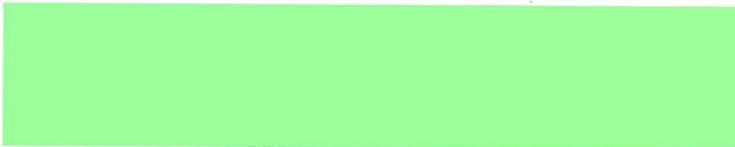


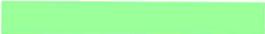


U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **APR 30 2013**

OFFICE: CALIFORNIA SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

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 in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

On the Form I-129 visa petition, the petitioner describes itself as an eight-employee "IT Professional Services and Software" company¹ established in 2010. In order to employ the beneficiary in what it designates as a computer systems analyst position,² the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on the basis of her determination that the petitioner failed to demonstrate: (1) the existence of an employer-employee relationship between the petitioner and the beneficiary; and (2) that the proffered position qualifies for classification as a specialty occupation.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's letter denying the petition; and (5) the Form I-290B and supporting documentation.

Upon review of the entire record of proceeding, the AAO finds that the petitioner has failed to overcome the director's ground for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

Beyond the decision of the director, the AAO finds three additional aspects which, although not addressed in the director's decision, nevertheless also preclude approval of the petition, namely, the petitioner's failures: (1) to submit a valid Labor Condition Application (LCA) for all work locations when it filed the petition; (2) to comply with the H-1B itinerary requirements; and (3) to demonstrate that it had secured work for the entire period of requested employment when it filed the petition.³ For these additional three reasons, the petition must also be denied.

¹ The petitioner provided a North American Industry Classification System (NAICS) Code of 541511, "Custom Computer Programming Services." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "541511 Custom Computer Programming Services," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (accessed Apr. 11, 2013).

² The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for the SOC (O*NET/OES) Code 15-1121, the associated Occupational Classification of "Computer Systems Analysts," and a Level II (qualified) prevailing wage rate.

³ The AAO conducts appellate review on a *de novo* basis (*See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)), and it was in the course of this review that the AAO identified these additional three grounds for denial.

I. Pertinent Facts and Procedural History

The petitioner filed the instant petition on April 9, 2012. When it filed the petition, the petitioner submitted, *inter alia*, a copy of a Subcontractor Agreement (SA) executed between the petitioner and [REDACTED] on November 30, 2010, which called for the petitioner to provide workers to perform consulting services on behalf of [REDACTED] for [REDACTED] clients. The petitioner also submitted a March 29, 2012 letter from [REDACTED] client [REDACTED] Software [REDACTED], which called for the petitioner to provide the beneficiary's services to [REDACTED] client, the [REDACTED]

In its response to the director's July 3, 2012 RFE, the petitioner submitted, *inter alia*, a September 2, 2011 statement of work (SOW) that was issued pursuant to the November 30, 2010 SA between the petitioner and [REDACTED], which also called for the petitioner to provide the beneficiary's services to the [REDACTED] in Vacaville, California. According to this SOW, the beneficiary's project would begin on January 16, 2012 and end on April 15, 2015.⁵

The director denied the petition on October 4, 2012. Again, the director denied the petition on the basis of her determinations that the petitioner failed to establish the existence of an employer-employee relationship between the petitioner and the beneficiary and also failed to demonstrate that the proffered position qualifies for classification as a specialty occupation.

On appeal, counsel claims that the beneficiary will no longer provide services to the [REDACTED]. Instead, counsel asserts, he will now work on an unspecified project in Dallas, Texas. Counsel submits an LCA for employment in Dallas, Texas certified on October 30, 2012, more than six months after the petition was filed, as well as an updated Form I-129 reflecting a new location of proposed employment. Counsel does not provide the name of the end-client utilizing the beneficiary's services or otherwise discuss the Dallas project.

In adjudicating this petition, the AAO will first address its supplemental findings that the petitioner failed to submit a valid LCA for all work locations when it filed the petition and that it failed to comply with the H-1B itinerary requirements. It will then discuss the director's determination that the petitioner failed to demonstrate the existence of an employer-employee relationship between the petitioner and the beneficiary. Next, the AAO will discuss its supplemental finding that the petitioner failed to establish that, on the date it filed the petition, it had secured work for the entire period of requested employment. Finally, the AAO will address the director's determination that the petitioner failed to establish that the proffered position qualifies for classification as a specialty occupation.

⁴ It is noted that although [REDACTED] letter referenced a contract between [REDACTED] and [REDACTED] a copy of that agreement is not contained in the record of proceeding. Nor does the record of proceeding contain a copy of any agreement between [REDACTED] and the [REDACTED]

⁵ On the Form I-129, the petitioner requested that the beneficiary's H-1B status be approved through September 19, 2015.

II. Failure to Submit a Valid LCA for all Work Locations, and an Itinerary, at the Time of Filing

As noted above, on appeal counsel submits an LCA certified more than six months after the petition was filed for employment in Dallas, Texas, as well as an updated Form I-129 reflecting this change. However, this evidence does not satisfy the applicable LCA and itinerary requirements.

The general requirements for filing applications and petitions are set forth at 8 C.F.R. §103.2(a)(1) as follows:

Every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions . . . and such instructions are incorporated into the regulations requiring its submission.

Further discussion of the filing requirements for applications and petitions is found at 8 C.F.R. § 103.2(b)(1):

Demonstrating eligibility. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request and must continue to be eligible through adjudication. Each benefit request must be properly completed and filed with all initial evidence required by applicable regulations and other USCIS instructions. Any evidence submitted in connection with a benefit request is incorporated into and considered part of the request.

The regulations require that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner must first obtain a certified LCA from the U.S. Department of Labor (DOL) in the occupational specialty in which the H-1B worker will be employed. *See* 8 C.F.R. § 214.2(h)(4)(i)(B). The instructions that accompany the Form I-129 also specify that an H-1B petitioner must submit evidence that an LCA has been certified by DOL when submitting the Form I-129.

Additionally, the regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) provides as follows:

Service or training in more than one location. A petition that requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with USCIS as provided in the form instructions. The address that the petitioner specifies as its location on the I-129 shall be where the petitioner is located for purposes of this paragraph.

The certified LCA submitted with the Form I-129 indicated that the beneficiary would work at one location: in Vacaville, California. However, on appeal, counsel submits an LCA certified six months after the petition was filed showing that the beneficiary would be working in Dallas, Texas for the duration of the approved petition.

The regulation at 8 C.F.R. § 214.2(h)(2)(E) states the following:

Amended or new petition. The petitioner shall file an amended or new petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition. An amended or new H-1C, H-1B, H-2A, or H-2B petition must be accompanied by a current or new Department of Labor determination. In the case of an H-1B petition, this requirement includes a new labor condition application.

It is self-evident that a change in the location of a beneficiary's work to a geographical area not covered by the LCA filed with the Form I-129 is a material change in the terms and conditions of employment. Because work locations are critical to the petitioner's wage rate obligations, the change deprives the petition of an LCA supporting the periods of work to be performed at the Dallas, Texas location and certified on or before the date the instant petition was filed. While the petitioner submits a new LCA listing the Dallas, Texas work location and respective dates of employment on appeal, it was required to submit an amended or new H-1B petition with USCIS indicating the change in locations and dates along with required fees and the newly certified LCA that establishes eligibility at the time that new or amended petition is filed.

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part:

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL-certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

[emphasis added]. As 20 C.F.R. § 655.705(b) requires that USCIS ensure that an H-1B petition is filed with a "DOL-certified LCA attached" that actually supports and corresponds with the petition on the petition's filing, this regulation inherently necessitates the filing of an amended H-1B petition to permit USCIS to perform its regulatory duty to ensure that a certified LCA actually supports and corresponds with an H-1B petition as of the date of that petition's filing. In addition, as 8 C.F.R. § 103.2(b)(1) requires eligibility to be established at the time of filing, it is factually impossible for an LCA certified by DOL after the filing of an initial H-1B petition to establish eligibility at the time the initial petition was filed. Therefore, in order for a petitioner to comply with 8 C.F.R. § 103.2(b)(1) and USCIS to perform its regulatory duties under 20 C.F.R. § 655.705(b), a petitioner must file an amended or new petition, with fee, whenever a beneficiary's job location changes such that a new LCA is required to be filed with DOL.

In light of the above, the AAO finds that a necessary condition for approval of an H-1B visa petition is an LCA, certified *on or before* the filing date of the petition, with information, accurate as of the date of the petition's filing, as to where the beneficiary would actually be employed. Furthermore, at its filing, the petition must list the locations where the beneficiary would be employed and be accompanied by an itinerary with the dates the beneficiary will provide services at each location. Both conditions were not satisfied in this proceeding.

The petitioner's attempt to remedy the LCA deficiency by submitting an LCA certified after the filing of the petition is ineffective. Again, a petitioner must establish eligibility at the time of filing a nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

It is further noted that to ascertain the intent of a petitioner, USCIS must look to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. If a petitioner's intent changes with regard to a material term and condition of employment or the beneficiary's eligibility, an amended or new petition must be filed. To allow a petition to be amended in any other way would be contrary to the regulations. Taken to the extreme, a petitioner could then simply claim to offer what is essentially speculative employment when filing the petition only to "change its intent" after the fact, either before or after the H-1B petition has been adjudicated. The agency made clear long ago that speculative employment is not permitted in the H-1B program. A 1998 proposed rule documented this position as follows:

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

63 Fed. Reg. 30419, 30419-30420 (Jun. 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).

In view of the foregoing, the AAO finds that the petitioner failed to submit a valid LCA for all work locations when it filed the petition. Although counsel claims on appeal that the beneficiary will be working in Dallas, Texas, the LCA submitted on appeal certified for that location was certified more than six months after the petition was filed. Accordingly, the petition must be denied on this basis. Thus, even if it were determined that the petitioner had overcome the director's grounds for denying this petition (which it has not), the petition could still not be approved.

Furthermore, the itinerary language at 8 C.F.R. § 214.2(h)(2)(i)(B), with its use of the mandatory "must" and its inclusion in the subsection "Filing of petitions," establishes that the itinerary as there defined is a material and necessary document for an H-1B petition involving employment at multiple locations, and that such a petition may not be approved for any employment period for which there is not submitted at least the employment dates and locations.

In her appellate brief counsel states only that the beneficiary would be working in Dallas, Texas. Counsel does not, however, provide the name of the client or the projected dates of the beneficiary's placement with this client. Thus, even if the AAO were to consider counsel's brief to be the petitioner's itinerary, it would still find that this "itinerary" failed to provide basic, foundational information regarding the work to be performed by the beneficiary. The petitioner, therefore, has not satisfied the itinerary requirements as set forth at 8 C.F.R. § 214.2(h)(2)(i)(B). Accordingly, the petition must be denied on this basis. Thus, even if it were determined that the petitioner had overcome the director's grounds for denying this petition (which it has not), the petition could still not be approved.

III. Employer-Employee Relationship Between the Petitioner and Beneficiary

The AAO will now address the director's first basis for denying this petition: her determination that the petitioner failed to establish that it would engage the beneficiary in an employer-employee relationship.

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)

"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;

- (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.

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

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

Neither the legacy 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. at 440 (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.⁶

⁶ 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).

The regulatory definition of “United States employer” requires H-1B employers to have a tax identification number, to employ persons in the United States, and to have an “employer-employee relationship” with the H-1B “employee.” 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term “United States employer” not only requires H-1B employers and employees to have an “employer-employee relationship” as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms “employee,” “employed,” “employment” or “employer-employee relationship” indicates that the regulations do not intend to extend the definition beyond “the traditional common law definition.” Therefore, in the absence of an intent to impose broader definitions by either Congress or USCIS, the “conventional master-servant relationship as understood by common-law agency doctrine,” and the *Darden* construction test, apply to the terms “employee,” “employer-employee relationship,” “employed,” and “employment” as used in section 101(a)(15)(H)(i)(b) of the Act, section 212(n) of the Act, and 8 C.F.R. § 214.2(h). That being said, there are instances in the Act where Congress may have intended a

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 importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. *Cf. Darden*, 503 U.S. at 318-319.⁷

Therefore, 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).⁸

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*,

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).

⁷ 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))).

⁸ 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).

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

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

That the beneficiary would not be providing his services to the petitioner directly is not in dispute. When it filed the petition, the petitioner claimed, and presented evidence to demonstrate, that the end-user of the beneficiary's services would be the [REDACTED] in Vacaville, California. On appeal, counsel claims that the beneficiary would no longer work on that project, but would instead work on an undefined project located in Dallas, Texas.⁹

Both counsel and the petitioner claim repeatedly that the petitioner would control the beneficiary's work, and [REDACTED] made the same claim in its March 29, 2012 letter. The SA also claims that the petitioner would control the beneficiary's work. The petitioner also claims that the submitted status reports sent from the beneficiary to the petitioner regarding his work on the [REDACTED]

⁹ As indicated above, the name of the end-client was not provided.

project further demonstrate the petitioner's control over the beneficiary.

However, applying the *Darden* and *Clackamas* tests to this matter, the AAO finds that 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." The record lacks detailed, probative information¹⁰ from either actual user of the beneficiary's services: (1) the [redacted] as claimed when the petition was filed; or (2) the unnamed user located in Dallas, Texas, regarding the nature and scope of the services to be provided by the beneficiary.

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. Without full disclosure of all relevant factors, the AAO is unable to find that the requisite employer-employee relationship will exist between the petitioner and the beneficiary.

The evidence, therefore, is insufficient to establish that the petitioner qualifies as a United States employer, as defined by 8 C.F.R. § 214.2(h)(4)(ii). Merely claiming in its letters that the petitioner exercises complete control over the beneficiary, without evidence supporting the claim, does not establish eligibility in this matter, particularly in a situation, such as exists here, where the petitioner would be providing the beneficiary to one of its clients. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

On appeal, counsel cites a January 8, 2010 memorandum issued by USCIS (the "Neufeld memo"),¹¹ in support of her argument that the petitioner has demonstrated the existence of an employer-employee relationship with the beneficiary. According to counsel, the petitioner complied with the Neufeld memorandum because the "totality of the circumstances must be considered" and that, if the "big picture and all of the evidence presented by the [p]etitioner" is taken into account, the petition should be approved.

¹⁰ In fact, the record lacks *any* information from either of these entities.

¹¹ See Memorandum from Donald Neufeld, Acting Director, Service Center Operations, U.S. Citizenship and Immigration Services, Department of Homeland Security, *Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements*, HQ 70/6.2.8 (Jan. 8, 2010).

Counsel's argument is not persuasive. The AAO has in fact considered the totality of the petitioner's evidence, and that evidence is not persuasive. That evidence simply does not describe the duties that the beneficiary would perform in probative detail, and there is no other information from the end-client user of the beneficiary's services, or anyone else, for that matter, describing those services.

Based on the tests outlined above, the petitioner has not established that it or any of its clients 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). Accordingly, the petition will be denied and the appeal dismissed on this basis.

IV. Securing of Work for Entire Period of Requested Employment at Time of Filing

Next, the AAO will discuss its supplemental finding regarding the petitioner's failure to establish that at the time of this petition's filing, it had secured work for the entire period of requested employment, that is, October 1, 2012 to September 19, 2015.

As noted above, the SOW issued pursuant to the November 30, 2010 SA between the petitioner and [REDACTED] extended only through April 15, 2015, more than six months before the end-date of the period of requested employment. Nor has the petitioner submitted any evidence to establish that the new project in Dallas, Texas upon which counsel now claims that the beneficiary would work would last through September 19, 2015. Consequently, the record lacks evidence establishing that, by the time of the petition's filing, the petitioner had secured definite, non-speculative employment for the beneficiary covering the entire three-year period of employment requested in the petition. 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)(12). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). 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.¹² Accordingly, the petition must be denied on

¹² Again, the agency made clear long ago that speculative employment is not permitted in the H-1B program. As noted above, 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

this basis also. Thus, even if it were determined that the petitioner had overcome the director's grounds for denying this petition (which it has not), the petition could still not be approved.

IV. Specialty Occupation

Finally, the AAO agrees with the director's determination that the petition must also be denied due to the petitioner's failure to establish that the proffered position qualifies for classification as a specialty occupation. As recognized in *Defensor v. Meissner*, it is necessary for the end-client to provide sufficient information regarding the proposed job duties to be performed at its location in order to properly ascertain the minimum educational requirements necessary to perform those duties. See *Defensor v. Meissner*, 201 F.3d at 387-388. In other words, as the nurses in that case would provide services to the end-client hospitals and not to the petitioning staffing company, the petitioner-provided job duties and alleged requirements to perform those duties were irrelevant to a specialty occupation determination. See *id.*

Here, the record of proceeding in this case is similarly devoid of sufficient information from either claimed end-client – the [REDACTED] or the unnamed company in Dallas, Texas – regarding the job duties to be performed by the beneficiary for it. The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary, therefore, precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.¹³

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).

¹³ Furthermore, even if the proffered position were established as being that of a systems analyst, a review of the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook* (the *Handbook*) does not indicate that, as a category, such a position qualifies as a specialty occupation in that the *Handbook* does not state a normal minimum requirement of a U.S. bachelor's or higher degree in a specific specialty or its equivalent for entry into the occupation of programmer analyst. See U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Computer Systems Analysts," <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-2> (accessed Apr. 11, 2013). As such, absent evidence that the position of systems analyst satisfies one of the alternative criteria available under 8 C.F.R. § 214.2(h)(4)(iii)(A), the instant petition could not be approved for this additional reason.

Accordingly, as the petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position qualifies as a specialty occupation. Accordingly, the appeal will be dismissed and the petition will be denied on this basis.

V. Conclusion

As set forth above, the AAO agrees with the director's findings that the petitioner has failed to demonstrate both: (1) the existence of an employer-employee relationship between the petitioner and the beneficiary; and (2) that the proffered position is a specialty occupation. Beyond the decision of the director, the petitioner has also failed: (1) to submit a valid Labor Condition Application (LCA) for all work locations when it filed the petition; (2) to comply with the H-1B itinerary requirements; and (3) to demonstrate that it had secured work for the entire period of requested employment when it filed the petition.

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

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

The petition will be denied and the appeal dismissed for the above stated reasons; with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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