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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 21 2014**

OFFICE: CALIFORNIA SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner: [REDACTED]

Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

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

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as an "International Staffing and Consulting Services" company established in 1986, with 3,405 employees. In order to employ the beneficiary in what it designates as a "Quality Assurance Engineer" 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 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 Form I-290B, Notice of Appeal or Motion, and a brief. The AAO reviewed the record in its entirety before issuing its decision.¹

The director denied the petition determining that the petitioner failed to establish that the proffered position qualifies for classification as a specialty occupation and that the petitioner failed to establish an employer-employee relationship in accordance with the applicable statutory and regulatory provisions for the time period requested.²

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.

I. PROCEDURAL AND FACTUAL BACKGROUND

In this matter, the petitioner indicated on the Form I-129 and in the supporting documentation that it seeks the beneficiary's services in a position that it designates as a Quality Assurance Engineer, to work on a full-time basis at a salary of \$40.00 per hour. In addition, the petitioner indicated that the beneficiary would be employed at [REDACTED] CA [REDACTED]. The petitioner stated that the dates of intended employment are from October 1, 2013 to September 30, 2014.

The petitioner attested on the required Labor Condition Application (LCA) that the proffered position is a full-time position and that the occupational classification for the position is "Computer

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

² The director also observed that the petitioner had not submitted sufficient evidence to establish the availability of work for the beneficiary throughout the requested validity period; however, the director did not discuss this finding as an issue separate from the specialty occupation issue.

Occupations, All Other" SOC (ONET/OES) Code 15-1799, at a Level II wage.³ The LCA was certified on March 27, 2013, for a validity period from September 15, 2013 to September 14, 2016.

In a letter of support, dated March 27, 2013, the petitioner stated that the beneficiary will be assigned at [REDACTED] LLC, a [REDACTED] Inc. company ("Visa"). The petitioner stated that the proffered position requires "at least a Master's Degree in computer science, engineering or mathematics," and experience in Quality Assurance Engineering. The petitioner further categorized the position as a Computer Systems Analyst as found in the U.S. Department of Labor's *Occupational Outlook Handbook* 2012-2013 (hereinafter the *Handbook*).

The petitioner also provided an itinerary of services showing that the beneficiary will be placed at the end-client's office from October 1, 2013 to September 30, 2014. The petitioner indicated that the minimum education to perform the duties of the position described on the itinerary is a Master's Degree. The petitioner also identified the name/title of "[the petitioner's] Supervisor" as [REDACTED] Business Leader. The petitioner identified the name/title of the "End Client Supervisor" as [REDACTED] Project Manager.

The petitioner listed the beneficiary's position on the itinerary as a "Quality Assurance Tester" and claimed the beneficiary will be responsible for, among other things:

- Interacting with business units to gather requirements, create test strategies and test plans and manage quality assurance resources;
- Utilizing software testing methodologies and processes;
- Analyzing technical documentation;
- Developing test assets (e.g. test plans, test designs, test cases, discrepancy reports, etc.);
- Utilizing QA tools and products (ClearQuest, Quality Center, QTP, Load Runner, SoapUI and SOAtest); and
- Communicating with Test Managers, Developers and Project Managers.

As evidence of the employer-employee relationship between the petitioner and beneficiary, the petitioner stated the following:

[The petitioner] will be **solely** responsible for paying [the beneficiary], providing him with benefits, withholding taxes, supervising him on a weekly basis ([the petitioner's] Business Leader, [REDACTED], is charged with [the beneficiary's] supervision, and controlling where, when, and how he performs his job...

As evidence of the relationship the petitioner provided the following documentation: Consultant Employment Agreement dated October, 2011 and signed by both parties; Master Services

³ See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

Agreement with [REDACTED] effective March 15, 2010 for five years and signed by both parties; Work Statement No. [REDACTED] providing for the beneficiary's assignment at [REDACTED]. The Work Statement is effective March 1, 2013 and expires June 30, 2013. The work is for the [REDACTED] Business Unit of [REDACTED]. The statement does not list the names of the petitioner's Quality Assurance Engineers to be assigned to the project.

The director issued an RFE on April 25, 2013. The petitioner was asked to submit evidence to establish, among other things, (1) an employer-employee relationship with the beneficiary through the right to control the manner and means by which the product or services are accomplished for the duration of the requested H-1B validity period, (2) that there is sufficient specialty occupation work for the beneficiary to perform for the duration of the requested H-1B validity period, and (3) the proffered position qualifies as a specialty occupation. The director provided a list of the types of evidence that could be submitted.

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

- Work statements and change orders entered into between the petitioner and [REDACTED] since December of 2010 pursuant to the Master Services Agreement. The most recent two projects end as of September 30, 2013.
- A copy of the Master Services agreement between the petitioner and [REDACTED] submitted with the initial petition.
- A revised Itinerary of Services. The revised itinerary now indicates that the minimum education to perform the same duties as listed on the initial itinerary is a bachelor's degree in Computer, Engineering or Mathematics field, rather than a master's degree. The revised itinerary amends the name/title of "[the petitioner's] Supervisor" from [REDACTED] Business Leader to [REDACTED] Business Development Manager, [REDACTED] Account. The revised itinerary amends the name/title of the "End Client Supervisor" from [REDACTED] Project Manager to [REDACTED], Business Leader [REDACTED].
- The petitioner's detailed statement of position description signed by [REDACTED] Business Development Manager [REDACTED] Account, dated July 16, 2016.⁴
- Sworn declaration from the petitioner's recruitment director attesting to the minimum requirements for the Quality Assurance Engineer position and including job postings from the petitioner seeking Quality Assurance Engineers for the [REDACTED] project as well as resumes of current and past members of the Quality Assurance Team assigned to the [REDACTED] project.

⁴ The year "2016" appears to be typographical error.

- An additional copy of the Consultant Employment Agreement between the petitioner and the beneficiary.
- The petitioner's 2013 employee benefits guide.
- A copy of the petitioner's organizational chart reflecting all of the Quality Assurance Engineers employed by the petitioner and assigned to the Visa Project.
- A photocopy of a memorandum dated July 16, 2013, from [REDACTED] Business Leader, [REDACTED] on [REDACTED] letterhead stating that the project the beneficiary is assigned to is a "long-term project that [REDACTED] anticipates will extend beyond [REDACTED] current fiscal year, which begins on October 1, 2013."
- Ads placed by [REDACTED] for staff Quality Assurance Engineers.

Based on the record, the director denied the petition for the reasons referenced above. The director noted in her decision that the petitioner submitted SOWs showing an availability of work for the majority of the past two years, however, the petitioner failed to provide evidence of available work for the time period requested. The director determined that without sufficient evidence of availability of work, U.S. Citizenship and Immigration Services (USCIS) is unable to determine that a valid employer-employee relationship exists. The director further found that similarly, without valid contracts and/or statements of work from the end-client, the petitioner has not established that the proffered position is a specialty occupation.

On appeal, counsel for the petitioner asserts that the director erred in finding that the petitioner failed to establish an employer-employee relationship. Counsel also contends that the petitioner established that it had sufficient work available for the time period requested. Counsel states that the work statements and change orders produced from December 2010 to September 30, 2013 reflect the work that would extend through the period requested. Counsel also references the July 16, 2013 memorandum on [REDACTED] letterhead confirming that the project to which the beneficiary was assigned is a long term project. Additionally, counsel cites to a letter submitted in support of the appeal, "furnished by [REDACTED] in which [REDACTED] confirms" the expectation that the project will continue for at least one year through the requested date. Counsel further claims that the following additional evidence supports the conclusion that an employer-employee relationship exists between the petitioner and beneficiary: employment agreement between the petitioner and beneficiary; pay stubs submitted with the initial petition showing the petitioner provides benefits to the beneficiary; and the Master Services Agreement between the petitioner and [REDACTED]

Counsel for the petitioner further avers that the Quality Assurance Engineer position is a specialty occupation. Counsel states that the following evidence submitted with the initial petition and on appeal support this finding: statement of position description and attached letter from [REDACTED] confirming the accuracy of the position description and minimum requirements for the position;

online advertisements placed by the petitioner; sworn declaration from the petitioner's recruiting director; resumes for all individuals assigned as Quality Assurance Engineers to the [REDACTED] project; and online advertisements placed by [REDACTED] for the position in-house.

The letter from [REDACTED] referenced by counsel and provided on appeal is a photocopy on [REDACTED] letterhead and signed by "[REDACTED] Business Leader, [REDACTED]" The letter described the ongoing nature of the project to which the beneficiary is assigned as follows:

The RTM project is a long-term project that [REDACTED] anticipates will extend beyond [REDACTED]'s current fiscal year, which begins on October 1, 2013. We expect that work on this project will continue for at least a year through approximately September 30, 2014, with possibility of extensions beyond that date.

The letter goes on to confirm that the beneficiary has been assigned to perform services for [REDACTED] since October 2011. The letter also confirms that [REDACTED] will not accept "less than a Bachelor's Degree in a Computer Science, Engineering, Mathematics or Physics" for the position of Quality Assurance Engineer and that [REDACTED] concurs" with the statement of position description prepared by the petitioner.

III. LAW AND ANALYSIS

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

The AAO will first discuss whether the petitioner has established that it meets the regulatory definition of a "United States employer" and 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" as set out at 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) (2012). The intending employer is described as offering full-time or part-time "employment" to the H-1B "employee." Subsections 212(n)(1)(A)(i) and 212(n)(2)(C)(vii) of the Act, 8 U.S.C. § 1182(n)(1)(A)(i), (2)(C)(vii) (2012). Further, the regulations indicate that "United States employers" must file a Petition for a Nonimmigrant Worker (Form I-129) in order to classify aliens as H-1B temporary "employees." 8 C.F.R. § 214.2(h)(1), (2)(i)(A). Finally, the definition of "United States employer" indicates in its second prong that the petitioner must have an "employer-employee relationship" with the "employees under this part," i.e., the H-1B beneficiary, and that this relationship be evidenced by the employer's ability to "hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer").

Neither the former Immigration and Naturalization Service (INS) nor 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.⁵

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

⁵ While the *Darden* court considered only the definition of "employee" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(6), and did not address the definition of "employer," courts have generally refused to extend the common law agency definition to ERISA's use of employer because "the definition of 'employer' in ERISA, unlike the definition of 'employee,' clearly indicates legislative intent to extend the definition beyond the traditional common law definition." See, e.g., *Bowers v. Andrew Weir Shipping, Ltd.*, 810 F. Supp. 522 (S.D.N.Y. 1992), *aff'd*, 27 F.3d 800 (2nd Cir.), *cert. denied*, 513 U.S. 1000 (1994).

However, in this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. Instead, in the context of the H-1B visa classification, the term "United States employer" was defined in the regulations to be even more restrictive than the common law agency definition. A federal agency's interpretation of a statute whose administration is entrusted to it is to be accepted unless Congress has spoken directly on the issue. See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-845 (1984).

additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee" or "employer-employee relationship" combined with the agency's otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition" or, more importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. *Cf. Darden*, 503 U.S. at 318-319.⁶

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).⁷

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).

⁶ 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))).

⁷ 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).

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

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

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

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

Specifically, the record does not contain evidence such as contracts, work orders, and statements of work which outline in sufficient detail the nature and scope of the beneficiary's intended employment with the end-client for the time period requested. The petitioner's two most recent statements of work both end on September 30, 2103, one day prior to the requested start date. Counsel for the petitioner claims that the work statements or change orders extending beyond October 1, 2013 were not available at the time of the RFE response as those documents are "not typically executed until well after the new fiscal year begins." In lieu of the actual contract, the petitioner submitted in response to the RFE a memorandum signed by [REDACTED], Business Leader for [REDACTED] stating that "[REDACTED] anticipates the project will extend beyond [REDACTED]'s current fiscal year which begins on October 1, 2013." However, there is no documentation from [REDACTED] describing when it anticipates issuing the statement of work or change order. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

On appeal, counsel for the petitioner claims that since the denial, [REDACTED] has confirmed that the project to which the beneficiary is assigned will continue through approximately September 30, 2014. As evidence of such extension, the petitioner attached a photocopy of a letter signed by

Business Leader for [REDACTED] The petitioner, however, was still unable to provide any statement of work or change order detailing the specific work to be done or supporting the duties that the beneficiary would perform. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

Furthermore, both the memorandum attached in response to the RFE, and the letter submitted on appeal, raise questions concerning the origin and reliability of the evidence. Both documents are copies submitted on paper with the [REDACTED] logo in the top right hand corner. The petitioner did not explain why the original documents were not submitted. The letter on appeal is undated. In the letter submitted on appeal, the letter-writer states to "please contact us" in the event of questions, however, no contact information is provided anywhere on the document. The memorandum dated July 16, 2013, similarly contains no contact information anywhere on the document. Both letters are signed by [REDACTED] Business Leader, [REDACTED]. We note here that the petitioner initially identified [REDACTED] as the petitioner's business leader charged with supervising the beneficiary. The initial itinerary submitted also identified [REDACTED] as the petitioner's supervisor and another individual as the end-client supervisor. Although the revised itinerary submitted in response to the director's RFE amended the name/title of the end client supervisor to [REDACTED] the petitioner offered no explanation regarding the change, calling into question the validity of [REDACTED] as the signatory on both [REDACTED] documents. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Additionally, while the petitioner claims that the beneficiary will work for [REDACTED] the letters referenced above are the only evidence that the beneficiary has been, or will be, working as a Quality Assurance Engineer for the end client. Neither the contract, nor Statement of Work, between the petitioner and [REDACTED] specifies that the beneficiary is assigned to work at [REDACTED] pursuant to the contract. The petitioner provides a chart of statements of work and change orders and lists in the "Notes" projects to which the beneficiary has been assigned, but provides no other corroborating evidence other than the letters in question.

As a result, the record is devoid of any documentation indicating and/or corroborating that the beneficiary would be the individual assigned to perform services pursuant to any contract(s), work order(s), and/or statement(s) of work for the requested, one-year validity period at the [REDACTED] offices. 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190).

On appeal, counsel references the beneficiary's paystubs as evidence that the petitioner was paying the beneficiary's salary and providing some benefits. 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 the work will be located, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary's employer. Without full disclosure of all of the relevant factors relating to the end-client, including evidence corroborating the beneficiary's actual work assignment, and consistent evidence regarding the beneficiary's direct supervision, the AAO is unable to find that the requisite employer-employee relationship will exist between the petitioner and 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 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. The petitioner's reliance on evidence showing that it pays the beneficiary's salary, makes contributions to worker's compensation, and withholds federal and state income tax as well as providing the beneficiary with certain health benefits, establishes in this matter only that the petitioner is providing an administrative function. The petitioner has not provided the necessary documentary evidence establishing that it provides the beneficiary's actual daily work and supervises him and his work. Without evidence supporting the petitioner's claims, the petitioner has not established eligibility in this matter. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190).

B. Specialty Occupation

The AAO will now address whether the petitioner established that there exists a credible offer of employment in a specialty occupation. Based upon a complete review of the record of proceeding, the AAO agrees with the director and finds that the evidence fails to establish that there exists a credible offer of employment in a specialty occupation.

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. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190). 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). 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 "Quality Assurance Engineer" position. However, to determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. As previously mentioned, the specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F.3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the evidence in the record of proceeding establishes that performance of the particular proffered position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in 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."

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

The AAO finds that the petitioner has failed in each of these regards. First, although the petitioner provided a position description both initially and in response to the RFE, without a statement of work for the time period requested, there is no corroborating evidence to determine that the duties listed will actually be performed by the beneficiary for the duration of the requested period in H-1B status. Again, without supporting documentary evidence the record is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

Second, as discussed above, the record does not establish that the petitioner had work orders, statements of work, or contracts to fulfill when the petition was filed. The petitioner failed to submit any actual contracts, statements of work, or change orders for the time period requested. The only evidence submitted to corroborate the "anticipated" continuation of the project to which the beneficiary will be assigned is unreliable as both the origin of the letter and the memorandum and the authority of the signatory of both documents are in question. The petitioner failed to submit original documents or signatures, dated documents, and documents including contact information. Again, doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The petitioner has not provided a credible supported description of the actual duties the beneficiary will perform for the duration of the requested employment period. Based upon a complete review of the record of proceeding, the AAO finds that the petitioner has failed to establish (1) the substantive nature and scope of the beneficiary's employment; (2) the actual work that the beneficiary would perform; (3) the complexity, uniqueness and/or specialization of the tasks; and/or (4) the correlation between that work and a need for a particular educational level of highly specialized knowledge in a specific specialty. Consequently, this precludes a determination that the petitioner's proffered position qualifies as a specialty occupation under the pertinent statutory and regulatory provisions.

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

which is the focus of criterion 1⁸; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4. Thus, the petitioner has failed to establish that the proffered position is a specialty occupation under the applicable provisions.

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

C. Beneficiary Qualifications

Beyond the decision of the director, the petitioner has not established that the beneficiary is qualified for the position requested. Here, we do not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient evidence to demonstrate that the proffered position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. Therefore, the beneficiary's qualifications need not be addressed. However, we note that, in any event, the petitioner did not submit an evaluation of the beneficiary's foreign degree or sufficient evidence to establish that his degree is the equivalent of a U.S. bachelor's degree in a specific specialty. Furthermore, the petitioner failed to show how the beneficiary's United States Master's degree in "Medical Device and Diagnostic Engineering" is related to the stated requirement of a Master's Degree or a bachelor's degree in computer science, engineering, or mathematics. The field of engineering is a broad category that covers numerous and various specialties, some of which are only related through the basic principles of science and mathematics, e.g., nuclear engineering and aerospace engineering. Therefore, besides a degree in electrical engineering, it is not readily apparent that a general degree in engineering or one of its other sub-specialties, such as chemical engineering, nuclear engineering, or medical device and diagnostic engineering, is closely related to computer science or that engineering or any and all engineering specialties are directly related to the duties and responsibilities of the particular position proffered in this matter. Therefore, the petition could not be approved even if eligibility for the benefit sought had been otherwise established.

⁸ It is noted that, even if the proffered position of Quality Assurance Engineer were established as being that of a computer systems analyst, a review of the *Handbook* does not indicate that such a position qualifies as a specialty occupation in that the *Handbook* does not state a normal minimum requirement of a U.S. bachelor's or higher degree in a specific specialty or its equivalent for entry into such occupation. See U.S. Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Computer Systems Analyst," <http://www.bls.gov/ooh/computer-and-information-technology/software-developers.htm#tab-4> (accessed May 16, 2014). As such, absent evidence that the position of a quality assurance engineer/computer systems analyst satisfies one of the alternative criteria available under 8 C.F.R. § 214.2(h)(4)(iii)(A), the instant petition could not be approved for this additional reason.

IV. CONCLUSION

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 must be denied for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act; *see e.g., Matter of Otiende*, 26 I&N Dec. at 128. Here, that burden has not been met.

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