



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: **NOV 03 2014** OFFICE: VERMONT 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. The appeal will be dismissed. The petition will be denied.

## I. PROCEDURAL AND FACTUAL BACKGROUND

On the Form I-129, Petition for Nonimmigrant Worker, the petitioner describes itself as an "Information Technology" firm. In order to continue to employ the beneficiary in what it designates as a "Software Engineer (ETL Specialist & Administrator)" 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, finding that the petitioner failed to establish that it has standing to file the instant visa petition as the beneficiary's prospective United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii).

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

## II. THE LAW

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.

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<sup>1</sup> We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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



particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

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

We note that, as recognized by the court in *Defensor, supra*, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. *See Defensor v. Meissner*, 201 F.3d at 387-388. The court held that the former Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. *Id.* at 384. Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work.

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).

### III. ANALYSIS

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

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

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

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

*Darden*, 503 U.S. at 323-324 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. at 751-

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

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

Specifically, the regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to engage a person to work within the United States, and to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-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

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

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

Finally, it is also noted that if the statute and the regulations were somehow read as extending the definition of employee in the H-1B context beyond the traditional common law definition, this interpretation would likely thwart congressional design and lead to an absurd result when considering the \$750 or \$1,500 fee imposed on H-1B employers under section 214(c)(9) of the Act, 8 U.S.C. § 1184(c)(9). As 20 C.F.R. § 655.731(c)(10)(ii) mandates that no part of the fee imposed under section 214(c)(9) of the Act shall be paid, "directly or indirectly, voluntarily or involuntarily," by the beneficiary, it would not appear possible to comply with this provision in a situation in which the beneficiary is his or her own employer, especially where the requisite "control" over the beneficiary has not been established by the petitioner.



United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition" or, more importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. *Cf. Darden*, 503 U.S. at 318-319.<sup>3</sup>

Accordingly, in the absence of an express congressional intent to impose broader definitions, both the "conventional master-servant relationship as understood by common-law agency doctrine" and the *Darden* construction test apply to the terms "employee" and "employer-employee relationship" as used in section 101(a)(15)(H)(i)(b) of the Act, section 212(n) of the Act, and 8 C.F.R. § 214.2(h).<sup>4</sup>

Therefore, in considering whether or not one will be an "employee" in an "employer-employee relationship" with a "United States employer" for purposes of H-1B nonimmigrant petitions, USCIS must focus on the common-law touchstone of "control." *Clackamas*, 538 U.S. at 450; *see also* 8 C.F.R. § 214.2(h)(4)(ii) (defining a "United States employer" as one who "has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise *control* the work of any such employee . . . ." (emphasis added)).

The factors indicating that a worker is or will be an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. *Darden*, 503 U.S. at 323-324; *Clackamas*, 538 U.S. at 445; *see also* *Restatement (Second) of Agency* § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. *See Clackamas*, 538 U.S. at 445; *see also* *New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1) (adopting a materially identical test and indicating that said test was based on the *Darden* decision); *see also* *Defensor v. Meissner*, 201 F.3d 384, 388 (5th Cir. 2000) (determining that hospitals, as the recipients of beneficiaries' services, are the "true employers" of H-1B nurses under 8 C.F.R. § 214.2(h), even though a medical contract service agency is the actual petitioner, because the hospitals ultimately hire, pay, fire, supervise, or otherwise control the work of the beneficiaries).

It is important to note, however, that the factors listed in *Darden* and *Clackamas* are not exhaustive and must be evaluated on a case-by-case basis. Other aspects of the relationship between the parties relevant

<sup>3</sup> To the extent the regulations are ambiguous with regard to the terms "employee" or "employer-employee relationship," the agency's interpretation of these terms should be found to be controlling unless "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359, 109 S.Ct. 1835, 1850, 104 L.Ed.2d 351 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945))).

<sup>4</sup> That said, there are instances in the Act where Congress may have intended a broader application of the term "employer" than what is encompassed in the conventional master-servant relationship. *See, e.g.*, section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F) (referring to "unaffiliated employers" supervising and controlling L-1B intracompany transferees having specialized knowledge); section 274A of the Act, 8 U.S.C. § 1324a (referring to the employment of unauthorized aliens).



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."

#### IV. EVIDENCE

The Labor Condition Application (LCA) submitted with the visa petition is certified for employment in [REDACTED] Texas and [REDACTED] New York. It states that the proffered position is a "Software Engineer (ETL Specialist & Administrator)" position and corresponds to Standard Occupational Classification (SOC) code and title 15-1132, Software Developers, Applications from the Occupational Information Network (O\*NET). The LCA further states that the proffered position is a Level II position.

With the visa petition, counsel submitted evidence that the beneficiary received a bachelor's degree in physics from [REDACTED] and a master's degree in computer science awarded by [REDACTED] both of which are in India. An evaluation in the record states that those degrees, together with the beneficiary's employment experience, are equivalent to a U.S. bachelor's degree in physics and computer information systems and a master's degree in computer information systems.

Counsel also submitted: (1) a "Pass Through Contractor Agreement" dated April 19, 2013, which was executed by the petitioner and [REDACTED]; (2) a purchase order executed by the petitioner and [REDACTED]; (3) a letter dated October 1, 2013 from [REDACTED] the HR Administrator of [REDACTED]; (4) a letter, dated December 2, 2013, from [REDACTED] the Systems Director of Depository [REDACTED]; and (5) a letter, dated December 16,

2013, from [REDACTED] the petitioner's HR Manager.

The April 19, 2013 contractor agreement between the petitioner and [REDACTED] sets out terms pursuant to which the petitioner may provide workers to perform "programming, systems analysis, technical writing or other specialized services," to be described more particularly in purchase orders, for clients of [REDACTED]

The purchase order provided appears to have been executed by the petitioner and [REDACTED] contemporaneously with the contractor agreement. It states that the petitioner will provide the beneficiary to work for a client of [REDACTED] beginning on April 29, 2013 and continuing through March 30, 2014 with possible month-to-month extensions thereafter. It states that the location of the client for whom the work was to be performed is [REDACTED] Texas. That purchase order also explicitly states: "[The petitioner] and [REDACTED] client] will discuss the hours and locations where the work is to be performed and [REDACTED] will not be involved."

The October 1, 2013 letter from [REDACTED] s HR Administrator, states that the [REDACTED] Texas address provided is the address of [REDACTED]. It further states that, while the beneficiary is working at that address he will be supervised by [REDACTED] and identifies Ms. [REDACTED] as "Director, Project Planning Manager," but does not state whether Ms. [REDACTED] is an employee of the petitioner, of [REDACTED] or of some other company. It further states that the term of the beneficiary's work at that location is "24+ months with extension(s)," which does not coincide with the terms of the purchase order. Mr. [REDACTED] further stated that the proffered position requires "[a] bachelor's degree or higher in computer science, engineering or related field . . . ."

In his December 2, 2013 letter, [REDACTED] the Systems Director of [REDACTED] stated that the beneficiary was then currently working at the [REDACTED] location in [REDACTED] Texas and stated the following as to the educational requirements of the proffered position:

We require the theoretical and practical application of a body of highly specialized knowledge in information technology, which can only be attained at the completion of bachelor's degree or higher in computer science, engineering or related field in order to perform the position's duties.

In the December 16, 2013 letter from [REDACTED] the petitioner's HR Manager, Ms. [REDACTED] stated, as to the educational requirement of the proffered position, that the proffered position requires a bachelor's degree in "computer science/applications, engineering, computer/management information systems, electrical/electronics or a related field." She further stated that the beneficiary will continue to work at the [REDACTED] location for "at least 24+ months with further possible extensions," and that if the project at that location ends prior to the end of the requested period of employment, the beneficiary will work at the petitioner's location in [REDACTED] New York. Finally, Ms. [REDACTED] stated: "The beneficiary will work under immediate supervision of [the petitioner]."

On December 31, 2013, the service center issued an RFE in this matter. The service center requested, *inter alia*, evidence pertinent to the proffered position and evidence pertinent to the



relationship between the petitioner and the beneficiary. The director outlined the specific evidence to be submitted.

In response to the RFE, counsel submitted: (1) an additional description of the proffered position; (2) a copy of an employment agreement, dated June 8, 2009, between the petitioner and the beneficiary; (3) two vacancy announcements placed by the petitioner; (4) six vacancy announcements placed by other companies; (5) diplomas of people other than the beneficiary; (6) a letter, dated January 22, 2014, from [REDACTED]; (6) a letter, dated February 6, 2014, from [REDACTED]; (7) a letter, dated February 10, 2014, from counsel; (8) a declaration, dated March 3, 2014, from [REDACTED]; and (9) another letter from counsel, dated March 11, 2014.

The additional position description indicated that the proffered position requires "[a] bachelor's degree in computer science/applications, engineering, computer/management information systems, electrical/electronics or a related field."

The June 8, 2009 employment agreement was signed by the beneficiary and [REDACTED]. The first sentence of the body of that agreement states: "You shall use your best energies and abilities to perform, *at locations designated by the [petitioner]*, the employment duties assigned to you from time to time."

[Emphasis supplied.]

One of the petitioner's vacancy announcements was placed on a popular job search website and the other was placed in a newspaper. Both state that the positions announced are for "Software Developers (Multiple Openings)." They state that the positions require a minimum of a bachelor's degree or the equivalent in "computer science/applications, engineering, computer/MIS, math, electrical/electronics or related field and 5-years of experience." They further state that the work place is "[REDACTED], NY and/or any unanticipated locations in the U.S," and "Must be willing to travel or relocate nationwide."

The diplomas of people other than the beneficiary show that [REDACTED] has a bachelor's degree in computer science and engineering, [REDACTED] has a master's degree in computer science, [REDACTED] has a master's degree in computer applications, [REDACTED] has a master's degree in computer applications, and [REDACTED] has a master's degree in bioinformatics. Form W-2 Wage and Tax Statements in the record show that [REDACTED] worked for the petitioner during 2013. Additional W-2 forms show that [REDACTED] and [REDACTED] also worked for the petitioner during that year, but the record contains no indication of their educational qualifications.

In the January 22, 2014 letter authored by [REDACTED], Systems Director for [REDACTED] Mr. [REDACTED] stated that the beneficiary is currently working at [REDACTED] Texas location pursuant to [REDACTED] agreement with [REDACTED] and [REDACTED] agreement with the petitioner. Mr. [REDACTED] also stated that [REDACTED] has locations in Tampa, Florida and Jersey City, New Jersey.



In the February 6, 2014 letter from [REDACTED] the petitioner's HR Manager, Ms. [REDACTED] stated that the beneficiary works and will continue to work at the [REDACTED] Texas location of [REDACTED]. She again stated that the beneficiary would work at that location for "at least 24+ months with possible future extensions" but added: "However, because of our business practice and general industry practice[] we are unable to provide a statement of work or a purchase order covering the [balance of the period of requested employment]." She further added, "[C]lients / customers never provide work orders for the entire project duration," but provided no evidence in support of that assertion.

She also stated that if the project in [REDACTED] Texas is terminated before the end of the period of requested employment, the beneficiary would work at the petitioner's own location. She provided no evidence of any work the petitioner has for the beneficiary at its own location.

In his February 10, 2014 letter, counsel cited vacancy announcements and the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* as evidence that the proffered position qualifies as a specialty occupation position pursuant to the salient regulations.

The director denied the visa petition on February 25, 2014, finding, as was noted above, that the petitioner had not demonstrated that it has standing to file the instant visa petition as the beneficiary's prospective U.S. employer.

On appeal, counsel submits: (1) an undated letter from [REDACTED] the Director, Human Resources of [REDACTED] (2) a declaration, dated March 3, 2014, from [REDACTED] and (3) counsel's own letter, dated March 11, 2014.

In his undated letter, [REDACTED] Director, Human Resources, states that the beneficiary would work at the [REDACTED] Texas location and "we anticipate that the project will go on for at least 24+ months with possible extensions." As to the supervision of the beneficiary, he states:

[REDACTED] will be [the beneficiary's] immediate supervisor for this project and for this location only. Mr. [REDACTED] Project Coordinator of [the petitioner] will be his overall technical supervisor.

In his March 3, 2014 declaration, [REDACTED] confirms some of the information he previously provided.

In his March 11, 2014 letter, counsel asserts that the evidence submitted shows that the petitioner has an employer-employee relationship with the beneficiary.

## V. DISCUSSION

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.

If the visa petition were approved in the instant case, the petitioner, in [REDACTED] New York, would assign the beneficiary to an intermediary, and the intermediary would assign the beneficiary to work at the location of [REDACTED] Texas.

The record contains conflicting evidence pertinent to who would supervise the beneficiary. The October 1, 2013 letter from [REDACTED] HR Administrator, states that [REDACTED] will supervise the beneficiary on the project. That letter does not identify the company for which Ms. [REDACTED] works but, in any event, there is no indication that she works for the petitioner. Other evidence shows that [REDACTED] will supervise the beneficiary's work on the [REDACTED] project. The evidence indicates that [REDACTED] is an employee of [REDACTED] not the petitioner.

In his undated letter, [REDACTED], Director – Human Resources for [REDACTED] states that [REDACTED] will be the beneficiary's immediate supervisor for the [REDACTED] project at [REDACTED] Texas, but that Mr. [REDACTED] will be the beneficiary's overall technical supervisor. He did not indicate that Mr. [REDACTED] will work at the [REDACTED] Texas location of [REDACTED]. The evidence contains no indication that the petitioner will assign a supervisor to work in [REDACTED], Texas with duties that include assigning the beneficiary's tasks and supervising his performance of them.

In the scenario proposed, in which the petitioner, in New York, would assign the beneficiary, through an intermediary, to work on a project in Texas for another company, it is more likely than not that someone other than the petitioner will assign the beneficiary's tasks and supervise his performance of them. Further, although there is conflicting evidence, there is evidence in the record that concedes that [REDACTED] would directly supervise the beneficiary. Under these circumstances, although various letters state that the petitioner would exercise complete control over the beneficiary, we find that the petitioner has not demonstrated that it would in fact exercise control over the assignment of the beneficiary's tasks and would supervise his performance of those tasks. The record does not include sufficient probative and consistent evidence of who will provide the instrumentalities and tools for the beneficiary's work and who will actually manage the beneficiary's daily work. For these reasons, the record does not establish that it is the petitioner who exercises control over the beneficiary and his work. Accordingly, the record is insufficient to demonstrate an employer-employee relationship between the petitioner and the beneficiary, if the visa petition were approved.

Based on the tests outlined above, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." As such, it has not established that it has standing to file the instant visa petition as the beneficiary's prospective employer. The appeal will be dismissed and the visa petition will be denied on this basis.



## VI. ADDITIONAL ISSUES BEYOND THE DIRECTOR'S DECISION

The record suggests additional issues that were not addressed in the denial decision but that, nonetheless, also preclude approval of this visa petition.

### A. SPECIALTY OCCUPATION ANALYSIS

Pursuant to the statutes and regulations set out above the petitioner is obliged to demonstrate that the proffered position qualifies as a specialty occupation by virtue of requiring a minimum of a bachelor's degree in a specific specialty or its equivalent. The record contains various statements pertinent to the educational requirements of the proffered position but, as was noted above, pursuant to *Defensor v. Meissner, supra*, the requirements placed on the proffered position by [REDACTED] the end-user of the beneficiary's services, are the critical consideration.

In his December 2, 2013 letter, [REDACTED] systems director for [REDACTED] stated that [REDACTED] requires a minimum of a bachelor's degree in "computer science, engineering or a related field" for the proffered position.<sup>5</sup> That an otherwise unspecified bachelor's degree in engineering would be a sufficient educational qualification for the proffered position does not indicate that the proffered position requires a minimum of a bachelor's degree in a specific specialty or its equivalent.

A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of degrees with generalized titles, such as engineering,<sup>6</sup> without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

As the entity using the beneficiary's services does not indicate that the performance of those services require a minimum of a bachelor's degree in a specific specialty or its equivalent, the position discussed here has not been shown to be a specialty occupation position. The visa petition will be denied on this additional basis.

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<sup>5</sup> The other statements pertinent to the educational requirements of the proffered position also indicate that an otherwise undifferentiated bachelor's degree in engineering would be a sufficient educational qualification for the proffered position. As such, even if [REDACTED] or the petitioner, or some other entity, were found to be the end-user of the beneficiary's services, this basis for denial would still apply.

<sup>6</sup> 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 or nuclear 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.



## B. BENEFICIARY QUALIFICATIONS ANALYSIS

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 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 above, 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, or its equivalent, in a specific specialty also cannot be determined. Therefore, we need not and will not address the beneficiary's qualifications further, except to note that, in any event, the combined evaluation of the beneficiary's education and work experience submitted by the petitioner is insufficient to establish that the beneficiary possesses the equivalent of a U.S. bachelor's degree in any specific specialty. Specifically, the claimed equivalency was based in part on experience, and there is no evidence that the evaluator has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience and that the beneficiary also has recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.<sup>7</sup> See 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) and (D)(1). As such, since evidence was not presented that the beneficiary has at least a U.S. bachelor's degree in any specific specialty, or its equivalent, the petition could not be approved even if eligibility for the benefit sought had been otherwise established.

## C. EVIDENCE PERTINENT TO AVAILABLE EMPLOYMENT

The period of employment requested in this case is from December 25, 2013 to December 24, 2016. To show that it has work to assign the beneficiary during that period, the petitioner provided evidence pertinent to the [REDACTED] project. Various documents in the record state that the project is expected to continue for "24+ months with extension(s)." On the other hand, the purchase order issued to the petitioner by [REDACTED] is for employment to begin on April 29, 2013 and to continue through March 30, 2014 with possible month-to-month extensions thereafter. Why [REDACTED] would issue a purchase order for less than one year for a project expected by the end-user to continue for at least 24 months is not explained in the record.

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<sup>7</sup> If the petitioner is to rely on the beneficiary's foreign education, without consideration of other training or experience, to show that he has the equivalent of a U.S. bachelor's degree, the petitioner is obliged to provide an evaluation of the beneficiary's education as required by 8 C.F.R. § 214.2(h)(4)(iii)(C)(2). If the petitioner is to rely on the beneficiary's foreign education combined with his other training and/or employment experience, the petitioner is obliged to provide the evaluation of the beneficiary's qualifications required by 8 C.F.R. § 214.2(h)(4)(iii)(C)(4).

In the instant case, the evaluation provided is of the beneficiary's education and employment experience, considered together. The evaluation must therefore satisfy the requirements of 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) and the other regulations pertinent to evaluations that include employment experience. The evaluation presented here does not satisfy the requirements of 8 C.F.R. § 214.2(h)(4)(iii)(C)(4).

Upon review, we find that the petitioner has failed to establish that the petition was filed for non-speculative work for the beneficiary, for the entire period requested, that existed as of the time of the petition's filing. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248. Thus, even if it were found that the petition would be otherwise approvable the petitioner has not demonstrated eligibility for the duration of the period requested.<sup>8</sup>

## VII. CONCLUSION

We recognize that this is an extension petition. The director's decision does not indicate whether she reviewed the prior approvals of the previous nonimmigrant petitions filed on behalf of the beneficiary. However, if the previous nonimmigrant petitions were approved based on the same evidence contained in the current record, those approvals would constitute material and gross error on the part of the director. We are not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See, e.g. *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990).

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<sup>8</sup> The agency made clear long ago that speculative employment is not permitted in the H-1B program. For example, a 1998 proposed rule documented this position as follows:

Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. See section 214(i) of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998). While a petitioner is certainly permitted to change its intent with regard to non-speculative employment, e.g., a change in duties or job location, it must nonetheless document such a material change in intent through an amended or new petition in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E).



Furthermore, this office's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the instant nonimmigrant petition on behalf of the beneficiary, we would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). The prior approvals do not preclude USCIS from denying an extension of the original visa based on reassessment of petitioner's qualifications. *See Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

An application or petition that fails to comply with the technical requirements of the law may be denied by us 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 we conduct appellate review on a *de novo* basis).

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

The director's decision will be affirmed and the petition will be denied 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.