



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

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

MATTER OF ERP [REDACTED], INC.

DATE: OCT. 2, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, an information technology provider, seeks to continue to temporarily employ the Beneficiary as a “Linux Administrator” 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 of the California Service Center denied the petition, concluding that the Petitioner had not established that 1) the required employer-employee relationship would exist, 2) the proffered position qualifies as a specialty occupation, and 3) it has sufficient specialty occupation work for the entire validity period requested.

On appeal, the Petitioner asserts that the Director erred in her decision.

Upon *de novo* review, we will dismiss the appeal.¹

I. PROFFERED POSITION

The Petitioner, located in Ohio, indicated that the Beneficiary will be providing services to an end-client in California. According to the Petitioner, the contractual chain is as follows: the Petitioner contracted with [REDACTED] (mid-vendor),² who in turn contracted with [REDACTED] (mid-vendor), who in turn contracted with [REDACTED] (end-client).

¹ We follow the preponderance of the evidence standard as specified in *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010).

² We note that the provided “Subcontractor Billing Services Agreement” discusses the relationship between [REDACTED] and [REDACTED] but according to the Petitioner [REDACTED] is the Managed Service Provider for [REDACTED] and is not another vendor in the contractual path.”

According to the end-client, the Beneficiary's responsibilities are as follows (note: errors in the original text have not been changed):

- Managing Linux servers including SLES, RHEL, Oracle Linux and Centos.
- Manage the chef environment for cloud infrastructure.
- Test and deploy new operating system versions and patches.
- Support WebSphere, oracle database, VMware and other applications.
- Setup and troubleshoot performance issues on Oracle RAC servers.
- Provide on call support and troubleshooting of various network, storage and OS related issues

The end-client states that the position requires, at a minimum, a bachelor's degree in one of the following fields: computer science, engineering, information technology, mathematics, science, or related field, in addition to relevant work experience.

II. EMPLOYER-EMPLOYEE RELATIONSHIP

Upon review of the entire record,³ we find that it does not sufficiently establish that the Petitioner would be a "United States employer" having "an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii).

A. Legal Framework

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 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;

³ While we may not discuss every document submitted, we have reviewed and considered each one.

- (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), the terms “employee” and “employer-employee relationship” are not defined for purposes of the H-1B visa classification. 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, we will look to common-law agency doctrine and focus on the common-law touchstone of “control.” *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992); *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440 (2003).

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) (defining “servant”). 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 at 388 (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 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).

B. Analysis

Applying the *Darden* and *Clackamas* tests to this matter, we find that the record does not establish that the Petitioner will be a “United States employer” having an “employer-employee relationship”

with the Beneficiary as an H-1B temporary “employee.” Specifically, we find that the Petitioner has not submitted sufficient, consistent, and credible documentation regarding salient aspects of the Beneficiary’s employment. Therefore, the key element in this matter, which is who exercises control over the Beneficiary, has not been substantiated.

Preliminarily, we must note that the record of proceedings does not contain copies of any contracts executed between the Petitioner and the end-client, or either of the mid-vendors and the end-client. Without full disclosure of the terms and conditions of the contractual agreement between the parties, we are unable to adequately assess whether the Petitioner has the requisite employer-employee relationship with the Beneficiary.

Further, contrary to the Petitioner’s assertions on appeal, the record contains contradictory information regarding who will actually supervise the Beneficiary and lacks sufficient, detailed documentation describing how the Petitioner would supervise and otherwise control the Beneficiary’s day-to-day activities at the end-client’s premises in California. According to the Petitioner’s offer letter, the Beneficiary will report to [REDACTED] but the end-client indicates that he reports to [REDACTED]. The letter from [REDACTED] states that “[REDACTED] does the performance review,” but all of the submitted reviews have been completed by [REDACTED]. The Petitioner must resolve these inconsistencies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1998).

We must also note that the organization chart indicates that [REDACTED] is the chief technical officer and supervises 8 managers, 30 subject matter experts, and 150 “computer occupations,” who, except for the Beneficiary, are not identified. The Petitioner did not provide the number of individuals each of the managers supervises or the number of different client sites to which these individuals are assigned. Without additional information, we are unable to determine who is actually supervising the Beneficiary and how that supervisor would manage the Beneficiary and all other employees assigned to client locations.

The Petitioner’s claims regarding its control over the Beneficiary are also contradicted by evidence in the record. For example, the submitted emails indicate that the Beneficiary is using a [REDACTED] email address and performs duties requested by the [REDACTED] project manager. It is notable that the Petitioner is not included or mentioned in any of these emails. According to its letter, the end-client “has allocated [REDACTED] space at its offices as well as access to its computers, information and networks so that [REDACTED] can complete an IT project for [REDACTED].” These details appear to demonstrate that the Beneficiary is functioning independently of the Petitioner at the end-client site as though he were an integrated member of the team, and do not indicate that the Petitioner has any control over his project tasks. Merely claiming that the Petitioner exercises complete control over the Beneficiary, without sufficient 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. at 376.

While items such as wages, social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are relevant factors in determining who will control the Beneficiary, other incidents of the relationship, e.g., where the work will be located, who will provide the instrumentalities and tools, who will oversee and direct the work of the Beneficiary, 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.

The record does indicate that the Petitioner would handle the administrative and personnel functions related to keeping the Beneficiary on its payroll. However, our review of the record leads us to conclude that the Petitioner would not operate as the Beneficiary's employer in the common law sense, but that it would instead act as a supplier of personnel to temporarily supplement the staff of another organization which will control the content, means, and methods of those individuals' work. The Petitioner's fulfillment of such administrative functions is insufficient to demonstrate the requisite employer-employee relationship. *See Defensor*, 201 F.3d at 388 (with the Petitioner's role limited to essentially the functions of a payroll administrator, the Beneficiary is even paid, in the end, by the end-client).

The Director also noted additional concerns regarding the fact that the Petitioner, mid-vendors, and end-client all provided the identical job duties, thereby raising questions as to the true author of the letters. On appeal, the Petitioner states that "the preponderance of the evidence standard allows for some doubt on this issue" and that "even if the statements in the letter were prepared by someone else, the statements were reviewed and confirmed by a representative of the company." As a result, the Petitioner argues that the letters should be deemed credible. However, these are not the only concerns regarding the submitted evidence. For example, although the signature information on the letter from [REDACTED] indicates that the first name of the author is [REDACTED] the actual signature is '[REDACTED]'. It is highly unlikely that an individual would misspell her own name. Further, we note a number of inconsistencies in the spelling of [REDACTED] in the record. Although the signature information on its letter uses "[REDACTED]", the letterhead indicates the name is "[REDACTED]" and the body of the letter uses "[REDACTED]". The "Subcontractor Billing Services Agreement" and "Statement of Work," use a third variation, "[REDACTED]". We consider not only the quantity, but also the quality (including relevance, probative value, and credibility) of the evidence. *Matter of Chawathe*, 25 I&N Dec. at 376; *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989). The Petitioner must resolve these inconsistencies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591.

As a result of the inconsistencies and deficiencies in the record, we find that the Petitioner has not sufficiently demonstrated that it qualifies as 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).

III. SPECIALTY OCCUPATION

For the reasons set out below, we determine that the Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation. Specifically, the Petitioner has not sufficiently established the substantive nature of the proffered position. In addition, it has not demonstrated that it has specialty occupation work for the Beneficiary for the entire validity period requested.

A. 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:

- (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” 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*, 201 F.3d at 387.

The court in *Defensor*, 201 F.3d at 387-88, held that the former Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring a petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of *the requirements imposed by the entities using a beneficiary's services* (emphasis added). In other words, it is not the Petitioner, but rather the end-client, who must provide the requirements, including the minimum education requirement, to establish that the proffered position qualifies as a specialty occupation. 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.

B. Analysis

For the reasons discussed below, the Petitioner has not sufficiently established the substantive nature of the proffered position.

While we acknowledge that the Petitioner provided a more detailed job description in response to the Director's request for evidence, as noted in *Defensor*, where the Beneficiary is providing services to an end-client, it is necessary for the end-client to provide the information regarding the proposed job duties to be performed at its location. 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.

In this case, as previously discussed, the initial job description from the Petitioner, mid-vendors, and end-client are identical, and we hereby incorporate our previous discussion on the issue and reiterate our concerns regarding the [REDACTED] letter. Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Matter of Ho*, 19 I&N Dec. at 591.

Regardless, the provided description lacks sufficient detail and concrete explanation to establish the substantive nature of the work to be performed. For example, the job duty of "[m]anaging Linux servers" does not explain what particular duties the Beneficiary will perform or his level of responsibility for the project. The only project description provided is simply "the infrastructure design and architecture project." Overall, the job description, as described, does not sufficiently communicate (1) the actual work that the Beneficiary will perform; (2) the complexity, uniqueness and/or specialization of the tasks; and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty. Without reliable, detailed documentation directly from the end-client that provides such pertinent information as the Beneficiary's specific duties and responsibilities in relation to the project(s) he is working on, we cannot determine the substantive nature of the proffered position.

We are therefore precluded from finding that the proffered position satisfies any of the 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 1; (2) industry positions which are parallel to the proffered position and thus

appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4. Accordingly, we cannot find that the proffered position qualifies for classification as a specialty occupation.

Here, we will briefly address the opinion letter from Professor [REDACTED] recites the end-client's list of job duties, and concludes based on this list of duties that the proffered position qualifies as a specialty occupation. However, as discussed above, the provided description lacks sufficient detail and concrete explanation to establish the substantive nature of the work to be performed by the Beneficiary. [REDACTED] does not specifically reference the end-client or the project to which the Beneficiary will be assigned. We therefore cannot find that the professor's opinion is based on sufficient factual information about the proffered position such that we can accord it probative weight in this matter. We may, in our discretion, use opinion statements submitted by the Petitioner as advisory. *Matter of Caron Int'l, Inc.*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, where an opinion is not in accord with other information or is in any way questionable, we are not required to accept or may give less weight to that evidence. *Id.*

Finally, 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. Specifically, as noted above, the record does not contain any evidence of contracts, statements of work, or other agreements between the end-client and the Petitioner or either of the mid-vendors. There is a statement of work between the Petitioner and the mid-vendor [REDACTED] but it only lists "TBD" as the estimated start and end dates of the project and does not reference the Beneficiary. Further, the letter from the end-client refers to its contract⁴ with [REDACTED] and only generally states that they "anticipate utilizing the services of the beneficiary for a foreseeable future as the project is ongoing [] and no specific end-date is determined." While we acknowledge that the Petitioner has established the Beneficiary's prior work at the end-client, it requested the Beneficiary's services from July 2017 until July 2020. Without additional evidence, such as a copy of the referenced contract and more specific information regarding the project itself and its duration, we cannot find that the Petitioner has established that it has sufficient specialty occupation work for the Beneficiary for the entire validity date requested.⁵

⁴ The record does not include a copy of the referenced contract.

⁵ 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

IV. PRIOR APPROVAL

While we realize that this is an extension petition, we are not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 597 (Comm'r 1988). If any of the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, they would constitute material and gross error on the part of the Director. It would be "absurd to suggest that [U.S. Citizenship and Immigration Services (USCIS)] or any agency must treat acknowledged errors as binding precedent." *Sussex Eng'g. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987). 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. Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act, 55 Fed. Reg. 2,606, 2,612 (Jan. 26, 1990) (to be codified at 8 C.F.R. pt. 214). A prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of eligibility for the benefit sought. *See Tex. A&M Univ. v. Upchurch*, 99 F. App'x 556 (5th Cir. 2004). Furthermore, our 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 nonimmigrant petitions on behalf of a beneficiary, we would not be bound to follow the contradictory decision of a service center. *See La. Philharmonic Orchestra v. INS*, 44 F. Supp. 2d 800, 803 (E.D. La. 1999).

V. CONCLUSION

The Petitioner has not sufficiently established that 1) the required employer-employee relationship would exist, 2) the proffered position qualifies as a specialty occupation, and 3) there is sufficient specialty occupation work for the Beneficiary for the entire validity period requested.

ORDER: The appeal is dismissed.

Cite as *Matter of ERF* ■ Inc., ID# 755223 (AAO Oct. 2, 2017)

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).