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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

DATE: **MAY 01 2014** OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

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. Rosenberg
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Ron Rosenberg
Chief, Administrative Appeals Office

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

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as an IT consulting business established in 2010, with 21 employees. In order to employ the beneficiary in what it designates as a "Programmer Analyst" position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on the grounds that the petitioner failed to establish (1) that it will have a valid employer-employee relationship with the beneficiary, and (2) that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. The petitioner filed a timely appeal of the decision. On appeal, the petitioner, through counsel, contends that the director's basis for denial of the petition was erroneous. In support of this contention, counsel submits a brief and additional evidence.

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

For the reasons that will be discussed below, the AAO agrees with the director's decision that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

The AAO will also address an additional, independent ground, not identified by the director's decision, that the AAO finds also precludes approval of this petition.¹ Specifically, beyond the decision of the director, the evidence in the record of proceeding does not 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. For this additional reason, the petition may not be approved.

I. PROCEDURAL AND FACTUAL BACKGROUND

In this matter, the petitioner indicated in the Form I-129 and supporting documentation that it seeks the beneficiary's services in a position that it designates as a programmer analyst to work on a full-time basis at a salary of \$55,000 per year. In addition, the petitioner indicated that the beneficiary would be employed at [REDACTED] Milwaukee, WI [REDACTED] The

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

petitioner stated on the Form I-129 that the dates of intended employment are from October 1, 2013 to September 4, 2016.

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

- Design and development of services integrating [REDACTED] MDM and legacy applications via Enterprise Service Bus (ESB).
- Development of Item Canonical which serves as the corporate level representation of any Product/Item.
- Working as part of a team designing and implementing Master Data Management to achieve consistent corporate data throughout the enterprise.
- Product development, documentation of designs, and integration testing in a fast-paced environment.
- Enterprise Application Integration design and development experience using [REDACTED] Business Works (BW), [REDACTED] Administrator and [REDACTED] Enterprise Message Service (EMS).
- Involved in development of Orchestration batch process to trigger and automate data extract and records import into [REDACTED] MDM.

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

- A copy of a job offer letter, dated March 25, 2013, from the petitioner to the beneficiary;
- A copy of the beneficiary's transcript and diploma indicating that he completed a Master of Engineering degree at [REDACTED] in [REDACTED] Louisiana;
- Copies of the beneficiary's foreign degrees;
- A copy of a document titled "Independent Contractor Consulting Agreement" dated January 18, 2013, between [REDACTED] LLC and the petitioner for the beneficiary's services, which states in pertinent part:

[The beneficiary] will provide herself² as the "Consultant".
Consultant will provide services as defined in this Agreement for [REDACTED] (the "Client").

- A copy of the Exhibit A (Statement of Work) attached to the Independent Contractor

² The document erroneously refers to the beneficiary with a feminine pronoun.

Consulting Agreement (hereinafter, SOW). The SOW states that the start date of the project is February 5, 2013, but does not list an end date. The SOW also states that the following are the services to be performed:

Consultant will provide [REDACTED] services for the benefit of the Client, working directly through [REDACTED] PSG. The Consultant's primary job responsibility is to architect and develop for the Client's needs under the guidance of [REDACTED] PSG using [REDACTED] technology. Specifically, the Consultant will be responsible for Master Data Management using [REDACTED] Collaborative Information Manager for CIM[.]

- A copy of an undated letter from [REDACTED] Manager, stating that the beneficiary has been working at the end-client [REDACTED]'s Milwaukee, WI location since January 2013 and lists the same duties that the petitioner listed in its support letter. The letter also states that the "project is an ongoing engagement and an end has not yet been determined." Further, the letter states that the beneficiary is an employee of the petitioner, and that the petitioner "at all times, maintains/exercises the right to control and supervise [the beneficiary's] overall work at the [REDACTED]'s site."
- A copy of a letter, dated March 28, 2013, from [REDACTED]³ of [REDACTED], stating that the beneficiary's services are needed at [REDACTED]'s Corporation in Milwaukee beginning on February 5, 2013. The letter also states that the "project is an ongoing engagement and will last for a period of at least 12 months."

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on May 20, 2013. The director asked the petitioner to submit evidence to demonstrate that it will have an employer-employee relationship with the beneficiary.

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

- A copy of a letter, dated July 28, 2013, from [REDACTED] Vice President of the petitioner, addressed to "To Whom It May Concern," which states:

The beneficiary . . . will be providing services to [REDACTED]'s. The beneficiary is not [an] employee of [REDACTED]'s. [The beneficiary] will serve in the capacity of an employee of [the petitioner]. [The petitioner] has a contractual agreement with [REDACTED] and [REDACTED] has a contractual agreement with [REDACTED], [REDACTED] and [REDACTED] has an agreement with [REDACTED]'s. [The beneficiary] shall continue to be an employee of [the petitioner] and shall be subjected to [the] ultimate

³ Mr. [REDACTED] does not indicate the position title that he holds with [REDACTED]

control of [the petitioner]. [REDACTED]'s will utilize [the beneficiary's] services as [a] Programmer Analyst on [an] ongoing basis as his role will be integral to the project he would be working on.

- A copy of a letter, dated August 5, 2013, from [REDACTED], Vice President of the petitioner, addressed to USCIS, which states that the petitioner "will have full control over the beneficiary" and that "the beneficiary will be supervised [by the petitioner's] vice president" and lists the same duties for the beneficiary that were listed in the petitioner's support letter, dated April 1, 2013. The petitioner also states, "[i]n case [the beneficiary's] current client assignment ends before the requested period, we will place [the beneficiary] at our other client locations for [the] same job profile."
- A copy of a letter on [REDACTED] letterhead, dated August 5, 2013, from [REDACTED] Resource Manager, addressed to "To Whom It May Concern," which lists the same duties for the beneficiary that were listed in the petitioner's support letter and in Mr. [REDACTED]'s earlier undated letter that was submitted with the petition. This letter also states that [REDACTED]'s, the end client, "does not supply any formal project confirmation letter to third part[y] consultants."
- Copies of the beneficiary's monthly performance evaluations by the petitioner for the months of March, April, May, July, and August 2013.
- A copy of the beneficiary's paystubs from the petitioner for the weeks ending on May 15, 2013, June 15, 2013, and July 15, 2013.
- A copy of the petitioner's Form 1120S, U.S. Income Tax Return for an S Corporation for 2012.
- A copy of the petitioner's organizational chart.

On August 29, 2013, the director denied the petition finding that the petitioner failed to establish (1) that it will be a United States employer having a valid employer-employee relationship with the beneficiary as an H-1B temporary employee; and (2) that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions.

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

- A copy of an email exchange, dated September 26, 2013 between (1) the beneficiary from [REDACTED] Inc. and (2) [REDACTED] Project Manager, [REDACTED]'s Department Stores, indicating that [REDACTED]'s could not provide a letter confirming how long the beneficiary's services would be needed at [REDACTED]'s because

the beneficiary is "under contract with [REDACTED] (not [REDACTED]s)."

- Copies of various email chains listing the beneficiary's [REDACTED]'s email address as one of the recipients.
- Copies of four job advertisements for programmer analyst positions.
- Copies of letters from the following individuals, stating that a bachelor's degree is typically required for programmer analyst positions and that the degree may be in a number of different fields related to the work to be performed:
 - [REDACTED] Founder, [REDACTED] LLC, signed on June 21, 2013;
 - [REDACTED] Resource Development Manager, signed on June 20, 2013 (on [REDACTED] Corporation letterhead); and,
 - [REDACTED] Managing Partner, signed on July 20, 2013 (on [REDACTED] letterhead).
- A copy of an affidavit, dated June 24, 2013, from [REDACTED] Director of [REDACTED] Inc., stating that the company has eight individuals working in the position of programmer analyst who hold at least a bachelor's degree.
- A copy of an affidavit, dated September 21, 2013, from [REDACTED] Vice President of the petitioner, stating that the petitioner has ten individuals working in the position of programmer analyst who hold at least a bachelor's degree.
- A letter from the petitioner dated September 12, 2013, with a "[l]ist of candidates with similar [j]ob [t]itle," listing the names of three individuals employed by the petitioner in programmer analyst positions, specifying the degrees they hold, and their immigration status. The letter also states that the individuals' educational transcripts and H-1B approvals are enclosed; however, the petitioner did not submit this documentation.

II. LAW AND ANALYSIS

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

The AAO will now discuss the director's decision, namely whether the petitioner has established that it meets the regulatory definition of a "United States employer" as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii). Specifically, the AAO will determine whether the petitioner has established that it will have "an employer-employee relationship with respect to employees under

this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii).

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

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

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

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

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

(Emphasis added); *see also* 56 Fed. Reg. 61111, 61121 (Dec. 2, 1991).

The record is not persuasive in establishing that the petitioner will have an employer-employee relationship with the beneficiary.

Although "United States employer" is defined in the regulations at 8 C.F.R. § 214.2(h)(4)(ii), it is noted that the terms "employee" and "employer-employee relationship" are not defined for purposes of the H-1B visa classification. Section 101(a)(15)(H)(i)(b) of the Act indicates that an alien coming to the United States to perform services in a specialty occupation will have an "intending employer" who will file a Labor Condition Application with the Secretary of Labor pursuant to section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). 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.⁴

⁴ 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

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

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).

importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. *Cf. Darden*, 503 U.S. at 318-319.⁵

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).⁶

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 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

⁵ 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))).

⁶ 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).

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."

In the instant case, the petitioner claims that it will have an employer-employee relationship with the beneficiary and that the beneficiary will work at the end-client, [REDACTED]'s. However, the record does not contain any agreements or contracts with the end-client [REDACTED]'s) demonstrating that the beneficiary would be working there and who would be supervising the beneficiary at the end-client's location.

In a letter dated July 28, 2013, the petitioner stated that it "has a contractual agreement with [REDACTED] and [REDACTED] has a contractual agreement with [REDACTED] and [REDACTED] has an agreement with [REDACTED]'s." However, the petitioner did not submit copies of these agreements. Furthermore, in a letter, dated August 5, 2013, [REDACTED] Resource Manager, stated that "[REDACTED]'s Corporation does not supply any formal project confirmation letter to third part[y] consultants." Therefore, the record does not contain evidence such as contracts, work orders, and statements of work between [REDACTED] and the petitioner, which outline in sufficient detail the nature and scope of the beneficiary's intended employment with the end-client, [REDACTED]'s. Also, the petitioner did not submit any contractual agreement between the petitioner and [REDACTED]'s. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

Moreover, the petitioner provided a copy of the "Independent Contractor Consulting Agreement" (the Agreement) with the primary vendor, [REDACTED] which identifies [REDACTED] as "the Company" and the beneficiary as the "Consultant." According to this agreement, the vendor, [REDACTED] would direct

the beneficiary's services and not the petitioner. The agreement states that the Consultant "shall furnish to the Company [REDACTED] periodic progress reports with regards to the Services, which shall be rendered at the Company's [REDACTED] discretion, including all information on the status of the Services as directed by the Company [REDACTED]." In addition, the SOW issued pursuant to the Agreement indicates that the beneficiary would be "working directly through [REDACTED] and "under the guidance of [REDACTED] using [REDACTED]." (Emphasis added.).

The petitioner's lack of control over the beneficiary's work is further noted in section 1(f), "Changes," of the Agreement between [REDACTED]s and the petitioner, which states the following:

The Client may make changes affecting the Services to be provided by the Consultant subsequent to the execution of this Agreement. Upon receipt of such change by the Client, the Company [REDACTED] shall promptly notify the Consultant. Unless otherwise directed by the Company [REDACTED] the Consultant shall not thereafter perform any services which would be inconsistent with said changes. The Consultant may be ordered by the Company [REDACTED] without invalidating this Agreement, to make changes to the Services within the general scope of this Agreement consisting of additions, deletions or other revisions, including those required by changes to the scope of work contained in the underlying Master Services Agreement, the payment terms, hours and time being adjusted accordingly. The Consultant, if required by the Company [REDACTED], must comply with any changes in the Services. . . .

The AAO finds materially significant the absence of any mention in the Agreement of any measure of control by the petitioner over the specifications or performance requirements of the actual work to be performed by the beneficiary while assigned to [REDACTED]' clients.

Upon review of the Agreement and SOW, the AAO finds that [REDACTED] and [REDACTED] - and not the petitioner - will exercise the most immediate and substantial control over the beneficiary and the beneficiary's day-to-day work, and make determinations regarding the performance requirements and acceptability standards that would dictate the substantive nature of the beneficiary's daily work.

Furthermore, even though the Agreement is signed by the petitioner and its vendor [REDACTED] the language of the Agreement consistently appears to refer to the beneficiary as the "Consultant" which gives the impression that the agreement is between [REDACTED] and the beneficiary - and that the beneficiary, rather than the petitioner, is an independent contractor of [REDACTED]. For example, Section 1(d), "Payment," of the Agreement states, "the Company [REDACTED] will pay Consultant fees as outlined in Exhibit A."

The SOW states, in pertinent part, the following:

II. Payment Terms and Fees

The rate for this engagement is \$85 per hour worked. Payments are made with Net 30 from end of month invoice date. Consultant will submit approved timesheets to [REDACTED] in [REDACTED] timekeeping system.

Furthermore, Section 2(b) and (c) of the Agreement state the following, in part:

- (b) Employment Taxes and Benefits. Consultant will report as self-employment income all compensation received by Consultant pursuant to this Agreement.
- (c) W9 Form. As an independent contractor, Consultant must submit a completed and executed W9 Form prior to its performance of the Services.

The language of the Agreement and SOW appear to indicate that the beneficiary is being hired as an independent contractor by [REDACTED] directly and not as an employee of the petitioner.

In efforts to demonstrate that the beneficiary is the employee of the petitioner, the petitioner submitted three monthly paystubs that it issued to the beneficiary. However, these pay stubs demonstrate that the petitioner did not pay the beneficiary a regular salary on a semi-monthly basis as indicated in the "Addendum to Offer Letter." The paystub for the period ending on May 15, 2013, indicates that the petitioner paid the beneficiary \$50 per hour in wages for 184 hours - a total of \$9,200 in gross amount. The paystub for the period ending on June 15, 2013, indicates that the petitioner paid the beneficiary \$5,416.66 in salary. The paystub for the period ending on July 15, 2013, indicates that the petitioner paid the beneficiary \$6,466.67 as a bonus. The Addendum to Offer Letter, signed by the beneficiary on January 28, 2013, states that the petitioner would pay the beneficiary on a "semi-monthly basis." As indicated above, the beneficiary received payments from the petitioner on a monthly basis rather than semi-monthly basis as indicated in the addendum to the offer letter. Furthermore, these payments were not based on standard methods. For example, the May payment was based on wages, the June payment was based on salary, and the July payment was a bonus. The petitioner fails to explain the inconsistency in the beneficiary's pay calculation methods and the frequency. Moreover, there is no explanation in the record as to why the beneficiary is required to report as self-employment income all compensation received by him pursuant to the Agreement signed by the petitioner and [REDACTED] and why the beneficiary must submit W9 Form to [REDACTED] as an independent contractor if the beneficiary is an employee of the petitioner.

While social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are still relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary's employer. Here, the record contains insufficient evidence to demonstrate that the petitioner paid the beneficiary regularly as its employee and that the petitioner will be overseeing and directing the work of the beneficiary. Instead, the evidence in the record

indicates that [REDACTED] would be paying the beneficiary directly; and that [REDACTED] and [REDACTED] will be overseeing and directing the work of the beneficiary, rather than the petitioner.

The evidence of record, therefore, is insufficient to establish that the petitioner qualifies as a "United States employer," as defined by 8 C.F.R. § 214.2(h)(4)(ii). Merely claiming in its letters that the beneficiary is the petitioner's employee and that the petitioner - from its remote relationship to the end-client - supervises the beneficiary does not establish that the petitioner exercises any substantial control over the beneficiary and the substantive work that 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).

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

The AAO will next address the director's second basis for the denial of the petition, 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 384, 387 (5th Cir. 2000). To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

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

The petitioner stated on the Form I-129 that the beneficiary would be employed in a programmer analyst position. However, 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 evidence in the record of proceeding establishes that performance of the particular proffered position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

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 companies' job requirements is critical. *See Defensor v. Meissner*, 201 F.3d 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.

As a preliminary matter and as recognized in *Defensor v. Meissner*, it is necessary for the end-client to provide sufficient information regarding the proposed job duties to be performed at its location(s) in order to properly ascertain the minimum educational requirements necessary to perform those duties. *See Defensor v. Meissner*, 201 F.3d at 387-388. In other words, as the nurses in that case would provide services to the end-client hospitals and not to the petitioning staffing company, the petitioner-provided job duties and alleged requirements to perform those duties were irrelevant to a specialty occupation determination. *See id.*

Here, the record of proceeding in this case is similarly devoid of sufficient information from the end-client, [REDACTED]'s, regarding the specific job duties to be performed by the beneficiary for that company. The letter dated August 5, 2013 from [REDACTED] Resource Manager, states, [REDACTED]'s is the end client receiving the services of [the beneficiary]. As a company policy, [REDACTED]'s Corporation does not supply any formal project confirmation letter to third part[y] consultants." Moreover, in this matter, there are numerous inaccuracies and inconsistencies in the petition and supporting documents, which undermine the petitioner's credibility and fail to establish the nature of the work that the beneficiary would perform.

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1;

(2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

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

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

As discussed in this decision, the petitioner has failed to establish that the proffered position requires a baccalaureate or higher degree in a specific specialty or its equivalent. Therefore, the AAO need not and will not address the beneficiary's qualifications further.

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

Moreover, beyond the decision of the director, the evidence submitted fails to establish non-speculative employment for the beneficiary for the entire period requested. Although the petitioner requested, on the Form I-129, that the beneficiary be granted H-1B classification from October 1, 2013 to September 4, 2016, there is a lack of substantive documentation regarding work for the beneficiary for the duration of the requested period. Rather, the employment offer letter from the petitioner to the beneficiary, dated March 25, 2013, is silent regarding the employment start or the end date. Furthermore, the SOW with [REDACTED], dated January 18, 2013, states the project would start on February 5, 2013, but does not list an end date for the contracted work. Moreover, the letter from [REDACTED] Resource Manager, dated August 5, 2013, states that the beneficiary has been on the end-client location since January 2013 and "[t]his project is an ongoing engagement and an end date has not yet been determined." However, the letter from [REDACTED] of [REDACTED] dated March 28, 2013, indicates the project would begin on February 5, 2013, and would last for 12 months, which is significantly sooner than the requested H-1B duration.

Upon review of all of the documentation in the record of proceeding, the AAO finds that the petitioner has not established the existence of work for the beneficiary from the date the petition was filed through the end of the requested period of H-1B employment. The petitioner also did not submit documentary evidence regarding any additional work for the beneficiary. Thus, the petitioner has failed to establish that the petition was filed for non-speculative work for the beneficiary that existed *as of the time of the petition's filing*, for the entire period requested. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on

speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). Thus, even if it were found that the petitioner would be the beneficiary's United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii), the petitioner has not demonstrated that it would maintain such an employer-employee relationship with the beneficiary for the duration of the period requested.⁷

III. CONCLUSION

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of

⁷ 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).

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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.