



U.S. Citizenship
and Immigration
Services

(b)(6)

[REDACTED]

Date: **JUN 26 2013** Office: VERMONT SERVICE CENTER FILE: [REDACTED]

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

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

[REDACTED]

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.

On the Form I-129 visa petition, the petitioner describes itself as a business information technology consulting firm established in 1968. In order to employ the beneficiary in what it designates as a technical analyst position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner failed to establish that it met the requirements for a United States employer. On appeal, counsel for the petitioner contends that the director's finding was erroneous and submits a brief in support of this contention.

The record of proceeding before the AAO contains: (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 notice of decision; and (5) the Form I-290B and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

In a letter of support dated November 2, 2010, the petitioner stated that it is a "global information technology consulting, services and business process outsourcing firm that provides product development and consulting services in all aspects of systems and software engineering to companies throughout the world." It further claimed to have approximately 150 offices in 30 countries and nearly 142,000 employees, and further stated that it had more than 1,000 clients in over 50 countries.

Regarding the employment of the beneficiary, the petitioner stated that he would be employed as a technical analyst for its client, [REDACTED] and would work on the Credit Card Services Data Warehouse application development and maintenance project. In support of this contention, the petitioner submitted several documents, including "Addendum No. 1 to [REDACTED] executed on May 8, 2002, and copies of various task orders relating to this agreement from 2002 and 2003, and various amendments to the [REDACTED] dated January 1, 2007 and January 1, 2009.

The director found this initial evidence insufficient to establish that the petitioner would serve as the beneficiary's employer in that it would control the beneficiary's work, and issued an RFE on November 18, 2010. Specifically, the director noted that the contractual documentation submitted in support of the petition had expired, and the record did not include evidence of a current contractual agreement or work order demonstrating the need for the beneficiary's services by [REDACTED]. The director requested additional documentation demonstrating that an employer-employee relationship would exist between the petitioner and the beneficiary, as well as evidence demonstrating a current service agreement between the petitioner and [REDACTED], for whom the beneficiary will provide services.

In a response dated December 29, 2010, the petitioner addressed the director's queries. Specifically, the petitioner reiterated that it had an ongoing relationship with [REDACTED] and resubmitted the previously-submitted agreement with exhibits and amendments in support of this contention. The petitioner further stated that it was "confident that the Beneficiary's services will be needed through at least the end of the requested validity date of September 30, 2013, if not beyond." The petitioner further stated that the beneficiary's work would be supervised at the [REDACTED] location by the petitioner's onsite Engagement Manager [REDACTED], as set forth on an organizational chart simultaneously submitted in response to the RFE.

The petitioner also submitted a copy of an offer and terms of employment letter, as well as a promotion letter, addressed to the beneficiary, and resubmitted an overview of the petitioner's semi-annual performance review practices for its employees. The petitioner also submitted two new task orders in furtherance of its master service agreement with [REDACTED]

On January 14, 2011, the director denied the petition. Specifically, the director found that absent current agreements outlining the nature of the petitioner's relationship with [REDACTED] and the beneficiary's intended role under said agreement, it could not be determined that the petitioner would have a qualifying employer-employee relationship with the beneficiary. On appeal, counsel for the petitioner states that the director's denial was erroneous, and asserts that the director held the petitioner to a higher standard of proof and incorrectly denied the petition based on the absence of an updated task order. Counsel further asserts that, while the petitioner expects the beneficiary to be employed on the [REDACTED] project, it has "hundreds of other projects it can staff him on if the workflow decreases at [REDACTED]" Counsel concludes that the petitioner has established that it will maintain a qualifying employer-employee relationship with the beneficiary.

The primary issue before the AAO is whether the petitioner has established that it is a U.S. employer and will maintain a qualifying employer-employee relationship with the beneficiary throughout the requested validity period.

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 in the Code of Federal Regulations at 8 C.F.R. § 214.2(h)(4)(ii) as follows:

United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
- (3) Has an Internal Revenue Service Tax identification number.

Upon review, 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 a Labor Condition Application (LCA) with the Secretary of Labor pursuant to section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). The intending employer is described as offering full-time or part-time "employment" to the H-1B "employee." Subsections 212(n)(1)(A)(i) and 212(n)(2)(C)(vii) of the Act, 8 U.S.C. § 1182(n)(1)(A)(i), (2)(C)(vii). Further, the regulations indicate that "United States employers" must file a Petition for a Nonimmigrant Worker (Form I-129) in order to classify aliens as H-1B temporary "employees." 8 C.F.R. § 214.2(h)(1), (2)(i)(A). Finally, the definition of "United States employer" indicates in its second prong that the petitioner must have an "employer-employee relationship" with the "employees under this part," i.e., the H-1B beneficiary, and that this relationship be evidenced by the employer's ability to "hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer").

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

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

"In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the

work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party."

Darden, 503 U.S. at 323-324 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. at 751-752); see also *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 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.¹

¹ While the *Darden* court considered only the definition of "employee" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(6), and did not address the definition of "employer," courts have generally refused to extend the common law agency definition to ERISA's use of employer because "the definition of 'employer' in ERISA, unlike the definition of 'employee,' clearly indicates legislative intent to extend the definition beyond the traditional common law definition." See, e.g., *Bowers v. Andrew Weir Shipping, Ltd.*, 810 F. Supp. 522 (S.D.N.Y. 1992), *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

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 318-319.²

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).³

"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 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).

² To the extent the regulations are ambiguous with regard to the terms "employee" or "employer-employee relationship," the agency's interpretation of these terms should be found to be controlling unless "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359, 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))).

³ That said, there are instances in the Act where Congress may have intended a broader application of the term "employer" than what is encompassed in the conventional master-servant relationship. *See, e.g.*, section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F) (referring to "unaffiliated employers" supervising and controlling L-1B intracompany transferees having specialized knowledge); section 274A of the Act, 8 U.S.C. § 1324a (referring to the employment of unauthorized aliens).

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

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

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

preponderance of the evidence that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee."

Although the petitioner submitted a copy of an offer of employment letter, which outlined the terms of the beneficiary's employment and extended the offer of employment to the beneficiary, this document requests the beneficiary to complete and return "Annexure 3" to the petitioner, at which time a letter of appointment would be issued to the beneficiary confirming his employment. The record does not contain such documentation. While the record does contain a copy of a "promotion" letter written to the beneficiary, which indicates that the beneficiary has accepted the offer of employment and subsequently received a promotion, there is no document in the file which outlines the nature of the beneficiary's employment with the petitioner. There is no discussion of the exact assignment(s) or project(s) upon which the beneficiary will work, nor does the record contain any documentation naming the beneficiary as personnel assigned to a specific client project or worksite. In any event, the employment outlined is for work in India at an annual salary of "Rs. 4,53,535/- per annum" (approximately \$7,650 per year at current market rates) and, without more, does not appear relevant to an offer of employment with the company in the United States as outlined in the petition (for which the attested salary is \$65,400 per year).

Throughout the course of the petition, the petitioner repeatedly contends that it has submitted sufficient evidence to establish its ongoing relationship with [REDACTED]. The AAO disagrees. Although the petitioner submitted documentary evidence suggesting a relationship between the petitioner and [REDACTED] the documentation submitted is insufficient to establish eligibility in this matter. Specifically, the record contains numerous task orders and addendums to a master service provider agreement allegedly executed on May 8, 2002, but the record does not contain the original master service provider agreement upon which all of these documents are based. Moreover, none of the addenda or task orders are current, and most appear to either have expired, will expire during the requested validity period, or specify no extension of the terms of the order.

In the RFE dated November 18, 2010, the director noted these deficiencies and provided the petitioner an opportunity to supplement the record with current task orders, agreements, or contracts outlining the nature, location, term, and duration of the beneficiary's assignment(s) during the requested validity period. Although the petitioner submitted some additional task orders not previously included in the record, these documents do not pertain to the beneficiary or the requested validity period and are therefore irrelevant to the eligibility determination to be made in this matter.

The petitioner failed to provide the requested contractual documentation showing the petitioner's current relationship with [REDACTED] and the beneficiary's intended role therein. Nor was any corroborating evidence provided indicating who will direct the beneficiary's work and who will report to and be controlled by the beneficiary in the proffered position, as requested. While the petitioner did submit a self-serving organizational chart identifying [REDACTED] as the "Engagement Manager" who would oversee the beneficiary's work, there is no documentation, such as contracts, work orders, tasks orders, or other employment agreements that demonstrate that such a relationship actually exists or would exist.

The regulations indicate that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary in the adjudication of the petition. See 8 C.F.R. §§ 103.2(b)(8); 214.2(h)(9)(i). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. § 103.2(b)(1), (8), and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The petitioner claims that the beneficiary will work on the Credit Card Services Data Warehouse application development project for [REDACTED]. However, the record contains no documentation showing that an agreement between [REDACTED] and the petitioner for such a project exists. As stated above, the record is first devoid of a master service agreement. Although various addenda and task orders executed pursuant to a May 8, 2002 agreement are submitted, the original master service agreement upon which these documents are based has not been submitted. Moreover, even if such a document had been submitted into the record, the evidence before the AAO still lacks a current contractual agreement between the petitioner and [REDACTED] which outlines the nature of the alleged Credit Card Services Data Warehouse application development project, and the beneficiary's intended role therein. Simply claiming that expired and outdated task orders submitted in furtherance of a master agreement that has not been produced is sufficient to establish that a valid offer of employment exists for the beneficiary in this matter will not suffice.

The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). If a required document does not exist or cannot be obtained, the petitioner must demonstrate this and submit secondary evidence pertinent to the facts at issue. *Id.* Where a record does not exist, the petitioner must submit an original written statement from the relevant authority establishing this as fact. The statement must indicate the reason the record does not exist and indicate whether similar records for the time and place are available. 8 C.F.R. § 103.2(b)(2)(ii).

In this matter, the petitioner fails to supplement the record with any documentation that would substitute for actual contractual agreements identifying the beneficiary as personnel assigned to a project with [REDACTED] pursuant to an agreement between the parties. 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)). Moreover, on appeal, counsel provides no new or additional documentation and again states that the documentation previously submitted, which the director found insufficient, establishes eligibility in this matter. 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).

The record is devoid of any document establishing that the petitioner has a current, valid contractual relationship with [REDACTED] or that the beneficiary will work on a project for [REDACTED] while under the control of the petitioner for the entire requested validity period. Moreover, it is noted that counsel acknowledges on appeal that, even if the stated employment with [REDACTED] decreases, the petitioner has

"hundreds" of other potential clients and assignments upon which it can employ the beneficiary, thus maintaining its employer-employee relationship with the beneficiary for the requested validity period. This claim is misplaced. The petitioner must establish eligibility at the time of filing the 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).

Absent documentation specifically outlining the nature of the petitioner's relationship with the beneficiary for the requested validity period, it cannot be found that the petitioner qualifies as a United States employer, as defined by 8 C.F.R. § 214.2(h)(4)(ii). The petitioner admits that the beneficiary will be employed off-site, whether with [REDACTED] or another client, but it fails to provide sufficient evidence of what the specifics of that contractual assignment would entail. Accordingly, there is simply insufficient evidence in the record of proceeding as currently constituted to properly assess and weigh the common-law factors outlined above to determine whether the petitioner would have and maintain throughout the requested employment period the requisite employer-employee relationship between itself and the beneficiary.⁴

Merely claiming that the petitioner exercises complete control over the beneficiary, without sufficient, corroborating evidence to support the claim, does not establish eligibility in this matter under the preponderance of the evidence standard. Again, 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. at 165. The evidence of record prior to adjudication did

⁴ 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 (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).

not establish that the petitioner would act as the beneficiary's employer in that it will hire, pay, fire, or otherwise control the work of the beneficiary. Despite the director's specific request for evidence such as current contracts or task orders from [REDACTED] the petitioner failed to submit such evidence. Once again, failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

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 petitioner has also failed to establish that the proffered position qualifies as a specialty occupation.

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 at 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.

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

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. The court held that the former INS 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 387-388. 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 addressing whether the proffered position is a specialty occupation, the record is devoid of sufficient documentary evidence as to where and for whom the beneficiary would be performing his services during the requested employment period and whether his services would in fact be that of a technical analyst.

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." Moreover, the regulation at 8 C.F.R. § 214.2(h)(4)(iv)(A)(I) indicates that contracts are one of the types of evidence that may be required to establish that the services to be performed by the beneficiary will be in a specialty occupation.

In its November 2, 2010 letter of support the petitioner stated that as a technical analyst, the beneficiary will:

[D]iscuss new business requirements with client users; coordinate project work with the offshore [petitioner] team; plan and monitor module activities; analyze system requirements to identify the scope of testing for the Card Data Warehouse applications; design test cases and prepare test plan documents; conduct peer reviews and walkthroughs of prepared documents; develop test scripts and execute test cases; design extract, transform and load scripts to validate the data against different sources; resolve testing and project-related issues; [prepare] stored procedures and shell scripts for automating data validation, extraction, transformation and loading procedures; set up the test environment for system and performance testing; train other project members; respond to application-related technical queries; ensure adherence to [petitioner's] quality policies and standards; participate in project status meetings; and provide technical support to the offshore team members in implementing tasks and resolving problems.

Regarding the proffered position, the petitioner repeatedly contended that it was "confident" that there would be sufficient work to employ the beneficiary on the [redacted] project through the duration of the requested validity period. However, the petitioner also stated that should the work with [redacted] decrease, it had "hundreds" of other projects with clients upon which it could employ the beneficiary.

Upon review, the petitioner has failed to establish that the proffered position is a specialty occupation. The petitioner and counsel assert that the beneficiary will be working onsite for [REDACTED] on a Credit Card Services Data Warehouse application development and maintenance project. However, the nature of the petitioner's business, combined with the absence of documentation establishing the existence of this project and coupled with the petitioner's acknowledgement that it had "hundreds" of other clients and projects upon which to employ the beneficiary should this particular project not succeed, indicate that it is engaged in the outsourcing of personnel to client sites as needed. The exact nature of the beneficiary's assignments throughout the validity period, therefore, have not been established, and will vary based on client needs during the duration of the petition. The uncertainty surrounding current and future projects and the absence of documentary evidence demonstrating the existence of a non-speculative project and current agreement with [REDACTED] for the beneficiary's services for the entire duration of the requested validity period renders it impossible to find that the proffered position is a specialty occupation, since no specific and corroborated description of the duties the beneficiary will perform from the actual end-user is included in the record.

The brief description of duties in the petitioner's support letter is generic and fails to specifically describe the nature of the services required by the beneficiary on the project in question. Moreover, the fact that the petitioner acknowledges that it has extensive numbers of projects available for the beneficiary suggests that the beneficiary's assignments will fluctuate throughout the validity period. Despite the claims of the petitioner and counsel on appeal that he will work solely on the [REDACTED] project, the very nature of the petitioner's business, as evidenced by the statements of the petitioner, confirms that the beneficiary's duties and responsibilities are subject to change in accordance with client requirements.

It therefore appears that the work of the beneficiary, and the work of the petitioner is general, is dependent on consulting agreements or contracts with clients who request specific services from the petitioner. Therefore, absent evidence of contracts or statements of work describing the duties the beneficiary would perform and for whom throughout the entire validity period, the petitioner fails to establish that the duties that the beneficiary would perform are those of a specialty occupation. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

USCIS routinely looks to *Defensor v. Meissner*, 201 F.3d 384, which requires an examination of the ultimate employment of the beneficiary to determine whether the position constitutes a specialty occupation. The petitioner in *Defensor*, Vintage Health Resources (Vintage) is a medical contract service agency that brought foreign nurses into the United States and located jobs for them at hospitals as registered nurses. The court in *Defensor* found that Vintage had "token degree requirements," to "mask the fact that nursing in general is not a specialty occupation." *Id.* at 387.

The court in *Defensor* held that for the purpose of determining whether a proffered position is a specialty occupation, the petitioner acting as an employment contractor is merely a "token

employer," while the entity for which the services are to be performed is the "more relevant employer." *Id.* at 388. The *Defensor* court recognized that evidence of the client companies' job requirements is critical where the work is to be performed for entities other than the petitioner. *Id.* Again, the *Defensor* court held that the former INS 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 387-388. In *Defensor*, the court found that evidence of the client companies' job requirements is critical if the work is to be performed for entities other than the petitioner. *Id.*

In this matter, it is unclear whether the petitioner will be an employer or will act as an employment contractor. The job description provided by the petitioner, as well as various statements from the petitioner and counsel both prior to adjudication and on appeal, indicates an uncertainty regarding the nature of the beneficiary's employment through the end of the validity period, and thus suggests that he will most likely be working on different projects throughout the duration of the petition. With regard to the specialty occupation determination, whether the beneficiary works in-house or at a client site is irrelevant, since it is apparent that the duties of the beneficiary will be dictated by the specific needs of a client on a given project. Therefore, absent sufficient evidence of the beneficiary's particular duties on a particular project for the entire requested validity period, the AAO cannot analyze whether his duties would require at least a baccalaureate degree in a specific specialty, or its equivalent, as required for classification as a specialty occupation.

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under 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. For this reason, the petition must be denied.⁵

⁵ It is noted that, even if the proffered position were established as being that of a software quality assurance engineer and tester (the occupational classification certified on the submitted LCA), a review of the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook* (the *Handbook*) does not indicate that, simply by virtue of its occupational classification, such a position qualifies as a specialty occupation. More specifically, the information on the educational requirements in the "Computer Systems Analysts" chapter of the 2012-2013 edition of the *Handbook* indicates at most that a bachelor's or higher degree in computer science, information systems, or management information systems may be a common preference, but not a standard occupational, entry requirement. 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-4> (last visited June 21, 2013). In fact, this chapter indicates that many systems analysts, including software quality assurance analysts, may only have liberal arts degrees and programming experience, while some only possess associate's degrees and experience.

An additional issue not raised by the director is whether the petitioner submitted an LCA that corresponds with the petition, and thus established filing eligibility at the time the Form I-129 was received by U.S. Citizenship and Immigration Services (USCIS).

General requirements for filing immigration applications and petitions are set forth at 8 C.F.R. §103.2(a)(1) in pertinent part 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 obtain a certified LCA from 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 petitioner claimed that it has more than 1,000 client companies in more than 50 countries. The petitioner also provided a general overview of the duties of the proffered position and an LCA certified for a software quality assurance engineer and tester position for the work location of

See id. As such, absent evidence that the position would be a software quality assurance engineer and tester and that it would satisfy 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.

Generally, 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(s) of the proffered 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. As noted above, 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 petition in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E). See 63 Fed. Reg. 30419, 30419 - 30420.

In the instant case, the petitioner filed the Form I-129 with USCIS on September 13, 2010. On the Form I-129, the petitioner indicated that the beneficiary would work in [REDACTED] and submitted a certified LCA for this location. It is noted that the LCA was certified for the period from October 1, 2010 through September 30, 2013 for a software quality assurance engineer. In response to the RFE, the petitioner stated that it was "confident" that there would be sufficient work to employ the beneficiary in this location until the end of the validity period. Through counsel on appeal, however, it also asserted that it had "hundreds" of other projects available should this not be the case.

A petitioner must establish eligibility at the time of filing the 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). In this matter, the petitioner indicates that it will assign the beneficiary to any number of new projects should the claimed project for which the beneficiary's services were sought at the time of filing terminate prematurely. This statement, when reviewed along with the absence of documentary evidence establishing that the claimed employment at a client site in [REDACTED] actually exists, indicates that the beneficiary's services will likely be provided at some point to third-party clients which have not yet been identified. Therefore, based on the absence of persuasive documentary evidence to the contrary, it is presumed that the physical location, salary, and duties of the beneficiary will ultimately fluctuate and change based on the petitioner's solicitation of new contracts and work orders on the beneficiary's behalf in the future and that the submitted LCA does not correspond to the petition in that it has not been certified for all of the beneficiary's employment locations. Accordingly, the petition must be denied for this additional reason.

Finally, the petition must also be denied due to the petitioner's failure to comply with the itinerary requirement at 8 C.F.R. § 214.2(h)(2)(i)(B). 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. Here, given the indications in the record that the beneficiary would likely work at multiple locations at some point during the requested period of employment and as the petitioner failed to provide this initial required evidence when it filed the Form I-129 in this matter, the petition must also be denied on this additional basis.

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 appeal will be dismissed and the petition denied 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.