

(b)(6)



U.S. Citizenship
and Immigration
Services

DATE: **MAY 15 2014**

OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

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

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

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

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

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

Thank you,

N. Rosenberg
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 17, 2013. On the Form I-129 visa petition, the petitioner describes itself as a "[p]roject management solutions" company established in 1989, with more than 300 employees. In order to employ the beneficiary in what it designates as an "Integrator" position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on the grounds that the petitioner failed to establish that the proffered position qualifies for classification 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 asserts that the director erroneously denied the petition. In support of this assertion, the petitioner submits a letter 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.

As a preliminary matter, the AAO will also address additional, independent grounds, not identified by the director's decision, that the AAO finds also precludes approval of this petition.¹ Specifically, the AAO finds that, beyond the decision of the director, the evidence in the record of proceeding does not establish (1) that the petitioner will be a United States employer having an "employer-employee relationship" with the beneficiary as an H-1B temporary employee, (2) the petitioner's eligibility at the time of filing for the benefit sought, and (3) 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.

I. PROCEDURAL AND FACTUAL BACKGROUND

In this matter, the petitioner indicated in the Form I-129 and supporting documentation that it seeks

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

the beneficiary's services in a position that it designates as an integrator to work on a full-time basis at a salary of \$70,720 per year. The petitioner stated that the dates of intended employment are from October 1, 2013 to August 25, 2016.

In a letter of support, dated March 29, 2013, the petitioner stated that the beneficiary will be responsible for the following duties:

[C]ommissioning and integration of GSM, UMTS and LTE base station equipment into the cellular network. [The beneficiary] will be responsible for new cabinet commissioning and integrations, installations, de-installations, troubleshooting and support. [The beneficiary] will conduct site audits and assessments, Radio Frequency preparation and installation, as well as T1 testing and extension and RF line sweeping and preparation. [The beneficiary] will be responsible for network element deployment and will ensure all work is completed to the satisfaction in accordance with all defined scope and technical specification documents and technical standards. [The beneficiary] will also conduct drive testing sites for proper call placement and site function, and installation of 911 equipment as well as T1 SIAD installation.

In the letter of support, the petitioner stated that "[t]he position requires the equivalent of at least a Bachelor's Degree in Electronics Engineering, Electrical Engineering, Mechanical Engineering or a related degree from an accredited college or university." The petitioner submitted, among other things, a copy of a letter from the registrar of the [REDACTED] certifying that the beneficiary has a Bachelor of Science degree in electrical engineering. The petitioner also submitted a copy of a credential evaluation by [REDACTED] stating that the beneficiary has the U.S. equivalent of a Bachelor of Science degree in electrical engineering.

In addition, the petitioner submitted an LCA in support of the instant H-1B petition corresponding to the occupational classification "Electronic Engineers, Except Computer" - SOC (ONET/OES Code) 17-2072, at a Level II wage.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on June 11, 2013. The petitioner was asked to submit evidence to establish that the proffered position qualifies as a specialty occupation. Specifically, the petitioner was asked to submit, among other things, copies of the following: a signed employment agreement between the petitioner and the beneficiary; an employment offer letter that describes the nature of the employer-employee relationship; valid contracts, statement of work, and letters between the petitioner and end-clients; description of the duties the beneficiary will perform; details of the project; the qualifications that are required to perform the job duties and any other related evidence. The director also requested the petitioner's two to three most recent federal income tax returns, company brochures and other information that details the petitioner's products and services, and evidence of sufficient production space and equipment to support the beneficiary's specialty occupation work.

In response to the director's RFE, the petitioner submitted a letter from [REDACTED] Operational Risk Manager, dated July 1, 2013, which states that the beneficiary would be "an internal employee of [the petitioner] and will be under the supervision and direction of another [petitioner] internal employee on a daily basis." While the petitioner stated that it is providing, among other things, copies of a detailed position description, the offer letter issued to the beneficiary, its organizational chart, and its most recent federal tax returns, the petitioner only submitted a copy of a sample document entitled "Project Associate Agreement," a sample new hire packet for "Associates," the petitioner's Associate Handbook, and a four-page promotional document about its services. According to this promotional document, the petitioner provides recruitment services and its "associates work on stimulating projects - on-site at some of the nation's largest companies."

On September 3, 2013, the director denied the petition finding that the petitioner failed to demonstrate that the proffered position qualifies for classification as a specialty occupation in accordance with the applicable statutory and regulatory provisions. The petitioner filed a timely appeal.

On appeal, the petitioner submits, among other things, the following documents:

- A letter from [REDACTED] dated September 18, 2013, stating that the proffered position is for "in-house employment" and that the petitioner is submitting additional evidence to demonstrate that the proffered position is a specialty occupation;
- A copy of a document containing a listing of the names of 58 individuals with the job title of "Integrator" and their start date. The petitioner claims that these individuals are currently employed by the petitioner;
- A copy of a two-page undated document entitled "Technical Documentation Summary";
- A copy of a document entitled "[REDACTED] Installer Training" with [REDACTED]'s name and logo;
- A copy of an 11-page document entitled "Commissioning Procedure for ION-B System" prepared by [REDACTED] and revised on August 1, 2011 with [REDACTED] name and logo;
- A printout entitled "In-Building Wireless Training" materials with [REDACTED];
- A copy of a 49-page document entitled "Antenna/Cable System Sweep MOP" with [REDACTED] logo;
- Copies of the résumés of various individuals who have backgrounds in engineering and their educational credentials;

- Copies of three job announcements for telecommunication engineering positions;
- The petitioner's promotional materials;
- A copy of the "Project Associate Agreement" signed by the petitioner and the beneficiary, entered into on February 26, 2013 and the attached Schedule I, "Project Information For [the beneficiary]," signed by the beneficiary on February 28, 2013;
- A copy of the petitioner's Form 1120, U.S. Corporation Income Tax Return, for 2012; and
- A copy of the petitioner's job description for the position of "Integrator," with an effective date of October 1, 2013, which describes the essential functions of the position as:
 - Responsible for the engineering, installation, commissioning, integration, testing, troubleshooting, and maintenance of telecommunications equipment.
 - Implement, commission, integrate, call test, maintain, and troubleshoot BTS equipment and related components.
 - Implement electronic equipment RF coax jumpers, assemble RF connectors and calibrate lines.
 - Operate test equipment and verify power connections at distribution power bay and at BTS cabinet. Activate AC power at main disconnect panel and at distribution power bay. Operate equipment and software to take AC and DC power measurements.
 - Operate test equipment and perform T1 testing.
 - Terminate, test and troubleshoot T1/DS1 circuits on an add-to-need basis.
 - Read and understand engineering drawing using theoretical knowledge to interpret engineering specifications and apply them to the actual onsite facility and equipment.
 - Read and understand sweep tests sing [sic] theoretical knowledge to interpret sweep test readings and troubleshoot errors when performance does not meet specifications.
 - Read and understand specifications for each site and perform pre and post site audits and interpret against the engineering drawings to ensure all equipment design and layout is compatible with specifications.
 - Conduct Pre Site Audits and provide onsite review of equipment and materials at the worksite. Identify each equipment component and ancillary gear and how equipment is arranged and connected and any missing components or connectors. Audit equipment performance and specifications. Interpret the scope of the new equipment and analyze how it will be installed and connected. Anticipate installation issues. Work with design team on any recommended design or layout changes.

- Conduct Post Site Audit: conduct a completion site audit to ensure all equipment and components are installed and performing up to specification. Identify any areas that could cause future network outages.
- Assemble various end connectors and calibrate / sweep RF coax lines.
- Install PDU & Bias T's.
- Fabricate / Run jumpers, power cables & alarm cables.
- Prepare and document daily site and equipment status reports including required photos.

In the job description document, the petitioner stated a requirement for a "4 year degree in Electrical Engineering or Related field."

II. LAW AND ANALYSIS

A. Requested Evidence Submitted for the First Time on Appeal

As a preliminary matter, with regard to the new documentation submitted on appeal that was encompassed by the director's RFE, the AAO notes that this evidence is outside the scope of the appeal. The regulations indicate that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary in the adjudication of the petition. *See* 8 C.F.R. §§ 103.2(b)(8); 214.2(h)(9)(i). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1), (8), and (12). The 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).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted it with the initial petition or in response to the director's request for evidence. *Id.* The petitioner has not provided a valid reason for not previously submitting the evidence. Under the circumstances, the AAO need not consider the sufficiency of such evidence requested by the director in the RFE but submitted for the first time on appeal. Nevertheless, the AAO reviewed the documentation. However, as will be discussed in this decision, the petitioner has not established eligibility for the benefit sought.

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

Beyond the decision of the director, the AAO will first discuss whether the petitioner has established that it meets the regulatory definition of a "United States employer" as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii). The AAO will now review the record of proceeding to determine whether the petitioner has established that it will have "an employer-employee

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

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

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

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

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

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

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

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

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

employee." 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer").

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

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

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

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

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

² 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 318-319.³

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).⁴

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

³ 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))).

⁴ 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."

Specifically, the petitioner claimed that the beneficiary will work for the petitioner as an "in-house" employee and submitted an undated, unsigned document titled "Project Associate Agreement" as a sample in response to the director's RFE. On appeal, the petitioner submitted another "Project Associate Agreement" that was signed by the petitioner and the beneficiary entered into on February 26, 2013 and an attached "Schedule I" entitled "Project Information For [the beneficiary]," signed by the beneficiary on February 28, 2013. The agreement and attached schedule were submitted for the first time on appeal although these documents were available at the time the petitioner responded to the director's RFE. However, upon review of the documentation, these documents do not establish an employer-employee relationship between the petitioner and the beneficiary. While Schedule I lists the petitioner as the client, the Project Associate Agreement to which it is attached appears to be intended for consulting services to be provided for the clients of the petitioner rather than for in-house employment at the petitioner. The Project Associate Agreement contains the following language:

Whereas, [the petitioner] is in the business of providing the services of independent computer programmers and consultants to perform telecommunications, networking and other consulting services (collectively, "Consulting Services") on a project basis to companies desiring such services, and

Whereas, [the petitioner] has obtained a contract to provide Consulting Services on behalf of the client specified on Schedule I (the "Client") for a particular work project described on Schedule I (the "Project") [.]

The language in the Project Associate Agreement further indicates an end-client other than the petitioner when it states the following: "(i) this Agreement shall be earlier terminated pursuant to Section 11, or (ii) *[the petitioner's] contract with Client shall be terminated prior to the end of such period*, in which case, this Agreement shall terminate concurrently with the termination thereof." (Emphasis added.).

Thus, although, the petitioner listed itself as the client on Schedule I, the language of the Project Associate Agreement suggests that the beneficiary is to perform services for companies other than the petitioner. Furthermore, the Project Associate Agreement states that the petitioner is in the business of providing the services of independent consultants to companies desiring consulting services and the petitioner's promotional materials indicate that it provides recruitment and project management services. Moreover, on appeal, the petitioner submits an undated document entitled "Technical Documentation Summary" and four technical documents to illustrate "the type of information a person holding the position of [integrator] uses on a daily basis. . . ." In the Technical Documentation Summary, the petitioner states:

Each site has approximately 5-10 pieces of specialized equipment which is connected together to ensure that radio signals are received by the equipment and transmitted to the ground equipment. The Integrator must be able to recognize, dismantle, reassemble, troubleshoot, and configure each piece of equipment onsite. While similar sites use similar equipment the layout and condition of the equipment varies with each location.

On appeal, the petitioner also submits a letter from [REDACTED] on [REDACTED] letterhead, dated September 18, 2013, in which she states that the beneficiary "has been hired under our project management division for our *nationwide* integration project management services." (Emphasis added.) Ms. [REDACTED] further states that "[the petitioner] manages multiple simultaneous integration projects nationwide and regionally" and that "[e]mployees working in our Project Management division are frequently providing services across multiple projects, clients, and scopes of work."

On appeal, the petitioner also submits a job description for the position of "Integrator." However, this document's "Acknowledgement" section is unsigned and undated. Therefore, it is unclear whether this job description is for the proffered position, which is claimed to be an "in-house" position, or whether it is applicable to all integrator positions that provide consulting services to the petitioner's clients. This document also includes the following statement:

This job description in no way states or implies that these are the only duties to be performed by the incumbent in this position. Employee(s) will be required to follow any other job-related duties requested by any person authorized to give instructions or assignments.

This statement appears to authorize others to control the beneficiary's work. Furthermore, according to "Essential Functions" listed in the job description document, integrators perform site audits and "provide onsite review of equipment and materials at the worksite." Although the petitioner states the beneficiary would be an "in-house" employee, the language on the job description indicates that integrators at the petitioner visit other worksites. Given the fact that the petitioner provides recruitment services and that the proffered position is within a division that provides services nationwide, the petitioner fails to explain who would oversee the beneficiary's work when he performs site visits.

The record contains insufficient evidence outlining in sufficient detail the nature and scope of the beneficiary's intended employment with the petitioner (or the petitioner's clients), the duties of the project(s) that the beneficiary would be performing, where the project(s) would be performed, and who would have control over the beneficiary's day-to-day assignments.

Thus, there is insufficient documentary evidence in the record corroborating what the beneficiary would do, where the beneficiary would work, and the availability of work for the beneficiary for the entire requested period of employment. 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)).

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 will be overseeing and directing the work of the beneficiary.

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 will be hired as an in-house employee and that the petitioner will supervise the beneficiary does not establish that the petitioner will exercise any substantial control over the beneficiary and the substantive work that the beneficiary will perform. 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. 190).

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 August 25, 2016, there is a lack of substantive documentation regarding work for the beneficiary for the duration of the requested period. The petitioner's support letter, dated March 29, 2013, does not mention either the start or the end date of the project. Also the letter from Ms. [REDACTED] submitted on appeal states that the petitioner's "employment relationship" with the beneficiary would begin on October 1, 2013, but does not indicate an end date. Similarly, the Project Associate Agreement and the attached Schedule I do not indicate the project's end date. While Ms. [REDACTED] stated on appeal that "[w]hen one project winds down we assign our existing resources to support another project with no break in service," the petitioner did not provide documentary evidence of the projects that the beneficiary would be assigned to support. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Id* at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

The AAO finds that the petitioner has not provided documentary evidence to demonstrate that it would employ the beneficiary for the entire H-1B period and has failed to establish the existence of work available to the beneficiary as an integrator for the requested H-1B validity period. 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, the petitioner has not demonstrated that it would maintain an employer-employee relationship with the beneficiary for the duration of the period requested.⁵

⁵ 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.

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

The AAO will now address the director's decision, namely whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

Specialty occupation means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or

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).

- (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 an integrator 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 a specific specialty as the minimum for entry into

the occupation, as required by the Act.

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

In the letter of support, dated March 29, 2013, the petitioner described itself as a "Technical Recruitment and Project Management" firm. The petitioner stated that the duties of the proffered position are as follows:

[C]ommissioning and integration of GSM, UMTS and LTE base station equipment into the cellular network. [The beneficiary] will be responsible for new cabinet commissioning and integrations, installations, de-installations, troubleshooting and support. [The beneficiary] will conduct site audits and assessments, Radio Frequency preparation and installation, as well as T1 testing and extension and RF line sweeping and preparation. [The beneficiary] will be responsible for network element deployment and will ensure all work is completed to the satisfaction in accordance with all defined scope and technical specification documents and technical standards. [The beneficiary] will also conduct drive testing sites for proper call placement and site function, and installation of 911 equipment as well as T1 SIAD installation.

As previously mentioned, on appeal, the petitioner submits a copy of a job description for the position of "Integrator." As discussed earlier, it is unclear whether this job description is for the proffered position that the petitioner claims is an in-house position or if it is for the consulting integrator position that provides services to the petitioner's clients. Nevertheless, the AAO reviewed the duties described in this document as well as the duties described in the petitioner's support letter.

However, both job descriptions contain insufficient information regarding the substantive nature of the work to be performed by the beneficiary for the petitioner (or its clients) and the record contains insufficient information regarding the projects that the beneficiary would work on.

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. 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.

III. CONCLUSION

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

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

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed. The petition is denied.