



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF [REDACTED]

DATE: FEB. 28, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, an IT consulting company, seeks to temporarily employ the Beneficiary as a systems analyst under the H-1B nonimmigrant classification for specialty occupations. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The H-1B program allows a U.S. employer to temporarily employ a qualified foreign worker in a position that requires both (a) the theoretical and practical application of a body of highly specialized knowledge and (b) the attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum prerequisite for entry into the position.

The Director, California Service Center, denied the petition concluding the Petitioner did not establish that: (1) the Petitioner will engage the Beneficiary in an employer-employee relationship; and (2) the proffered position qualifies as a specialty occupation.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the Director erred in denying the petition.

Upon *de novo* review, we will dismiss the appeal.

I. LEGAL FRAMEWORK

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) largely restates this statutory definition, but adds a non-exhaustive list of fields of endeavor. In addition, the regulations provide that the proffered position must meet one of the following criteria to qualify as a specialty occupation:

Matter of [REDACTED]

- (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.

8 C.F.R. § 214.2(h)(4)(iii)(A). We have consistently interpreted 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 proposed 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”); *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000).

II. PROFFERED POSITION

In the H-1B petition, the Petitioner stated that the Beneficiary will serve as a systems analyst. The Petitioner described the job duties of the proffered position as follows:

- AIX Server build and application support
- Perform upgrades of the operating system
- Performance tuning and benchmarking
- Troubleshooting
- Installation of AIX, fix packs and additional software using NIM server
- Configuration of LPARS
- Migration of AIX OS from 4.3.3 to 5.1, 5.1, 5.2 to 5.3 and 5.3 to 6.1 on pSeries servers.
- Administered the UNIX System for clustered AIX Servers running HACMP and dynamic LPARs.
- Provide on-call support as needed by the client
- Interact with project team, DBA's, application admins and PM's.
- Provided technical support for the remote migration team and SAN team.
- Attend team meetings, change control meetings to update installation progress, and for upcoming changes in environment

Matter of [REDACTED]

Additionally, in response to the Director's request for evidence (RFE), the Petitioner added the following percentage breakdown of the duties for the proffered position:

Job Duty	Percentage of time
Setup, configuration, maintenance & troubleshooting UNIX AIX on Power7/6/5 550 frames	70%
Working with System Administration related tasks on Linux & Windows Servers	10%
Working with Storage area networking related tasks on EMC Clarion System	5%
Documentation of technical procedures	5%
Support on Backup Tools, Servers & SAN Systems	10%

The Petitioner stated that the minimum entry requirement for the proffered position is a "bachelor's degree preferably in computer science with progressive corporate experience in similar roles."

III. UNITED STATES EMPLOYER

For the reasons set out below, we have determined that the Petitioner has not demonstrated that it meets the regulatory definition of a United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii). Specifically, the Petitioner has not established that it will have "an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." *Id.*

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

[S]ubject 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;

Matter of [REDACTED]

(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* Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act 56 Fed. Reg. 61,111, 61,121 (Dec. 2, 1991) (to be codified at 8 C.F.R. pt. 214).

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 individual coming to the United States to perform services in a specialty occupation will have an “intending employer” who will file a Labor Condition Application with the Secretary of Labor pursuant to section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). The intending employer is described as offering full-time or part-time “employment” to the H-1B “employee.” Subsections 212(n)(1)(A)(i) and 212(n)(2)(C)(vii) of the Act, 8 U.S.C. §§ 1182(n)(1)(A)(i), (2)(C)(vii). Further, the regulations indicate that “United States employers” must file a Form I-129, Petition for a Nonimmigrant Worker, in order to classify individuals 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 Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992) (quoting *Cnty. 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

Matter of [REDACTED]

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."

Id.; see also *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 445 (2003) (quoting *Darden*, 503 U.S. at 323). 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 Am.*, 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.¹

Specifically, the regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to engage a person to work within the United States, and to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee" or "employer-employee relationship" combined with the agency's otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition" or, more

¹ 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).

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 Res. Def. Council, Inc.*, 467 U.S. 837, 844-45 (1984).

Matter of [REDACTED]

importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. *Cf. Darden*, 503 U.S. at 318-19.²

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).³

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 323-24; *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* EEOC Compl. Man. at § 2-III(A)(1) (adopting a materially identical test and indicating that said test was based on the *Darden* decision); *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 petitioner, because the hospitals ultimately hire, pay, fire, supervise, or otherwise control the work of the beneficiaries).

It is important to note, however, that the factors listed in *Darden* and *Clackamas* are not exhaustive and must be evaluated on a case-by-case basis. Other aspects of the relationship between the parties relevant to control may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met; however, the fact finder must weigh and compare a combination of the factors in analyzing the facts of each individual

² 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 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945))).

³ 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 individuals).

Matter of [REDACTED]

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 448-49; EEOC Compl. Man. 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 323-24. 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, in support of the petition, the Petitioner submitted its employment agreement with the Beneficiary stating that the Beneficiary "must personally perform all work as directed by Client or Employer," and that the Beneficiary's "performance is subject to review by both Employer and Client." The Petitioner stated that it has complete rights to assign additional work to the Beneficiary and that when the Beneficiary is located at the end-client site, it manages the Beneficiary's work via daily/weekly status updates, and monthly staff meetings. The Petitioner stated that the Beneficiary reports directly to its Director, IT, and that it monitors the Beneficiary's performance and progress on each project. In describing how it supervises the Beneficiary's work, the Petitioner stated that the Beneficiary is required to attend mandatory weekly and monthly staff meetings chaired by its IT Director who also monitors the Beneficiary's assigned work, tools and technology requirements to perform the work efficiently, and any other work-related or non-technical issues faced by the Beneficiary.

The Petitioner specifically stated that the Beneficiary will be working on an end-client project for [REDACTED]. The Petitioner stated that it has a sub-vendor agreement with [REDACTED] and that [REDACTED] is a client of [REDACTED]. The Petitioner submitted a letter from [REDACTED] dated March 7, 2016, indicating that it has a contract with the Petitioner who will supply [REDACTED] with specialty personnel to provide services to its client, [REDACTED] on a long-term project. [REDACTED] further states that the Beneficiary is an employee of the Petitioner and that the Petitioner will have the exclusive authority to hire, pay, fire, and supervise or otherwise control the work of the Beneficiary. The Petitioner also submitted its Independent Contractor Agreement with the mid-vendor, [REDACTED] stating that the Petitioner

Matter of [REDACTED]

agrees to provide [REDACTED] and/or its clients with technical assistance, products, consulting, or other related services as described. It states that the Petitioner agrees to perform work in accordance to [REDACTED] or its clients' specifications and [REDACTED] must consent to changes in personnel assigned to it or its clients.

In response to the RFE, the Petitioner submitted a letter stating that it has a contract with [REDACTED] and that [REDACTED] in [REDACTED] is a client of [REDACTED]. The Petitioner also submitted a letter from [REDACTED] dated June 23, 2016, stating that it has a contract with [REDACTED] to provide IT consulting services, for which it executed a contract with the Petitioner to provide the same.

On appeal, the Petitioner provided a Contract Work Authorization between [REDACTED] and [REDACTED] referencing their Master Service Agreement dated March 27, 2013, for a specific project that expires on February 28, 2017. The Petitioner also submitted an updated itinerary for the proffered position again listing [REDACTED] as the mid-vendor and [REDACTED] as the end-client.

Upon review, we find that the Petitioner has provided inconsistent information pertaining to its mid-vendor and end-client agreements. The Petitioner stated that its mid-vendor is [REDACTED] and the end-client is [REDACTED]. However, the letter from [REDACTED] states that it has a contract directly with the Petitioner and that its end-client is [REDACTED]. Further, we note that [REDACTED] letter, dated March 7, 2016, does not make any reference to [REDACTED] and similarly, [REDACTED] letter, dated June 23, 2016, does not make any reference to [REDACTED]. The Petitioner did not provide any statement directly from [REDACTED] to clarify the relationship of all three companies and it remains unknown how and if [REDACTED] and [REDACTED] are related.

Additionally, we find inconsistencies in the evidence pertaining to the Petitioner's supervision of the Beneficiary's work as his employer. The Petitioner stated throughout the record that the Beneficiary will be directly supervised by its Director, IT, and that the Beneficiary will be required to attend mandatory weekly and monthly meetings with the supervisor at the Petitioner. In the updated itinerary, submitted on appeal, the Petitioner lists "[REDACTED] Director IT" as the Beneficiary's supervisor at the Petitioner. However, the Petitioner's organizational chart lists [REDACTED] as the Director/CEO, again subordinate to that under Information Technology, subordinate to that under Infrastructure, and subordinate to that under Management. Subordinate to [REDACTED] under Information Technology, there are four positions, two of which are assigned to [REDACTED]. The remaining two positions are Networking and Training, which are assigned to 2 other individuals. Neither the Beneficiary nor the proffered position appear on the Petitioner's organizational chart. Further, the Beneficiary's Weekly Status Reports for May and June 2016, each list [REDACTED] with an e-mail address at [REDACTED] as the Beneficiary's supervisor.

⁴ The Petitioner refers to this company as "[REDACTED]" however, based on the company's letterhead, it appears that the company is named "[REDACTED]". We will refer to this company as simply "[REDACTED]".

Matter of [REDACTED]

Here, the Petitioner has not provided corroborating evidence to demonstrate that it directly monitors and supervises the Beneficiary's work as his employer.

The Petitioner contends that the Beneficiary is employed by the Petitioner and that the Petitioner controls the Beneficiary's salary and conditions of employment. 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 the 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 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, we are unable to find that the requisite employer-employee relationship will exist between the Petitioner and the Beneficiary.

Further, we cannot conclude that the claimed work for the Beneficiary will continue to exist for the duration of the requested H-1B status period.⁵ In its initial letter of support and in response to the RFE, the Petitioner specifically stated that the proffered position is for a project at the end-client site and provided information for the same. The letter from [REDACTED] specifically states that the Beneficiary "is expected to work . . . on a long-term project until the end of the H1B duration" and the Petitioner's itinerary states that "the contract is expected to be a multi-year long-term contract" with the assignment's expected duration at "about 36 months." The letter from [REDACTED] specifically states that the project on which the Beneficiary is working "is expected to last for multiple years with extensions thereafter given the size and scope of the project." The Petitioner's Independent Contractor Agreement with [REDACTED] is dated January 12, 2015 (signed by both parties on December 30, 2014), but it does not indicate a period of time for which the contract is valid. The Petitioner did not submit a copy of a contract with [REDACTED] nor did it submit a copy of a contract between [REDACTED] and [REDACTED]. The copy of the Contract Work Authorization between [REDACTED] and [REDACTED] was executed for a specific project that expires on February 28, 2017, which is only 4 months after the requested start date in the H-1B petition.

The duration of the Petitioner's contract with [REDACTED] and the duration of [REDACTED] contract with [REDACTED] is unknown. The terms and duration of the Petitioner's contract with [REDACTED] is also unknown. Although [REDACTED] and [REDACTED] letters state that the project is multi-year or long-term, the contracts do not reflect the same. Furthermore, the Petitioner's statement (provided for the first time on appeal) that the Beneficiary will also work on an in-house project, is insufficient to establish that the proffered position will continue to exist. Based on the limited information provided, we cannot conclude that the in-house project translates to the same work of the proffered position.

⁵ On the Form I-129, the Petitioner requested that the Beneficiary be granted H-1B classification from October 1, 2016, to August 31, 2019.

Matter of [REDACTED]

Thus, even if it were found that the Petitioner would be the Beneficiary's United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii), the Petitioner has not demonstrated that it would maintain such an employer-employee relationship for the duration of the period requested.⁶ Merely claiming in its letters that the Petitioner exercises complete control over the Beneficiary, without evidence supporting the claim, does not establish eligibility in this matter. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

Based on the tests outlined above, the Petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the Beneficiary as an H-1B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii). The appeal will be dismissed for this reason.

IV. SPECIALTY OCCUPATION

For the reasons set out below, we have also determined that the Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation. Specifically, the record (1) does not describe the actual proffered position with sufficient detail; and (2) does not establish that the job duties require an educational background, or its equivalent, commensurate with a specialty occupation.

For H-1B approval, the Petitioner must demonstrate a legitimate need for an employee exists and to substantiate that it has H-1B caliber work for the Beneficiary for the period of employment requested in the petition. It is incumbent upon the Petitioner to demonstrate it has sufficient work to require the services of a person with at least a bachelor's degree in a specific specialty, or its equivalent, to perform

⁶ 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.

Petitioning Requirements for the H Nonimmigrant Classification, 63 Fed. Reg. 30,419, 30,419-20 (proposed June 4, 1998) (to be codified at 8 C.F.R. pt. 214). 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).

Matter of [REDACTED]

duties at a level that requires the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty for the period specified in the petition.

As discussed above, we find that the Petitioner has not established 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 (Reg'l Comm'r 1978).

Further, the record of proceedings lacks documentation regarding the Petitioner's business activities and the actual work that the Beneficiary will perform to sufficiently substantiate the claim that the Petitioner has H-1B caliber work for the Beneficiary for the period of employment requested in the petition. The Petitioner submitted several invoices to [REDACTED] for the Beneficiary's services provided to [REDACTED] for the months of January through June of 2016. However, these invoices do not provide any information detailing the work being performed by the Beneficiary on behalf of the Petitioner for the clients or the products being provided by the Petitioner to the clients.

Without detailed work orders, statement of works, or similar documentation describing the specific duties the Petitioner requires the Beneficiary to perform, as those duties relate to specific projects, we are unable to discern the nature of the proffered position and whether the position indeed requires the theoretical and practical application of a body of highly specialized knowledge attained through a baccalaureate program.

Consequently, we are precluded from finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines: (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4. As the Petitioner has not established that it satisfies any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed for this additional reason.

V. CONCLUSION

The burden is on the Petitioner to show eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

(b)(6)

Matter of [REDACTED]

ORDER: The appeal is dismissed.

Cite as *Matter of* [REDACTED] ID# 150910 (AAO Feb. 28, 2017)