



U.S. Citizenship
and Immigration
Services

(b)(6)

[REDACTED]

DATE: **JUN 14 2013** OFFICE: VERMONT SERVICE CENTE [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

ON BEHALF OF PETITIONER:

[REDACTED]

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. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the Vermont Service Center on August 17, 2011. In the Form I-129 visa petition, the petitioner describes itself as a computer software services company established in 1993. In order to employ the beneficiary in what it designates as a programmer analyst/team leader position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on January 11, 2012, finding that the petitioner failed to establish that it will have a valid employer-employee relationship with the beneficiary for the duration of the requested H-1B validity period. On appeal, counsel asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements. In support of this assertion, the petitioner and counsel submitted a brief and supporting evidence.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE) dated October 4, 2011; (3) the response to the RFE; (4) the director's denial letter; (6) the Form I-290B and supporting documentation; (7) the AAO's RFE dated February 4, 2013; and (8) the response to the RFE. The AAO reviewed the record in its entirety before issuing its decision.

For the reasons that will be discussed below, the AAO agrees with the director that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed. The petition will be denied.

As a preliminary matter, the AAO notes that even if the petitioner were to overcome the basis for the director's denial of the petition (which it has not), it could not be found eligible for the benefit sought. That is, upon review of the record of proceeding, the AAO notes that in the instant case, there are additional issues, not addressed by the director, which preclude the approval of the H-1B petition.¹ As will be discussed later in the decision, for these additional reasons the petition also may not be approved. They are considered independent and alternative bases for denial of the petition.

In this matter, the petitioner stated in the Form I-129 petition that it is a computer software services company and that it seeks the beneficiary's services as a programmer analyst/team leader to work on a full-time basis. In the H Classification Supplement to Form I-129 (page 11), the petitioner described the proposed duties as "[e]valuates user requests for new or modified programs and plans, develops, tests and documents the programs or modifications required." In the Form I-129 petition, the petitioner indicated that the job title is "Programmer Analyst/Team Leader" for an annual salary

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

of \$78,000. In the Labor Condition Application (LCA) submitted with the Form I-129, the petitioner indicated that the job title is "Programmer Analyst" and that the wage rate is \$45,000. No explanation was provided.

In the instant case, the petitioner did not submit a letter of support with the H-1B petition. The record of proceeding contains a letter from counsel that is dated August 11, 2011. In the letter, counsel provided the following statement:

[The beneficiary] will be employed as a Programmer Analyst/Project Leader and would direct and coordinate the analysis and design of databases within a specified application area. He would confer with software engineers, analysts and programmers assigned to his unit to design the application and interfaces. He would direct the design and development of the software, including the analysis of user needs and software requirements to determine the feasibility of proposed designs with time and cost restraints. He would analyze information to determine, recommend and plan computer specifications and layouts, and peripheral equipment modifications. He would supervise the work of software engineers, programmers and technicians and would also be obtaining and evaluating information to determine hardware configurations.

The AAO notes that this job description is not probative evidence as the description was provided by counsel, not the petitioner. Counsel's brief was not endorsed by the petitioner and the record of proceeding does not indicate the source of the duties and responsibilities that counsel attributes to the proffered position. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Further, counsel indicates that the beneficiary "possesses a Bachelor of Science degree in Computer Science from [REDACTED]." Counsel also notes that the beneficiary has been "employed by the petitioner as a computer software developer for over 11 years," and asserts that "by education, training and experience, claims that the petitioner feels he is qualified to be considered a professional worker and for the immigrations status being sought." The petitioner submitted copies of the beneficiary's foreign academic credentials and documents from the petitioner regarding the beneficiary's prior employment with the company. The petitioner did not provide an evaluation of the beneficiary's credentials.

The AAO notes that neither counsel nor the petitioner stated there are any specific requirements for the proffered position. Thus, the petitioner does not claim and has failed to establish that the position requires theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States pursuant to 8 C.F.R. § 214.2(h)(4)(ii).

In addition, the petitioner submitted (1) an employment offer letter, dated July 27, 2011, indicating that the beneficiary's "initial assignment will be with [the petitioner's] client [REDACTED] (2) a Master Services Agreement between [REDACTED] and the petitioner (dated August 17, 2010); (3) a Form W-2, Wage and Tax Statement, for 2010 that was issued to the beneficiary by the petitioner; (4) a pay statement issued to the beneficiary on July 29, 2011 by the petitioner (and that lists an address for the beneficiary in [REDACTED]; and (5) a 2010 tax return for the petitioner.

The petitioner also submitted an LCA in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification of "Computer System Analysts" – SOC (ONET/OES Code) 15-1121. The petitioner designated the proffered position as a Level I (entry) position.²

The AAO notes that in the Form I-129 and the LCA, the petitioner listed its address as [REDACTED]. The petitioner claimed (on page 3 of the Form I-129) that the beneficiary's "[c]urrent U.S. address" was the same address as the petitioner's address in [REDACTED]. No explanation was provided.

Furthermore, the petitioner indicated on the Form I-129 petition and LCA that the beneficiary would work at [REDACTED]. Moreover, counsel specified that the beneficiary would be employed "at [REDACTED]" and continued by stating that "the beneficiary will be working at the address given in Part 5 of the form I-129 submitted, that of the petitioner's client, [REDACTED]." In the offer letter, the petitioner indicated that the beneficiary would work at a client site located at a different address, specifically at "[REDACTED]." The AAO observes that on the Form I-129 petition and supplement, the petitioner indicated (on page 4 and on page 19) that the beneficiary would **not** be working off-site. Specifically, the petitioner responded (and failed to respond) to the entries of the Form I-129 as follows:

² The "Prevailing Wage Determination Policy Guidance" issued by DOL provides a description of the wage levels. A Level I wage rate is described by DOL as follows:

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

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

Will the beneficiary work off-site? No Yes

* * *

No Yes The beneficiary of this petition will be assigned to work at an off-site location for all or part of the period for which H-1B classification is sought.

No Yes Placement of the beneficiary off-site during the period of employment will comply with the statutory and regulatory requirements of the H-1B nonimmigrant classification.

No Yes The beneficiary will be paid the higher of the prevailing or actual wage at any and all off-site locations.

The instructions to the Form I-129 petition state, in part, the following regarding the off-site assignment of an H-1B beneficiary:

Petitioners seeking to place the H-1B beneficiary off-site at a location other than their own location must answer general questions regarding this assignment on page 19, relating to: actual or prevailing wage and assurance that all assignments will comply with the employment described in the H-1B petition and applicable statute and regulations governing the H-1B nonimmigrant classification.

In the instant case, as noted above, the petitioner and counsel provided inconsistent information as to whether or not the beneficiary would be employed on-site or off-site, and the specific address at which the beneficiary would be employed. Furthermore, the petitioner did not provide responses to all of the questions on page 19 relating to any off-site assignments as described above in instructions to the Form I-129.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on October 4, 2011. The AAO notes that the director specifically requested the petitioner submit probative evidence to establish that a valid employer-employee relationship will exist for the duration of the requested validity period. The director noted that the terms of the agreement between the petitioner and client are determined by the Statement of Work (SOW), but that the petitioner had not provided the SOW with its submission. The director also requested further information regarding the beneficiary's qualifications. The director outlined the evidence to be submitted.

Counsel for the petitioner responded to the RFE by submitting a brief and additional evidence. The submission included: (1) an evaluation report regarding the beneficiary's credentials, dated October 31, 2011; (2) a Statement of Work between [redacted] and the petitioner, dated July 2, 2011 for a period "starting on July 4, 2011 and ending on September 23, 2011"; (3) a copy of *Matter of Smith*, 12 I & N. Dec. 772 (D.D.1968); (4) a printout from the Internal Revenue Service

website; and (5) the articles of incorporation and related documents for the petitioner.

The director reviewed the evidence but determined that "the totality of evidence provided does not demonstrate that a valid employer-employee relationship will exist for the duration of the requested H-1B validity period." The director denied the petition on January 11, 2012. Counsel submitted an appeal of the denial of the H-1B petition. The AAO issued an RFE on February 4, 2013 finding that the appeal was not filed with a properly completed Form G-28, Notice of Entry of Appearance as Attorney or Representative, pursuant to 8 C.F.R. § 292.4(a) and the instructions to the Form I-290B. In response, counsel submitted a new Form G-28.

The AAO reviewed the record of proceeding in its entirety and will now discuss some findings that are material to this decision's application of the H-1B statutory and regulatory framework to the proffered position as described in the record of proceeding.

When determining whether a position is a specialty occupation, the AAO must look at the nature of the business offering the employment and the description of the specific duties of the position as it relates to the particular employer. To ascertain the intent of a petitioner, USCIS looks to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

With the RFE, the director notified the petitioner that additional documentation was required to establish that the present petition meets the criteria for H-1B classification. In response to the RFE, counsel states that in the "template" RFE, USCIS "is implying that the petitioner is misrepresenting its business, the nature of the beneficiary's employment, and its relation with its clients" and "this is both lacking factual justification and legally improper." The AAO finds that, in the context of the record of proceeding as it existed at the time the RFE was issued, the request for additional evidence was appropriate under the above cited regulations, not only on the basis that it was required initial evidence, but also on the basis that it was material in that it addressed the petitioner's failure to submit documentary evidence substantiating the petitioner's claim that it had H-1B caliber work for the beneficiary for the entire period of employment requested in the petition.

The regulations at 8 C.F.R. §§ 103.2(b)(8) and 214.2(h)(9)(i) provide the director broad discretionary authority to require such evidence as contracts and itineraries to establish that the services to be performed by the beneficiary will be in a specialty occupation during the entire period requested in the petition. A service center director may issue an RFE for evidence that he or she may independently require to assist in adjudicating an H-1B petition, and his or her decision to approve a petition must be based upon consideration of all of the evidence as submitted by the petitioner, both initially and in response to any RFE that the director may issue. *See* 8 C.F.R. § 214.2(h)(9).

On appeal, counsel asserts that there is no requirement under 8 C.F.R. 214.2(h)(4)(ii) that the "petitioner must be able to 'establish' an 'employer-employee relationship' will exit between the petitioner and the beneficiary 'throughout the requested H-1B validity period'" to meet the definition of a "United States employer." Counsel further claims that "legal validity of the denial" can be "determined by an examination of this provision of regulations" and asserts that "doing so reveals that the preponderance of the evidence submitted by the petitioner shows its requirements have been satisfied and that the claimed requirement which is the basis for the denial does not exist."

The AAO notes that with respect to the preponderance of the evidence standard, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010), states in pertinent part the following:

Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.

* * *

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case.

* * *

Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. *See INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Thus, in adjudicating the petition pursuant to the preponderance of the evidence standard, USCIS examines each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true. The "preponderance of the evidence" standard does not relieve the petitioner from satisfying the basic evidentiary requirements set by regulation. The standard of proof should not be confused with the burden of proof. Specifically, the petitioner bears the burden of establishing eligibility for the benefit sought. A petitioner must establish that it is eligible for the requested

benefit at the time of filing the petition. 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. As will be discussed, in the instant case, that burden has not been met.

The first issue for consideration is whether the petitioner has established 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). The AAO will now review the record of proceeding to determine whether the petitioner has established that it will have "an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." *Id.*

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

subject to section 212(j)(2), who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 214(i)(1) . . . , who meets the requirements for the occupation specified in section 214(i)(2) . . . , and with respect to whom the Secretary of Labor determines and certifies to the [Secretary of Homeland Security] that the intending employer has filed with the Secretary [of Labor] an application under section 212(n)(1)

The term "United States employer" is defined in the Code of Federal Regulations 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.

8 C.F.R. § 214.2(h)(4)(ii) (emphasis added); *see also* 56 Fed. Reg. 61111, 61121 (Dec. 2, 1991). In the instant case, the record is not persuasive in establishing that the petitioner will have an employer-employee relationship with the beneficiary.

Although "United States employer" is defined in the regulations at 8 C.F.R. § 214.2(h)(4)(ii), it is noted that the terms "employee" and "employer-employee relationship" are not defined for purposes of the H-1B visa classification. Section 101(a)(15)(H)(i)(b) of the Act indicates that an alien coming to the United States to perform services in a specialty occupation will have an "intending employer" who will file an LCA 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.

In response to the RFE, counsel provided a copy of the decision *Matter of Smith*, 12 I & N. Dec. 772 (D.D.1968). Counsel claims that it "contains both the ruling of what constitutes an 'employer' and specifically applied it to services contractors."

The AAO notes that subsequent to the decision in *Matter of Smith*, the United States Supreme Court 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:

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

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

Darden, 503 U.S. at 323-324 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. at 751-752); see also *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440, 445 (2003) (hereinafter "*Clackamas*"). As the common-law test contains "no shorthand formula or magic phrase

that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).

As such, 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 of the relevant factors, the director would be unable to properly assess whether the requisite employer-employee relationship will exist between the petitioner and the beneficiary.

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.³

³ 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*

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 318-319.⁴

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).⁵

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)).

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 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).

⁴ 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))).

⁵ 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).

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

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

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."

Upon review of the record of proceeding, the AAO finds that the petitioner has failed to adequately establish several basic elements of the beneficiary's employment. The petitioner is required to submit written contracts between the petitioner and beneficiary, or if there is no written agreement, a summary of the terms of the oral agreement under which the beneficiary will be employed. The regulation at 8 C.F.R. § 214.2(h)(4)(iv) states, in pertinent part, the following:

(b)(6)

(A) General documentary requirements for H-1B classification in a specialty occupation. An H-1B petition involving a specialty occupation shall be accompanied by:

* * *

(B) Copies of any written contracts between the petitioner and beneficiary, or a summary of the terms of the oral agreement under which the beneficiary will be employed, if there is no written contract.

The petitioner provided an offer letter dated July 27, 2011 between the petitioner and the beneficiary. The letter sets out what the beneficiary is entitled to such as annual gross salary and benefits. In addition, the letter states that the beneficiary has the following obligations:

- You will be willing work in the place specified by [the petitioner.] Your initial assignment will be with our client [REDACTED]
- You will observe all reasonable rules, regulations and security requirements at [the company] or [the petitioner]'s client premises and failure to observe such requirements will be grounds for immediate termination.
- While working in the US, you shall follow the normal working hours of the place you are working.
- If you are working at a Client location, by the end of each week, you shall submit to [the petitioner] a Client approved time sheet for payment purposes. In the case of the said time sheet not being approved by the Client within seven days from the last date of the period to which the time-sheet relates, you must submit the time sheet(s) to [the petitioner] without the Client's approval. Failure to submit the time sheet may delay the processing of the salary.
- You shall not accept any employment or other form of services directly or indirectly from the Client while being employed by [the petitioner] and for a period of 12 calendar months thereafter.
- You agree to regard and preserve as confidential any and all information shared by you with the Client or [the petitioner]. Further, you shall not otherwise than in connection with the affairs with Client and [the petitioner] pass any information about the Client to a third party at any time during or after the employment.
- Any payment made to you by [the petitioner], as advance against expenses will be supported by vouchers/bills at the time of settlement. You also

authorize [the petitioner] to deduct from your payroll any loans provided by [the petitioner] to you.

- If you wish to terminate the employment, you shall do so by giving [the petitioner] thirty days' notice addressed to its last published address. Any payment that is due and outstanding for the services rendered by you at the time of termination in respect of the completed portion of the work til the date of expiration of the employment shall be paid by [the petitioner] upon the expiration of the employment after deduction of any amounts due from you against loans or advances taken by you.

Upon review of the document, the AAO notes that the offer letter fails to adequately establish several critical aspects of the beneficiary's employment. Furthermore, the offer letter has several inconsistencies which undermine the petitioner's credibility with regard to the services the beneficiary will perform, as well as the actual nature and requirements of the proffered position.

For example, the offer letter states that the beneficiary's "initial assignment will be with [the petitioner's] client [REDACTED] As previously mentioned, this address is different from the previously provided address on the Form I-129 and the LCA, which was listed as [REDACTED] The offer letter further states that the position being offered is of a "programmer/analyst" rather than a "programmer analyst/team leader."

Moreover, as previously mentioned, in the Form I-129 petition and the offer letter, the petitioner stated that the beneficiary would be paid \$78,000 per year. In the LCA, the wage rate is indicated as \$45,000 per year. Thus, the record of proceeding contains conflicting information as to the salary to be paid to the beneficiary. No explanation was provided.

Further, the offer letter lacks information about the work to be performed and the beneficiary's specific role in the project. Notably, the offer letter does not provide a description of the beneficiary's duties, the requirements for the position, number of hours to be worked per week, whether the position is full-time or part-time, et cetera.⁶ While an employment agreement may provide some insights into the relationship of a petitioner and a beneficiary, it must be noted again that 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.

The letter also indicates that the beneficiary is entitled to "Health Insurance Coverage as per Company rules." However, a substantive determination cannot be inferred regarding these

⁶ Notably, the record of proceeding does not contain any documentation from the petitioner and/or the client with regard to the requirements (if any) for the proffered position and a detailed description of the duties and responsibilities of the proffered position. As previously mentioned, the job description provided by counsel with the H-1B petition was not endorsed by the petitioner, and the record of proceeding does not indicate the source of the duties that counsel attributes to the proffered position.

"benefits" as no further information regarding the plans, including eligibility requirements, was provided to USCIS.

More importantly, while counsel claims that the beneficiary would be working on a project for [REDACTED] the record does not contain evidence to establish that the beneficiary is or would be working on any such projects. More specifically, in support of counsel's assertion, the record of proceeding contains a Master Services Agreement dated August 17, 2010 and (SOW) entitled "VB to VB.Net Conversion Phase 4 Project" dated July 4, 2011. The Master Services Agreement specifies that [REDACTED] desires to retain [the petitioner] from time to time to work on projects as set forth in individual Statements of Works (as defined below) to provide Services (each a 'Project')." The agreement continues by providing, in pertinent part, the following under the heading "Statement of Work":

Before undertaking a Project, [REDACTED] and [the petitioner] shall complete a statement of work Each Statement of Work shall specify the Services, including, but not limited to, all deliverables ("Deliverables") fees, specifications and related documentation, time frames, acceptance-timing criteria, and other particulars that shall govern the Services rendered under such Statement of Work. Each Statement of Work shall be signed by each Party and shall be attached to this Agreement and incorporated herein by reference.

In the section entitled "Changes in Scope," the Master Services Agreement provides, in pertinent part, the following information:

During a Project, if [REDACTED] wishes to alter, modify, expand or change the scope of the Project ("Change"), the Parties shall comply with the procedures set forth herein. Any such Change requires a mutually agreed-upon amendment of the applicable Statement of Work. . . . No change shall be considered authorized unless [REDACTED] and [the petitioner] have signed a PCR [Project Change Request] to the applicable Statement of Work, and the terms of such PCR shall control over any inconsistent provisions in the Statement of Work or this Agreement.

The SOW provided by the petitioner and counsel in response to the RFE provides the following project overview:

This SOW will be for an initial period starting on July 4, 2011 and ending on September 23, 2011 and may be extended by mutual written agreement between both parties prior to expiration of the term of this SOW.

As part of the services provided pursuant to this SOW (the "Services"), Consultant will perform the following below functions for the VB to VB.Net conversion Phase 1 Project.

- Convert 24 identified VB applications to VB.net from the attached list of applications

The SOW further outlines the scope of work, responsibilities, payment milestones/target dates, and acceptance criteria. However, the SOW does not identify the positions required for the project nor name specific employees assigned to the project; in other words, there is no indication that the beneficiary would be working on this project as a programmer analyst/team lead. Moreover, as noted, the SOW was valid only from July 4, 2011 to September 21, 2011, and there is no evidence that the agreement has been extended and is still viable. Notably, the petitioner stated that the date of intended employment for the beneficiary to begin working was October 1, 2011. Thus, the validity of the SOW ended *prior* to the beneficiary's intended start date. The petitioner did not provide probative evidence of any specific projects that overlap (for any period of time) with the beneficiary's intended H-1B employment dates as stated by the petitioner in the Form I-129 and LCA.

In response to the RFE, counsel claims that the contract "has had four 'phases' to date (one for each converted application)" and that "it is projected to have 20 more at the same rate." Notably, as stated above, the Master Service Agreement specifies that [REDACTED] will "retain [the petitioner] **from time to time** to work on a project or projects [emphasis added]" and that "[b]efore undertaking a Project, [REDACTED] and [the petitioner] shall complete a statement of work" which provides specific information regarding the services, and "shall be **signed by each Party** [emphasis added]." The agreement further states, "No change shall be considered authorized unless [REDACTED] and [the petitioner] have signed a PCR."

Upon review of the record of proceeding, the AAO observes that there is no documentary evidence to substantiate that the project has been extended or that there are ongoing projects that would utilize the beneficiary's services and would entail H-1B caliber work for the beneficiary for the period of employment requested in the petition. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

A key element in this matter is who would have the ability to hire, fire, supervise, or otherwise control the work of the beneficiary for the duration of the H-1B petition. The record of proceeding provides limited substantive information on this issue. For instance, as previously noted, the petitioner and counsel have provided inconsistent information as to the beneficiary's place of employment, and whether or not he will be employed "off-site." However, in a letter dated December 23, 2011, counsel claims that "the beneficiary will be working in Bentonville, AR." The petitioner indicated that its office is located at [REDACTED]. These locations are approximately 1,260 miles apart from each other.

The AAO observes that in the RFE, the director specifically requested that the petitioner provide documentation to clarify the petitioner's employer-employee relationship with the beneficiary. The director provided a list of the types of evidence to be submitted, such as an organizational chart, demonstrating the beneficiary's supervisory chain. The petitioner did not provide an organizational chart or other documentation regarding the company's hierarchy. In response to the RFE, counsel stated that "[the beneficiary] would report to [the petitioner's] General Manager, [REDACTED]"

Counsel did not provide any further information or any evidence from the petitioner to corroborate his statement. The petitioner did not submit any specific information regarding the beneficiary's supervisor (e.g., specific role, brief job description, location). Notably, the offer letter is signed by [REDACTED] and indicates his job title as "General Manager – **Administration** [emphasis added]." The petitioner has not provided any information regarding [REDACTED] specific role in the claimed [REDACTED]. Furthermore, the petitioner did not indicate [REDACTED] place of employment (city and state) and how (as well as how often) [REDACTED] and the beneficiary will communicate. There is a lack of information as to how the day-to-day work of the beneficiary will be supervised and overseen.

Counsel states in response to the RFE that "per the terms of [the petitioner's] employment contracts with [its employees], [the petitioner] has the legal right to dictate when and where its computer specialists will work, it tell them what equipment they will be using, it dictates the general nature of the work to be performed." The only document on record that resembles an employment contract is the above mentioned offer letter; however, as discussed, it lacks significant details regarding critical aspects of beneficiary's employment. Further, it contains statements that are vague and fail to establish who has control of the work of the beneficiary. For example, while it appears to dictate where the beneficiary would work by stating that "you will be willing to work in the place specified by [the petitioner]," it also states the following:

If you are working at a client's location, by the end of each week, you shall submit to [the petitioner] a Client approved time sheet for payment purposes. In the case of the said time sheet not being approved by the Client within seven days from the last date of the period to which the time sheet relates, you must submit the time sheet(s) to [the petitioner] without the Client's approval. Failure to submit the time sheet may delay the processing of the salary.

Based on this statement, it appears that the Client also has at least some control over the work of the beneficiary on a day to day basis since the time sheet is to be approved by the Client. Further, it also states the beneficiary "will observe all reasonable rules, regulations and security requirements whenever at [the petitioner's] or [the petitioner]'s client premises and failure to observe such requirements will be grounds for immediate termination." The letter does not specify who oversees the beneficiary to enforce such requirements.

Moreover, the AAO observes that the petitioner did not provide any information regarding how work and performance standards are established, the methods for assessing and evaluating the beneficiary's performance, who will prepare evaluations (if applicable), the criteria for determining bonuses and salary adjustments, et cetera. In response to the RFE, counsel states that the petitioner "has no formal performance review process." He continues by stating that "if [REDACTED] determines that [the beneficiary] is not fulfilling the requirements of its contract it has a right to **request** a replacement."

Notably, the AAO observes that the Master Services Agreement states, [REDACTED] in its sole discretion shall have the right to reject any personnel whom [the petitioner] assigns to the Project. [The petitioner] shall remove any personnel who is performing the Services upon [REDACTED]

request and promptly replace such personnel." The agreement does not limit [redacted] "right to reject any personnel whom [the petitioner] assigns to the Project" to individuals who are not fulfilling the contract. Instead, based upon the Master Service Agreement, [redacted] can "reject any personnel" apparently for any reason (or no reason) and that the petitioner "shall remove any personnel" and "promptly replace such personnel" at [redacted] request.

The AAO notes that it is not sufficient to establish eligibility in this matter for counsel to merely claim that the petitioner will be responsible for hiring, firing, supervising, and controlling the beneficiary's employment. The petitioner has failed to provide sufficient details or submit probative evidence substantiating counsel's claims. In the instant case, there is insufficient evidence of an employer-employee relationship for the entire period specified in the petition. The submitted documents do not substantiate the services to be performed, do not cover the entire period of requested employment, and do not establish the existence of projects or specific work for the beneficiary at the time of filing. Without full disclosure of all of the relevant factors or sufficient corroborating evidence to support the counsel's assertions, the AAO is unable to find that the requisite employer-employee relationship will exist between the petitioner and the beneficiary.

The record of proceeding contains inconsistent information regarding the duration of the petitioner's relationship with the beneficiary. In a letter dated August 11, 2011, counsel for the petitioner states that "[the beneficiary] has been employed by the petitioner as a computer software developer for over 11 years." Notably, counsel claims on appeal, "The employment relationship between the petitioner and the beneficiary began in August 2011 and is ongoing (he has been employed by its affiliate in India)." In the same letter, counsel states that the documentation submitted "prove[s], beyond any doubt whatsoever, that, as of the date of [the] denial of this petition [January 11, 2012], [the petitioner] was, and had been for the previous two years the employer of the beneficiary."

The AAO notes that the documents in the record are inconsistent with counsel's statements. For example, the record contains a copy of a Form W-2, Wage and Tax Statement, issued in 2010 for \$27,500, which appears to contradict counsel's statement that "the employment relationship between the petitioner and the beneficiary began in August 2011." Further, the Form I-129 and a receipt notice indicate that the beneficiary has been in the United States in L-1 status with the petitioner since February 27, 2009. The record also contains a letter from the petitioner's Indian office stating that the beneficiary has been working with the office since August 7, 2000. No explanation for the discrepancies was provided.

As mentioned, the petitioner submitted a Form W-2 issued to the beneficiary in 2010, as well as a pay statement issued on July 29, 2011. The AAO notes that while salary, tax, and other benefits are 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. In the instant case, while there may be evidence of a past relationship, there is insufficient evidence to establish an employer-employee relationship for the period specified in the petition. As the director noted, the submitted documents do not establish when, where, and how the beneficiary will perform the proposed work,

do not list services to be performed, do not cover the entire period of requested employment, do not establish that any projects continue to be underway, and do not establish the listed project's continued existence. Without full disclosure of all of the relevant factors or sufficient corroborating evidence to support counsel's claims, the AAO is unable to find that the requisite employer-employee relationship will exist between the petitioner and the beneficiary. Accordingly, the appeal will be dismissed, and the petition will be denied on this basis.

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. 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). While counsel claims that it has on-going projects with Walmart, counsel failed to provide evidence to substantiate the beneficiary's actual work on any particular project.

On appeal, counsel claims that the regulatory provisions that define "employer" at 8 C.F.R. § 214.2(h)(4)(ii) and 8 C.F.R. 274a.1 do not contain a single word, reference, implication, hint etc. indicating that a petitioner must be able to 'establish' that an 'employer-employee relationship' will exist between the petitioner and the beneficiary 'throughout the requested H-1B validity period' in order to meet the definition of a 'United States employer' stated therein."

In the instant case, the petitioner provided a SOW with validity dates that ended prior to the requested H-1B period of employment. Notably, the SOW was provided on December 28, 2011 (three months *after* the end date of the SOW), and the petitioner did not provide any further documentation to establish additional projects for the beneficiary. The petitioner failed to establish that the petition was filed on the basis of employment for the beneficiary as a programmer analyst that, at the time of the petition's filing, was definite and nonspeculative for any of the requested period of employment specified in the Form I-129.⁷ The record of proceeding lacks (1) evidence

⁷ The AAO notes that 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.

corroborating that the petitioner has work that exists as an ongoing endeavor generating definite employment for the beneficiary's services (e.g., documentary evidence regarding the scope, staging, time and resource requirements, supporting contract negotiations, documentation regarding the business analysis and planning to support the work); and (2) evidence that the beneficiary's duties ascribed would actually require the theoretical and practical application of at least a baccalaureate level of a body of highly specialized knowledge in a specific specialty, as required by the Act.

A position may be awarded H-1B classification only on the basis of evidence of record establishing that, at the time of the filing, definite, non-speculative work would exist for the beneficiary for the period of employment specified in the Form I-129. The record of proceeding does not contain such evidence. 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. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Accordingly, the petitioner has not demonstrated that it will maintain an employer-employee relationship for the duration of the period requested. The AAO finds that the petitioner has failed to establish that the petition was filed for work that was reserved for the beneficiary as of the time of the petition was submitted.

Upon review of the record of proceeding, it cannot be concluded that the petitioner has established that it qualifies as a United States employer with standing to file the instant petition in this matter. *See* section 214(c)(1) of the Act (requiring an "Importing Employer"); 8 C.F.R. § 214.2(h)(2)(i)(A) (stating that the "United States employer . . . must file" the petition); 56 Fed. Reg. 61111, 61112 (Dec. 2, 1991) (explaining that only "United States employers can file an H-1B petition" and adding the definition of that term at 8 C.F.R. § 214.2(h)(4)(ii) as clarification). That is, 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).

Beyond the decision of the director, the AAO will enter an additional basis for denial, i.e., the petitioner's failure to establish that it would employ the beneficiary in a specialty occupation position.

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and

- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

Specialty occupation means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 387. To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), USCIS consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

Upon review of the record of proceeding, the AAO notes again that the petitioner failed to establish educational requirements for the proffered position. In response to the RFE, counsel claims "skills involved in this position are, of course, those of a computer software developer, systems analyst, or a 'Programmer/Analyst.'" Counsel further claims to reference the occupational categories "Computer Systems Analysts" and "Computer Software Engineers and Computer Programmers" as described in the U.S. Department of Labor's *Occupational Outlook Handbook*. The AAO notes that counsel is incorrect if he meant to convey that any job described by a petitioner (or counsel) as a computer systems analyst/computer software engineer/computer programmer position qualifies as a specialty occupation. That is, to determine whether a particular job qualifies as a specialty occupation, the specific duties of the proffered position, combined with the nature of the entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F.3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

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

In the instant case, the record of proceeding is devoid of substantive information from [REDACTED] regarding not only the specific job duties to be performed by the beneficiary, but also information regarding whatever the [REDACTED] may or may not have specified with regard to the educational credentials of persons to be assigned to its projects. The record of proceeding does not contain any documentation on this issue from, or endorsed by, [REDACTED], the company that will actually be utilizing the beneficiary's services (according to the petitioner).

Further, the record of proceeding contains numerous inconsistencies and discrepancies regarding the proffered position, as described in detail earlier in the decision. The AAO finds that 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.

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. For this additional reason, the appeal will be dismissed and the petition denied.

Moreover, the AAO will now address another basis for denial of the petition. More specifically, the AAO finds that the petitioner failed to comply with the itinerary requirement at 8 C.F.R. § 214.2(h)(2)(i)(B).

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) states, in pertinent part:

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 Form I-129 shall be where the petitioner is located for purposes of this paragraph.

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 response to the RFE, counsel stated that the "petitioner has no intention of employing [the beneficiary] anywhere else for the foreseeable future and most assuredly has given no indication in

its petition or its supporting documents that he would be 'required' to perform services in another location." The AAO does not agree with counsel. As discussed earlier, the petitioner has provided inconsistent information as to whether or not the beneficiary would be employed off-site. Moreover, there is a lack of documentary evidence sufficient to corroborate the claim that the beneficiary would be serving as a programmer analyst for [REDACTED] for the period sought in the petition. Although the petitioner requested the beneficiary be granted H-1B classification until October 1, 2014, the petitioner failed to substantiate the proposed employment at the client's location for any of the period requested. Therefore, it appears that the beneficiary will work at more than one location during the requested period of employment and the petitioner failed to provide an itinerary when it filed the Form I-129 in this matter. Thus, the petition must also be denied on this additional basis.

Next, the AAO will review the director's finding that the petitioner failed to establish that the beneficiary is qualified to perform services in a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the beneficiary's qualifications meet the applicable statutory and regulatory requirements.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C)
 - (i) experience in the specialty equivalent to the completion of such degree, and
 - (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

In implementing section 214(i)(2) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C) states that an alien must also meet one of the following criteria in order to qualify to perform services in a specialty occupation:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be

immediately engaged in that specialty in the state of intended employment; or

- (4) Have education, specialized training, and/or progressively responsible experience that are equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

Therefore, to qualify an alien for classification as an H-1B nonimmigrant worker under the Act, the petitioner must establish that the beneficiary possesses the requisite license or, if none is required, that he or she has completed a degree in the specialty that the occupation requires. Alternatively, if a license is not required and if the beneficiary does not possess the required U.S. degree or its foreign degree equivalent, the petitioner must show that the beneficiary possesses both (1) education, specialized training, and/or progressively responsible experience in the specialty equivalent to the completion of such degree, and (2) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

In this case, the petitioner stated on the Form I-129 petition that it seeks to employ the beneficiary in what it designates as a programmer analyst/team leader position. In response to the RFE, counsel claimed that the proffered position "'normally' requires the possession of at least a bachelor's degree in computer science or a closely related field."

In its support letter dated August 11, 2011, counsel stated that "by education, training and experience the petitioner feels he is qualified to be considered a professional worker and for the immigration status being sought." The petitioner provided the following documents regarding the beneficiary's qualifications for the proffered position:

- A copy of diploma from [REDACTED] which states that the beneficiary was awarded Bachelor of Science in October 1994 for Computer Science, Mathematics and Statistics.
- A letter from the petitioner dated February 28, 2008 stating that the beneficiary has been working with the company since August 7, 2000 and outlining his responsibilities in his current position as a project leader.
- A summary/resume of the beneficiary's experience. The document is on the petitioner's letterhead.

In the instant case, counsel claim that the beneficiary possesses the necessary qualifications for the proffered position based upon his academic background, training and work experience. Under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), the petitioner must establish both (1) that the beneficiary's combined education, specialized training, and/or progressively responsible experience are equivalent to completion of a United States baccalaureate or higher degree in the specialty

(b)(6)

occupation, and (2) that the beneficiary has recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

For purposes of 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), the provisions at 8 C.F.R. § 214.2(h)(4)(iii)(D) require one or more of the following to determine whether a beneficiary has achieved a level of knowledge, competence, and practice in the specialty occupation that is equal to that of an individual who has a baccalaureate or higher degree in the specialty:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;⁸
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience. . . .

The petitioner did not submit evidence to satisfy the criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(D)(2)-(4). In the present matter, the petitioner relies upon an evaluation of the beneficiary's qualifications. However, upon review of the record, the petitioner has failed to establish that the beneficiary is qualified to serve in a specialty occupation position.

Counsel provided an evaluation report by [redacted] (evaluator) for [redacted]. However, the evaluator does not claim or provide any documentation to demonstrate that she has the authority to grant college-level credit for *work experience* in the specialty (nor does she indicate that she is affiliated with a university that has a program for granting such credit based on an individual's work experience).

⁸ The AAO reminds counsel that, in accordance with this provision, the AAO will accept a credentials evaluation service's evaluation of *education only*, not experience.

Furthermore, there is no independent evidence in the record from appropriate officials, such as deans or provosts, to establish that, at the time of the evaluation, the evaluator was, in the language of the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D)(I), "an official [with] authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience." Thus, the evaluator has not established that she is competent under 8 C.F.R. § 214.2(h)(4)(iii)(D)(I) to evaluate the educational equivalency of the beneficiary's work experience. Accordingly, this evaluation, does not meet the standard of 8 C.F.R. § 214.2(h)(4)(iii)(D)(I) for competency to render to USCIS an opinion on the educational equivalency of work experience.

Aside from the decisive fact that the evidence of record does not establish the aforementioned evaluator as competent under 8 C.F.R. § 214.2(h)(4)(iii)(D)(I) to evaluate the beneficiary's experience, the AAO finds that the content of the evaluation regarding the beneficiary's experience would merit no weight even if the evaluator was qualified under 8 C.F.R. § 214.2(h)(4)(iii)(D)(I). The evaluation is not supported by probative evidence to support the evaluator's claims regarding the beneficiary's professional experience.

The evaluator indicated that the beneficiary provided a copy of the diploma and the letter dated February 28, 2008 which was relied upon for evaluating his professional experience for the evaluations. Upon review of the letter, the AAO finds that it provides insufficient information regarding the beneficiary's work history and duties (i.e., complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties). Additionally, the letter does not indicate the number of hours worked and/or whether the beneficiary was employed on a full-time or part-time basis. The letter does not provide information regarding the requirements (if any) for the beneficiary's position.⁹

The letter provides a general description of the beneficiary's responsibilities from 2000 to 2008 and, thus, even if it had been relied upon by the evaluator, the letter does not present an adequate factual foundation for the evaluator's assertions and conclusions. The AAO finds the evaluation fails to establish that the beneficiary possesses the equivalent of a "bachelor's degree in management information systems" (as stated by the evaluator) based upon the information provided regarding his academic credentials and work-related duties and responsibilities. In light of the lack of a sufficient factual foundation discussed above, the evaluation is insufficient even if it had been rendered by an official qualified under 8 C.F.R. § 214.2(h)(4)(iii)(D)(I). Accordingly, the AAO accords no weight to the assessment of the beneficiary's work experience by the evaluator, and no weight to the ultimate conclusion of the evaluator that the beneficiary holds the equivalent of a U.S. bachelor's degree in management information systems.

⁹ Furthermore, for the purposes of a determination by USCIS, the AAO notes that the letter is devoid of information regarding the academic credentials of the beneficiary's peers, supervisors and/or subordinates. See 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

As previously discussed, USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

The petitioner has failed to satisfy any of the criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(D)(1)-(4), and the AAO will next perform an evaluation pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). It is always worth noting that, by its very terms, 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) is a matter strictly for USCIS application and determination, and that, also by the clear terms of the rule, experience will merit a positive determination only to the extent that the record of proceeding establishes all of the qualifying elements at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) – including, but not limited to, a type of professional recognition.

When USCIS determines an alien's qualifications pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation¹⁰;
- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

Upon review of the record, the petitioner has not provided corroborating evidence as outlined in 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). Thus, the AAO cannot conclude that the beneficiary's combination of education, training, and/or work experience included the theoretical and practical

¹⁰ *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. 8 C.F.R. § 214.2(h)(4)(ii).

application of a body of highly specialized knowledge in a field related to the proffered position or that the beneficiary has recognition of expertise in the industry. As such, since evidence was not presented that the beneficiary has at least a bachelor's degree in a specific specialty, or its equivalent, directly related to the duties and responsibilities of the proffered position, the petition could not be approved even if eligibility for the benefit sought had been otherwise established.

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 145 (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.¹¹ 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.

¹¹ As mentioned above, the AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d at 145. However, as the petition is denied for the reasons discussed above, the AAO need not nor will it address the additional issues and deficiencies that it observes in the record of proceeding.