U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: JUN 2 8 2013 OFFICE: CALIFORNIA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. 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 and supporting documents, the petitioner described itself as a business engaged in software development and consulting with over 1500 employees and a gross annual income of $293 million. In order to employ the beneficiary in what it designates as a computer programmer position, the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on the basis of her determination that the petitioner had failed to demonstrate the existence of an employer-employee relationship between the petitioner and the beneficiary.

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

Upon review of the entire record of proceeding, the AAO finds that the petitioner has failed to overcome the director's ground for denying this petition. The petitioner has not established that it will have "an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the AAO will not disturb the director's decision.

The evidence of record does not establish the petitioner as being in a United States employer status relative to the beneficiary with regard to the particular position for which the petition is filed (namely, that of a computer programmer assigned to, and to perform work as contractually specified by, a client at that client's location in California). Based upon its review of the entire record of proceeding as presently constituted, the AAO finds that the petitioner has failed to establish that it actually had secured the requested the position for the beneficiary. Consequently, as the evidence of record does not establish that the position with reference to which the petitioner's status with regard to the beneficiary must be established would exist, the petition fails to establish 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," as required to establish U.S Employer status in accordance with the definition at 8 C.F.R. § 214.2(h)(4)(ii) and the related common-law standard for establishing an underlying employer-employee relationship. Thus, the appeal will be dismissed, and the petition will be denied.

Beyond the decision of the director, the AAO finds an additional aspect which, although not addressed in the director's decision, nevertheless also preclude approval of the petition, namely, the petitioner's failure to establish that the proffered position qualifies for classification as a specialty occupation..[1] For these additional two reasons, the petition must also be denied. (This issue will be directly addressed towards the end of this decision.)

As a preliminary matter, the AAO concurs with counsel's assertion that the "preponderance of the evidence" standard must be applied.

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.
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> * * *
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> 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.
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> * * *
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> 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.
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> 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.

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

In its consideration of this appeal, the AAO has applied the preponderance of the evidence standard as described above, having examined each piece of evidence in this record of proceeding for relevance, probative value, and credibility, both individually and also within the context of the totality of the evidence. However, as will be evident in the remainder of this decision, the AAO's application of this standard to the evidence in this record of proceeding leads the AAO to conclude that the petitioner has not submitted relevant, probative, and credible evidence sufficient for the AAO to find that the petitioner's claim is "more likely than not" or "probably" true.

At the outset, the AAO will address salient documentary evidence upon which the petitioner relies to establish an employer-employee relationship with the beneficiary.[2]

The AAO will first note that the offer-of-employment letter dated June 29, 2010 offered the beneficiary employment as a software engineer trainee, and outlined the term of employment for a period of one year: it does not relate to the employment that the petitioner claims it is offering in the petition – that is, employment as a computer programmer.

The AAO likewise accords very little weight to the performance review sheet submitted into the record, for it does not contain any supplementary documentation that indicates that it reflects or is a product of any significant degree of day-to-day substantive control over the beneficiary and what he would specifically do and how he would do it, or that any such control would extend over the beneficiary for any work on assignment to [redacted] if and when that should happen. While counsel for the petitioner alleges in the RFE response letter that this document establishes the petitioner's supervisory aspect of the relationship, and seems to indicate that by extension, it indicates the employer-employee relationship, the AAO finds that reliance on this document is misplaced.[3]

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[2] It should be noted that this same documentary evidence is material to the petitioner's claim that the position for which the petition was filed qualifies as a specialty occupation.

[3] Also, the performance review appears to be for a project with a stated duration beginning on September 29, 2009 and concluding on October 26, 2012; it shows that the performance review was signed on April 5, 2012 by the beneficiary, and by the petitioner's project manager. Notably, performance review occurred 24 months after the offer of employment. As such, this performance review evidences one single instance of supervisory control over the beneficiary's work performed in India, but it does not establish an ongoing exercise of control over the beneficiary. Without additional performance review documentation, there is not sufficient evidence within this record to show an ongoing supervisory relationship with the beneficiary. Moreover, there is no other evidence within the record that points to the petitioner's intention of conducting ongoing performance reviews of the beneficiary's work product, such as a statement that would indicate regularly scheduled oversight of the beneficiary while placed at a client location. In any event, by its own terms, the document is not relevant to the claimed employment that is the subject of this 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. 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 LCA and the Form I-129 and its allied papers indicate that the petitioner is located in Edison, New Jersey. Those documents also assert that, for the period of intended employment specified in the Form I-129, the beneficiary will be assigned to work for a particular, separate business entity, namely (hereinafter referred to as at an address in Santa Ana, California.

In the November 11, 2011 letter in support of the petition, the petitioner's Human Resources Manager (HR Manager) stated that the petitioner will be assigned as a computer programmer to a "project at ' in Santa Ana, California. The "Job Duties" section includes the following section with dovetails with the client, work location, and type of work to which the petitioner attested as the basis of the petition, through the Form I-129 itself, the petitioner's "Itinerary" document, the LCA, and the MSA which the petitioner presented as the cornerstone of the work that the beneficiary would perform:

> [The beneficiary] will work for [the petitioner] as a Computer Programmer, and will be involved in the writing, testing, and development of computer programs for software and systems modification for clients of [the petitioner]. In this particular instance, [the beneficiary] will be assigned by the petitioner to a project at . . . which is one of our customers. . . .

As fundamentally decisive to the outcome of this appeal, the AAO finds that the record of proceeding contains no documentary evidence from – the client and asserted location of the beneficiary's work – that adopts or endorses any of the petitioner's statements to the effect that it had secured actual work for the petitioner, as a computer programmer, at The AAO also finds that, as will be evident in its discussion of the extent of the contractual documentation in the record, there are no contractual documents signed by the petitioner and by that specify any of the above duties as work to be performed for by the beneficiary, for any period of time.

Next, the AAO notes that the single-page "Itinerary" document restates the petitioner's basic claims that it would be the beneficiary's employer, that the beneficiary would be assigned to work at that her job designation would be "Computer Programmer," and that she would work at for the period "11/11/2011 to 11/10/2014." The AAO finds that this document has no evidentiary significance other than as a reaffirmation by the petitioner of its claims. As will also be evident in this decision's discussion of the contractual documentation submitted into the record of proceeding, the petitioner has not submitted any documentation from that confirms the accuracy of the assertions in this "Itinerary" document, either with regard to the nature of any work that the beneficiary would perform for or with regard to the duration of any such work. [4]

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[4] Thus, the record of proceeding does not establish the existence of the claimed work assignment that is the very foundation of the petition's specialty-occupation claim and the existence of any work-context relationship springing from that assignment. Thus also the evidence of record negates the petitioner's claim

Significantly, both the Form I-129 and the LCA attest that the petitioner's address is in Edison New Jersey, which the AAO notes is thousands of miles from the work place claimed by the petitioner.

There is, however, no evidence in the record of proceeding that the petitioner has assigned any of its staff to perform day-to-day management and supervision over the particular work assignments that the beneficiary would have to perform in order to perform whatever onsite services for which may contract with the petitioner.

The AAO notes that the author of the single letter submitted into the record states that workers assigned to by the petitioner "shall at all times be directly managed and supervised by [the petitioner's] Account Managers"; but the AAO finds that there is no evidence anywhere in the record indicating ongoing day-to-day contact, supervision, and management by the petitioner over the workers it has assigned to – a location thousands of miles away from the petitioner. Further, and most decisively, whatever supervisory and control aspects may have in the past or may in the future pertain to workers assigned by the petitioner to has no bearing on the matter before as, as the evidence of record does not establish that the beneficiary is among those workers.

The AAO finds that neither the copies of the /petitioner Master Services Agreement (to be discussed later in this decision) nor any other documentation establishes that the petitioner, rather than would specify, direct, manage, and supervise the beneficiary and the specific work that he would perform on a day-to-day basis, if, in fact he were ever actually assigned to The AAO specifically finds that the quarterly-performance-review submitted into the record is not indicative of any such day-to-day control over the beneficiary or any work that he would perform. In this regard the AAO notes, for instance, that the signing supervisor signs-off as his location being Chennai-India. Furthermore – and further undermining the credibility of this petition – the document identifies the beneficiary as a software engineer – not a computer programmer as stated in the petition.

Next, the AAO notes that the June 29, 2010 Offer of Employment letter from the petitioner to the beneficiary references work not related to the proffered position, as it states that is being offered work as a "Software Engineer Trainee" and apparently in India. Also, the Confirmation of Employment letter references the position as Software Engineer – not computer programmer – and not for

The AAO will now expand its focus upon the Master Services Agreement between and the petitioner (to which we will hereafter refer as the MSA). The discussion will focus on the particular aspects of this document that render it of no probative value towards establishing an employer-employee relationship between the petitioner and the beneficiary.

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to an employer-employee relationship, as the work based upon which it is said to exist has not itself been shown to exist.

The AAO finds that the record of proceeding contains no documentary evidence from – the client and asserted location of the beneficiary's work – that adopts or endorses any of the petitioner's duty descriptions as accurate depictions of any work that the beneficiary would perform for it. The AAO also finds that, as will be evident in its discussion of the extent of the contractual documentation in the record, there are no contractual documents signed by the petitioner and by that specify any of the above duties as work to be performed for by the beneficiary, for any period of time.

The petitioner relies heavily upon that "Master Service Agreement" produced by (and hereafter referred to as the MSA).

The cardinal aspect of the MSA is that its terms do not bind either party to any particular contractual obligation, other than to accept the terms specified in the MSA as automatically incorporated into any contract for services that the petitioner may enter into with during the pendency of the MSA. In this regard, the AAO notes that section 2 (SERVICES AND DELIVERABLES) specifically states that any services that the petitioner would agree to provide would be specified in a related "properly executed Statement of Work ("SOW") that references the MSA, that any such SOW would be attached to the MSA "upon the written agreement of the parties," and that the SOW would in the form attached to the MSA as schedule 1 (Form of Statement of Work).

The AAO observes that there is no such SOW is attached to the MSA. The AAO further observes that a copy of a standard Form of Statement of Work is not even attached. Rather, at the place in the MSA for Schedule 1 appears a Windows document symbol bearing below it the label "SOW template" – but no template. The AAO further finds that nowhere in this record of proceeding is there any copy of any MSA that includes an SOW that has been executed by the petitioner and by

The AAO also notes that, per subsection 3.3 ("Service Employees") of the MSA, whenever the and the petitioner would, by the appropriate contractual formalities, commit themselves to an SOW, would have the authority to request the removal of anyone assigned by the petitioner, and the petitioner must immediately remove such person upon receipt of a written request from that specifies any reasonable grounds for the request. This is noted as an indication of control by Ingram Micro over workers assigned to it in accordance with the MSA. (The AAO hastens to note that the evidence of record fails to place the beneficiary in that group; however, if the MSA had been proven to be operative with regard to the beneficiary in the context of this petition, it would contain this evidence of control by the over the beneficiary and his very ability to work at)

The AAO observes that, if the MSA were to become operative by virtue of an effectively executed, attached, and included SOW, the petitioner would be responsible for the worker's compensation, liability, and other insurance coverage that might be required; however, it is also noted that, significantly, subsection 13.3 (Ownership) of the MSA recognizes that performance of work by the petitioner for pursuant to an SOW may involve "data, equipment, and/or materials"

provided by , there is no mention of the petitioner providing any such items. Further, there is no credible indication anywhere in the MSA or anywhere else in the record of proceeding that the petitioner would provide any proprietary materials if there ever were a contractual commitment to perform specific work pursuant to a properly executed SOW. (These are additional indicia of control that would exercise over the means of the beneficiary's work – if, as is not the case here – the petitioner had proven that the MSA was actually operational in the work context claimed in the petition).

Next, the AAO is negatively impressed by the fact that Attachment 2-1 (Change Order Form) to the MSA has been signed by representatives of the petitioner and By its very terms, the change order applies to an SOW – but none is identified or attached anywhere to the MSA. Further, the AAO notes that the Table which is to identify the modifications is blank. The fact that the petitioner would sign such an empty and apparently useless form as if to render it effective, weighs against the credibility of the petition.

Additionally, the AAO finds the terms at Schedule 3 (Acceptance Procedures) as further evidence of the centrality of a duly executed SOW to the effectiveness and enforceability of the MSA; and the AAO repeats its finding that there is none in this record of proceeding.

Also bearing negatively against the credibility of this petition is the untitled chart that appears to assign pricing or charge rates to the types of positions that appear in the first column, by locations in the other columns. Notably, the petitioner has here submitted a chart that contains no mention of any level of Computer Programmer – yet, the petitioner claims that the beneficiary would be assigned to work in that capacity for This discrepancy is another factor weighing against the credibility of the petition.

Additionally, as reflected in the above review of documentary evidence, while claiming that the beneficiary would be assigned to Network and Computer Systems Administrator work for the record of proceeding lacks persuasive evidence of any contractual commitment by to hire this particular beneficiary for any specific work or for any particular period of time. Further, while the record indicates that, if the MSA were to become operational - necessarily pursuant to a mutually executed and mutually binding SOW signed by the petitioner and by (and none appear in this record) – the petitioner would be responsible for the worker's compensation, liability, and other insurance coverage that might be required, the MSA also indicates that would have the right to immediate removal of any petitioner-assigned worker upon a written request that specifies any reasonable grounds for removal. Hence, if ever were to accept assignment of the beneficiary, it would retain removal-authority control over the beneficiary. Further, documentary evidence does not indicate that, if assigned pursuant to the MSA and an executed SOW, the beneficiary would be employing proprietary information or applications of the petitioner or would be using the petitioner's equipment or instrumentalities. Further, there is no evidence in the record that the petitioner would substantially supervise or control the substantive work, specific tasks, performance requirements, or work-quality evaluations during the course of the beneficiary's day-to-day job activities. These aspects of the documentary record also weigh against the petitioner's claim of an employer-employee relationship.

Now, the AAO notes that there record of proceeding does contain a single letter from the to which the AAO accords no probative weight, for the reasons now to be discussed. (The AAO will quote the entire body of that letter, as it is the only statement in the record from anyone at about its dealings with the petitioner.)

The AAO finds the following aspects of the letter particularly significant – and heavily damaging to the petitioner's claims: (1) the letter does not state or confirm that Ingram Micro has issued under the MSA any SOW or work order for the beneficiary for any position; and (2) the letter does not reference any specific project for which has issued SOWs identifiable with the beneficiary and for performance of any work by him. As Senior Manager, Governance, wrote as follows, on March 21 2012 and "RE" the petitioner:

> We write this letter to confirm that our company has an ongoing service agreement dated August 5, 2010 [(apparently the MSA)] with [the petitioner] in which the [petitioner] provides services in connection with various computer systems and software projects. The agreed projects require both offshore and onsite software and system design, development, customization, testing, and integration.
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> Our complex projects require the individuals to have the minimum of a Bachelor's degree or its equivalent in the relevant technologies and domains and we understand that this is also an industry standard.
>
> Accordingly, [the petitioner] will be required to assign qualified and skilled employees to work location(s) across the United States, including Santa Ana and Buffalo, for durations up to 36 months. However[,] the length of the project is frequently reviewed and may be extended subject to final delivery of the project.
>
> The employees assigned by [the petitioner] shall at all times be directly managed and supervised by [the petitioner's] Account Managers. We confirm that we have no unilateral right to relocate the individuals to another location or project. [The petitioner] retains the sole and exclusive right to control their employment and the manner and means for accomplishing the services to be performed.
>
> We would like to confirm that [the petitioner's] assigned to our project will not be given access to technology/technical date [sic] identified under the US Export Administration Regulation (EAR) and/or the International Traffic in Arms Regulations (ITAR)[.]
>
> We understand and confirm that this letter is merely an expression of our intent to negotiate a further extension of our Agreement on mutually acceptable terms and is not [a] legally binding document.

Further, the AAO is not impressed by the author's statement that the petitioner's Account Managers would exercise some control over persons assigned by and receiving pay through the petitioner. Such would be expected. However, the AAO accords little weight to this person's pronouncements as evidence of whatever relative degrees of control and supervision would be exercised by the petitioner and by in a specific situation which has not been shown to exist – namely, the beneficiary's actually working for at its location in California, and performing the work which the petitioned claimed that he would there perform. Further, the value of the letter is further devalued because the record does not establish what knowledge of, and authority to speak for, contracting practices this author possesses.

Additionally, the AAO finds that the author's statements about the petitioner exclusively controlling the manner and means by which assigned persons would accomplish their work are not only incorrect, but directly and materially conflicts with MSA paragraph 3.1. That paragraph clearly and explicitly subordinates and subjects the petitioner's control to desires: that paragraph explicitly states that the exercise of any such control by the petitioner is "subject to the satisfaction of to the quality, effectiveness, and timeliness of the required Services[,] and provided that all services are performed in a professional workmanlike manner, consistent with industry standards, as well as to the requirements set forth hereinafter in this agreement."

Consequent to the above findings about the content of the letter, and particularly as the letter, one, does not establish the author's standing to speak knowledgeably on the areas about which he writes, and, two, proves to be a materially incorrect statement about exercise of control, the AAO accords absolutely no weight to it for any purpose.

Given the evidentiary record discussed above, application of the requisite common-law standards to this record of proceeding also indicates that the petitioner has not established the requisite employer-employee relationship, as will be seen below.

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:
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> (1) Engages a person to work within the United States;

(2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and

(3) Has an Internal Revenue Service Tax identification number.

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

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

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

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

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

> extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party."

Darden, 503 U.S. at 323-324 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. at 751-752); *see also Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. at 440 (hereinafter "*Clackamas*"). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).

In this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. *See generally* 136 Cong. Rec. S17106 (daily ed. Oct. 26, 1990); 136 Cong. Rec. H12358 (daily ed. Oct. 27, 1990). On the contrary, in the context of the H-1B visa classification, the regulations define the term "United States employer" to be even more restrictive than the common law agency definition.[5]

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[5] While the *Darden* court considered only the definition of "employee" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(6), and did not address the definition of "employer," courts have generally refused to extend the common law agency definition to ERISA's use of employer because "the definition of 'employer' in ERISA, unlike the definition of 'employee,' clearly indicates legislative intent to extend the definition beyond the traditional common law definition." *See, e.g., Bowers v. Andrew Weir Shipping, Ltd.*, 810 F. Supp. 522 (S.D.N.Y. 1992), *aff'd*, 27 F.3d 800 (2nd Cir.), *cert. denied*, 513 U.S. 1000 (1994).

However, in this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. Instead, in the context of the H-1B visa classification, the term "United States employer" was defined in the regulations to be even more restrictive than the common law agency definition. A federal agency's interpretation of a statute whose administration is entrusted to it is to be accepted unless Congress has spoken directly on the issue. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-845 (1984).

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

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.[6]

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).[7]

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)).

"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).

[6] 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)).

[7] 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."

As reflected in the above review of documentary evidence, while the petitioner claims that the beneficiary would be assigned to Computer Programmer work for the the record of proceeding lacks persuasive evidence of any contractual commitment by to hire this particular beneficiary for any specific work or for any particular period of time. Further, while the record indicates that, if the MSA were to become operational - necessarily pursuant to a mutually executed and mutually binding SOW signed by the petitioner and by (and none appear in this record) – the petitioner would be responsible for the worker's compensation, liability,

and other insurance coverage that might be required, the MSA also indicates that would would have the right to immediate removal of any petitioner-assigned worker upon a written request that specifies any reasonable grounds for removal. Hence, if ever were to accept assignment of the beneficiary, it would retain removal-authority control over the beneficiary. Further, documentary evidence does not indicate that, if assigned pursuant to the MSA and an executed SOW, the beneficiary would be employing proprietary information or applications of the petitioner or would be using the petitioner's equipment or instrumentalities. Further, there is no evidence in the record that the petitioner would substantially supervise or control the substantive work, specific tasks, performance requirements, or work-quality evaluations of the beneficiary's day-to-day job activities, but there is the aforementioned critical provision at paragraph 3.1 of the MSA that clearly indicates that would retain primary and independent control, independent from and superior to the petitioner, exercisable at its own discretion, over the means and manner by which people assigned to it by the petitioner would perform their work.

Thus – and here the AAO incorporates by reference all of its prior analyses of the documentary evidence, in and lacking in, the record – the AAO finds that the petitioner fails to establish the necessary common-law indicia of control over the beneficiary and his work because the evidence of record does not establish that any such work actually had been secured for the beneficiary over which the petitioner, or could exercise any degree of control.

Further, the AAO finds that the MSA provisions related to control over workers under its purview weigh in favor of primary and decisive control residing with the - not with the petitioner. Therefore, if, which is not the case, the petitioner had established that the MSA was operative in setting the terms and conditions of work actually performed under the petition, the MSA would work as evidence against the petitioner's claim to an employer-employee relationship.

While salary, 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 AAO is unable to find that the requisite employer-employee relationship will exist between the petitioner and the beneficiary.

The evidence described above, therefore, is insufficient to establish that the petitioner qualifies as a United States employer, as defined by 8 C.F.R. § 214.2(h)(4)(ii). Merely claiming that there would be a work relationship in which the petitioner exercises complete control over the beneficiary, without evidence supporting the claim, does not establish eligibility in this matter. 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.

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). Accordingly, the appeal will be dismissed, and the petition will be denied for this reason.

As noted early in this decision, there is this aspect of the petition which also precludes its approval: the evidence of record fails to establish the proffered position as a specialty occupation.

As reflected in the preceding discussions regarding the absence of evidence establishing that there in fact exists any contractual commitment by for accepting the beneficiary to work for it at all, let alone in the capacity claimed by the petitioner. Thus, the petition must also be denied for the petitioner's failure to establish that it was filed for a specialty occupation position. The petitioner's failure to establish the substantive nature of definite work to be performed by the beneficiary 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 such work that would determine (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. Accordingly, the petition will be denied on this basis also.

Also, 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. As evidence of record does not establish definite, non-speculative work for the beneficiary, the petition must be denied for this reason also.

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

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

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

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