types of specific evidence that could be submitted.

<sup>1</sup> [REDACTED] Inc. does not appear to be a party to these proceedings.



In a letter in response to the RFE dated June 21, 2013, the petitioner stated that the location of the beneficiary's work will be '[redacted] Lewinsville, TX [redacted]'. The petitioner also stated that "[o]nce she completes her assignment at the current place, she is going to report [for] work at our location: [redacted] Rolling Meadows, IL [redacted]". The petitioner provided a new LCA for the new work location in Lewinsville, Texas, certified on May 29, 2013. The petitioner explained that the beneficiary "got the new project confirmation at [redacted] through [redacted]". The petitioner also explained that it assigns the work to the beneficiary on a weekly/daily basis, evaluates her work, and pays her salary.

The petitioner also provided, among other things, the following documents:

- An affidavit of support dated June 21, 2013 from [redacted], a co-worker of the beneficiary, working on the [redacted] project as a FileNet Administrator. The affidavit lists the duties that [redacted] is performing, but does not discuss the duties of the beneficiary.
- A letter dated May 22, 2013 from the Managing Director: Dallas of [redacted] confirming that it has contracted with the petitioner for the services of the beneficiary "starting 06/03/2013 to serve as a *FileNet System Administrator/Programmer* for our client, [redacted] at their facility located at [redacted] Lewinsville, TX [redacted]". The letter lists the job duties that the beneficiary would perform. In addition, the letter states that "[t]he minimum education, training, and experience necessary to perform the job duties include a Bachelor's degree or the equivalent," but does not specify a specific specialty. Also, the letter states that "[t]he duration of this project is ongoing with no immediate expiration date."
- A copy of a document entitled, "Independent Contractor Agreement" made as of March 24, 2009, by and between [redacted] Corp. and the petitioner. The agreement states that "[redacted] may retain Contractor [the petitioner], on a subcontract basis in connection with [redacted] provision of consulting services to one or more of [redacted]' clients."
- A copy of "Exhibit A, Work Memo" (Work Memo) that is "governed by the terms of the [I]ndependent Contractor Agreement by and between [redacted] Corp. and [the petitioner] (Contractor), dated as of April 10, 2013<sup>2</sup> ("the Agreement")." The Work Memo states that the beneficiary is assigned to the client, [redacted] starting on June 3, 2013 "until the project is complete."
- A copy of "Exhibit B, Employee Acknowledgment" signed by the beneficiary regarding the Agreement dated as of April 10, 2013 by and between [redacted] Corp. and the petitioner.

<sup>2</sup> The Independent Contractor Agreement that was submitted into the record was made as of March 24, 2009. Exhibit A references an Independent Contractor Agreement dated as of April 10, 2013. It appears that the parties may have entered into another agreement that was not submitted into the record. In any event, no explanation was provided for the variance in dates.

- A copy of the beneficiary's [REDACTED] badge, listing her name and "[REDACTED]" immediately below her name.
- Photographs of the beneficiary at the site of [REDACTED]

The director reviewed the documentation and found it insufficient to establish eligibility for the benefit sought. The director denied the petition on July 30, 2013. The petitioner submitted an appeal of the denial of the H-1B petition. With the appeal, the petitioner submitted a letter, a newly completed Form I-129, an LCA certified on August 8, 2013, and resubmitted documents that were previously submitted.

## II. Law and Analysis

### A. Lack of an Employer-Employee Relationship Between the Petitioner and the Beneficiary

The AAO will first determine 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." *Id.*

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

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

The term "United States employer" is defined in the Code of Federal Regulations at 8 C.F.R. § 214.2(h)(4)(ii) as follows:

*United States employer* means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) *Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and*
- (3) Has an Internal Revenue Service Tax identification number.



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

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-

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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).

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 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

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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).



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."

As a preliminary issue, the AAO observes that the petitioner provided conflicting information as to the job title of the proffered position. For example, in the Form I-129, the petitioner referred to the proffered position as "Computer Programmer/Programmer Analyst." In the letter from [REDACTED], dated May 22, 2013, the Managing Director stated that the beneficiary would serve in the position of FileNet Administrator/Programmer. No explanation for the inconsistencies was provided. Thus, the AAO must question the accuracy of the evidence provided and whether the information provided is correctly attributed to this particular position.<sup>6</sup>

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]. Specifically, in response to the director's RFE, in which documentation from the end-client was requested, the petitioner stated that the beneficiary would work for [REDACTED] and that the Independent Contractor Agreement between the petitioner and [REDACTED] Corp., the Work Memo, and the letter from the Managing Director at [REDACTED] supports this contention.

<sup>6</sup> 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).



Although, the petitioner contends that it has the right to control the beneficiary's work and monitors and assigns her work on a daily/weekly basis, and submitted evidence such as the Independent Contractor Agreement, the Work Memo, and the letter from [REDACTED] discussed above, the petitioner did not submit any document which outlined in detail the nature and scope of the beneficiary's employment from the end client, [REDACTED]. The AAO notes that the petitioner provided an affidavit of support from a co-worker of the beneficiary listing that individual's job duties in the position of FileNet Administrator. However, the record does not contain documentation from the end client, [REDACTED]. Therefore, the key element in this matter, which is who exercises control over the beneficiary, has not been substantiated.

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. Without full disclosure of all of the relevant factors, the AAO is unable to find that the requisite employer-employee relationship will likely exist between the petitioner and the beneficiary.

The AAO also notes that the petitioner has not established the duration of the relationship between the parties and the location(s) where the beneficiary will work. More specifically, on the Form I-129, the petitioner requested that the beneficiary be granted H-1B classification from October 1, 2013, to September 30, 2016. The first LCA that was submitted with the petition indicates that the beneficiary will work in the following two locations: (1) [REDACTED] San Antonio, Texas [REDACTED] and (2) [REDACTED] Rolling Meadows, IL [REDACTED]. In the letter of support, the petitioner stated that the itinerary of services is [REDACTED] Rolling Meadows, IL [REDACTED] and other unanticipated client locations."

In response to the request for evidence, the petitioner provided a new LCA that indicates the beneficiary will work at the following two locations: (1) [REDACTED] Lewisville, Texas [REDACTED] and (2) [REDACTED] Rolling Meadows, IL [REDACTED]. The petitioner explained in the response to the RFE that the beneficiary will work at [REDACTED] Lewisville, Texas [REDACTED] and "once she completes her assignment at the current place, she is going to report [for] work at our location: [REDACTED] Rolling Meadows, IL [REDACTED]." The petitioner also explained that the change in location was due to the fact that "[s]he [(the beneficiary)] got the new project confirmation at [REDACTED] through [REDACTED]."

The documentation does not provide a clear end date for the project with [REDACTED]. The petitioner contends that the beneficiary will work at the petitioner's office when the project with [REDACTED] ends; however, the petitioner did not provide any information on the job duties that the beneficiary will perform for the petitioner. Also, the petitioner did not submit probative evidence substantiating additional projects or specific work for the beneficiary.

Therefore, the AAO also finds that 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. Thus, even if the petitioner established that it would be the beneficiary's United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii), which it has not, the petitioner has not demonstrated that it would maintain such an employer-employee relationship for the duration of the period requested.<sup>7</sup>

Moreover, the evidence indicates that the beneficiary will be working in the Texas office of [REDACTED]. The petitioner is located in Illinois, raising the additional issue of who would supervise, control and oversee the beneficiary's work.

The evidence, 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 petitioner exercises complete control over the beneficiary, without sufficient, corroborating evidence to support the claim, does not establish eligibility in this matter. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. The evidence of record prior to adjudication did not establish that the petitioner would act as the beneficiary's employer in that it will hire, pay, fire, or otherwise control the work of the beneficiary.

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). Moreover, the petition must also be denied due to the petitioner's failure to establish eligibility at the time of filing and to proffer non-speculative

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<sup>7</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).



employment to the beneficiary.

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

The AAO will now address the petitioner's failure to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions.

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.

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'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.* 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 sufficient information from the end-client, [REDACTED] regarding the specific job duties to be performed by the beneficiary for [REDACTED]. In addition, the petitioner did not provide any information of the job duties the beneficiary will perform when she is done with her project at [REDACTED] and returns to work for the petitioner.

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

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

The AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient documentation to demonstrate that the position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. The AAO notes that the director requested in the RFE that the petitioner submit the beneficiary's original U.S. Master's degree or transcripts. In response to the RFE, the petitioner did not submit the requested documentation. 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).

As discussed in this decision, the petitioner did not submit sufficient evidence regarding the proffered position to determine that it is a specialty occupation and, therefore, the issue of whether it will require a baccalaureate or higher degree in a specific specialty, or its equivalent, also cannot be determined. Therefore, the AAO need not and will not address the beneficiary's qualifications.

### **C. Lack of a valid LCA for all work locations**

The next issues before the AAO are whether the petitioner submitted a valid LCA for all work locations and complied with the itinerary requirement at 8 C.F.R. § 214.2(h)(2)(i)(B). General requirements for filing immigration applications and petitions are set forth at 8 C.F.R. § 103.2(a)(1) in pertinent part as follows:



Every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions . . . and such instructions are incorporated into the regulations requiring its submission.

Further discussion of the filing requirements for applications and petitions is found at 8 C.F.R. § 103.2(b)(1):

*Demonstrating eligibility.* An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request and must continue to be eligible through adjudication. Each benefit request must be properly completed and filed with all initial evidence required by applicable regulations and other USCIS instructions. Any evidence submitted in connection with a benefit request is incorporated into and considered part of the request.

The regulations require that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner obtain a certified LCA from DOL in the occupational specialty in which the H-1B worker will be employed. *See* 8 C.F.R. § 214.2(h)(4)(i)(B). The instructions that accompany the Form I-129 also specify that an H-1B petitioner must submit evidence that an LCA has been certified by DOL when submitting the Form I-129.

Additionally, the regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) provides as follows:

*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 I-129 shall be where the petitioner is located for purposes of this paragraph.

As noted above, on the Form I-129, the petitioner requested that the beneficiary be granted H-1B classification from October 1, 2013, to September 30, 2016 and indicated that the beneficiary would be working at the following two locations: (1) [REDACTED] San Antonio, Texas [REDACTED] (an end-client location); and (2) [REDACTED] Rolling Meadows, IL [REDACTED] (the petitioner's location). The certified LCA submitted *with* the Form I-129 also indicates that the beneficiary would work at an end-client location in Texas and at the petitioner's location in Illinois. However, in response to the director's RFE, the petitioner submitted a new LCA, certified on May 29, 2013, that indicates the beneficiary will work at the following two locations: (1) [REDACTED] Lewisville, Texas [REDACTED] (a new end-client location); and (2) [REDACTED] Rolling Meadows, IL [REDACTED] (the petitioner's location). The petitioner explained in the response to the RFE that the beneficiary will work at [REDACTED] Lewisville, Texas [REDACTED] and "once she completes her assignment at the current place, she is going to report work at our location: [REDACTED] Rolling Meadows, IL [REDACTED] The petitioner also explained that the change in location is due to the fact that "[s]he [(the beneficiary)] got the new project confirmation at [REDACTED] through [REDACTED]."



The regulation at 8 C.F.R. § 214.2(h)(2)(E) states:

*Amended or new petition.* The petitioner shall file an amended or new petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition. An amended or new H-1C, H-1B, H-2A, or H-2B petition must be accompanied by a current or new Department of Labor determination. In the case of an H-1B petition, this requirement includes a new labor condition application.

It is self-evident that a change in the location of a beneficiary's work to a geographical area not covered by the LCA filed with the Form I-129 is a material change in the terms and conditions of employment. Because work locations are critical to the petitioner's wage rate obligations, the change deprives the petition of an LCA supporting the periods of work to be performed at the two locations and certified on or before the date the instant petition was filed. While the petitioner submitted a new LCA listing the new Texas location and Illinois work location in response to the RFE, the petitioner in this case was required to submit an amended or new H-1B petition with USCIS indicating the change in locations and dates along with the newly certified LCA that establishes eligibility at the time that new or amended petition is filed.

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the U.S. Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. See 20 C.F.R. § 655.705(b), which states, in pertinent part:

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL-certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

[emphasis added]. As 20 C.F.R. § 655.705(b) requires that USCIS ensure that an H-1B petition is filed with a "DOL-certified LCA attached" that actually supports and corresponds with the petition on the petition's filing, this regulation inherently necessitates the filing of an amended H-1B petition to permit USCIS to perform its regulatory duty to ensure that a certified LCA actually supports and corresponds with an H-1B petition as of the date of that petition's filing. In addition, as 8 C.F.R. § 103.2(b)(1) requires eligibility to be established at the time of filing, it is factually impossible for an LCA certified by DOL after the filing of an initial H-1B petition to establish eligibility at the time the initial petition was filed. Therefore, in order for a petitioner to comply with 8 C.F.R. § 103.2(b)(1) and USCIS to perform its regulatory duties under 20 C.F.R. § 655.705(b), a petitioner must file an amended or new petition, with fee, whenever a beneficiary's job location changes such that a new LCA is required to be filed with DOL.

In light of the above, the AAO finds that a necessary condition for approval of an H-1B visa petition is an LCA, certified *on or before* the filing date of the petition, with information, accurate as of the date of the petition's filing, as to where the beneficiary would actually be employed. Furthermore, the petition must list the locations where the beneficiary would be employed and be accompanied by an itinerary with the dates the beneficiary will provide services at each location. Both conditions were not satisfied in this proceeding. The petitioner's attempt to amend the petition by submitting an LCA certified after the filing of the petition is ineffective. Again, a petitioner must establish eligibility at the time of filing a nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

It is further noted that 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. If a petitioner's intent changes with regard to a material term and condition of employment or the beneficiary's eligibility, an amended or new petition must be filed. To allow a petition to be amended in any other way would be contrary to the regulations. Taken to the extreme, a petitioner could then simply claim to offer what is essentially speculative employment when filing the petition only to "change its intent" after the fact, either before or after the H-1B petition has been adjudicated. 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).

In view of the foregoing, the petitioner has not overcome the director's basis for denying the petition, and it has also failed to meet the itinerary requirement at 8 C.F.R. § 214.2(h)(2)(i)(B). For these reasons, the petition may not be approved. Accordingly, the AAO shall not disturb the director's denial



of the petition on this ground and shall deny the petition on the additional ground that the requisite itinerary was not filed with the petition.

### 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 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.