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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



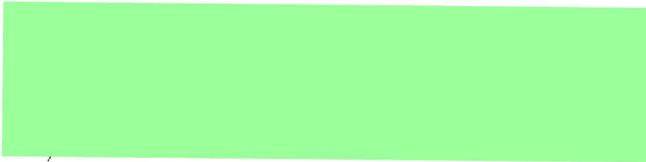
Date: **JUN 28 2013** Office: VERMONT SERVICE CENTER

IN RE: Petitioner:  
Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

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

The Form I-129 visa petition states that the petitioner is a Software Development & Consultancy firm. To employ the beneficiary in what it designates as a Project Manager position, the petitioner endeavors 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 has standing to file the instant visa petition as the beneficiary's prospective United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii). The director also found that the petitioner had not demonstrated that it has work at which it could employ the beneficiary throughout the period of requested employment.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) Form I-290B and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

As a preliminary matter, and in light of counsel's references to the requirement that the AAO apply the "preponderance of the evidence" standard, the AAO affirms that, in the exercise of its appellate review in this matter, as in all matters that come within its purview, the AAO follows the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010). In pertinent part, that decision states the following:

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

\* \* \*

The "preponderance of the evidence" of "truth" is made based on the factual circumstances of each individual case.

\* \* \*

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

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

*Id.*

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In doing so, the AAO applies the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon its review of the present matter pursuant to that standard, however, the AAO finds that the evidence in the record of proceeding does not support counsel’s contentions that the evidence of record requires that the petition at issue be approved. Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, the AAO finds that the director’s determination that the petitioner did not establish the proffered position as a specialty occupation was correct. Upon its review of the entire record of proceeding, and with close attention and due regard to all of the evidence, separately and in the aggregate, submitted in support of this petition, the AAO finds that the petitioner has not established that its claim of a specialty occupation position is “more likely than not” or “probably” true. As the evidentiary analysis of this decision will reflect, the petitioner has not submitted relevant, probative, and credible evidence that leads the AAO to believe that the petitioner’s claim is “more likely than not” or “probably” true.

The AAO will now address whether the petitioner has established that it meets the regulatory definition of an intending United States employer within the meaning of section 101(a)(15)(H)(i)(b) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). Specifically, the AAO must determine whether the petitioner has established that it will have “an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee.” 8 C.F.R. § 214.2(h)(4)(ii)(2).

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

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

The regulation at 8 C.F.R. § 214.2(h)(1)(i) states:

(h) Temporary employees--(1) Admission of temporary employees--(i) General. Under section 101(a)(15)(H) of the Act, an alien may be authorized to come to the United States temporarily to perform services or labor for, or to receive training from, an employer, if petitioned for by that employer. . . .

"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.

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

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

Neither the legacy Immigration and Naturalization Service (INS) nor 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.<sup>1</sup>

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<sup>1</sup> 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).

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.<sup>2</sup>

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).<sup>3</sup>

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

<sup>2</sup> 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))).

<sup>3</sup> 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

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).

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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."

With the visa petition, counsel submitted a letter, dated September 8, 2011, in which he stated that, in the proffered position, the beneficiary would work at the premises of [REDACTED] in [REDACTED] New Jersey. An itinerary signed by the petitioner's human resources manager also states that the beneficiary would work at that location throughout the period of requested employment.

The record contains a Master Services Agreement, dated July 21, 2010 and executed by representatives of the petitioner and [REDACTED]. That agreement states:

The purpose of this Agreement is to establish the general terms and conditions applicable to [the petitioner's] provision of information technology and consulting services to [REDACTED] as such services are described in [statements of work (SOWs)].

The agreement further states: "This agreement contemplates the future execution of one or more [SOWs] for Services . . . ." The agreement also states the following:

The term of an SOW shall commence on the SOW Effective Date and continue until the earlier of (1) the expiration date specified in such SOW or, if no expiration date is specified, the date on which all work under such SOW is completed in accordance with the terms and conditions of this Agreement and such SOW and (2) the date upon which such SOW is terminated in accordance with its terms and conditions or in accordance with Section 15.01. . . .

No evidence that the petitioner and [REDACTED] ever executed any such statement of work (SOW) was then provided.

The record contains an Offer of Employment that the petitioner issued to the beneficiary seeking to employ him as a Senior Software Engineer. That document states, "[The beneficiary] may be transferred to any of the [petitioner's] establishments anywhere in India or abroad, as and when required by the [petitioner]. The beneficiary ratified that agreement on April 7, 2011. The record contains a letter, dated August 8, 2011 and addressed, "To Whomsoever It May Concern," confirming that the beneficiary had then worked for the petitioner since April 7, 2011.

On September 27, 2011, the service center issued an RFE in this matter. That letter requested that the petitioner demonstrate, *inter alia*, that it would have an employer-employee relationship with the beneficiary.

The RFE stated:

The term of the agreement between your company and [REDACTED] is

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determined by [an SOW], which was not provided. Please submit the required [SOW] to establish that a working agreement exists for the duration of the requested validity period.

In response, counsel submitted an employment contract and counsel's own letter, dated September 28, 2011.

The employment contract submitted was executed by the petitioner and the beneficiary on October 5, 2011, which is after the visa petition in this matter was submitted, on September 16, 2011. It states, "For [his] current assignment [the beneficiary] will work for an ongoing project with our client [REDACTED] It further states:

The [petitioner retains] the sole and exclusive right to control [the beneficiary's] employment and the manner and means for accomplishing the services to be performed, including and not limited to:

- ❖ Obtaining approvals to visa petitions to temporarily work in the US
- ❖ Defining your job roles and responsibilities keeping in mind your qualifications and experience, project requirements, business needs and related consideration
- ❖ Sole responsibility for payroll, hiring and firing decision, performance reviews and appraisals
- ❖ Project & location assignments and relocations
- ❖ Providing transportation to your home country on completion of your US assignment.

Finally, the employment agreement states:

Further, irrespective of the client location and project that [the beneficiary is] assigned to, during the duration of [the beneficiary's] employment with [the petitioner] and [the beneficiary's] permitted stay in the US on [the petitioner's] H-1B visa, [the beneficiary] shall at all times be supervised by our assigned Project/Delivery Manager.

The AAO notes that the employment agreement characterizes the beneficiary's placement with [REDACTED] as his "current" assignment, and that it states that the petitioner has "the sole and exclusive right" to determine the beneficiary's subsequent assignments and locations. Further, although the employment agreement indicates that the beneficiary would be supervised, on whatever project and at whatever location, by the petitioner's Project/Delivery Manager, the petitioner designates the proffered position a Project Manager position. Whether Project Manager and Project/Delivery Manager are two different positions, or are synonymous, is unclear. Further, although the record contains what purports to be the petitioner's organizational chart, it contains no position designated Project/Delivery Manager. For both reasons, the employment agreement does not clarify who would assign tasks to the beneficiary and supervise the beneficiary's performance of

those tasks.

In his own September 28, 2011 letter, counsel asserted that the evidence submitted demonstrates that the petitioner would have an employer-employee relationship with the beneficiary. Counsel did not provide the requested SOW or SOWs, and did not explain that omission.

The director denied the visa petition on December 7, 2011, finding, *inter alia*, as was observed above, that the petitioner had not demonstrated that the petitioner meets the regulatory definition of an intending United States employer. The director observed that no SOW had been submitted, although it was specifically requested in the RFE.

On appeal, counsel submitted additional copies of evidence previously provided, a printout of an E-mail, and a brief. In his appeal brief, counsel noted that [REDACTED] is well-known company. He observed that the Master Services Agreement between the petitioner and [REDACTED] has no fixed termination date, which counsel asserted, "is evidence that the Petitioner and [REDACTED] contemplated the two organizations would have a long business relationship."

As further evidence that the petitioner has had and will continue to have work to which to assign the beneficiary at the premises of [REDACTED] counsel referred to the E-mail printout. That E-mail is dated January 6, 2012, and was addressed by [REDACTED] who works for [REDACTED] in an unknown capacity, to various people, some or all of whom may work for the petitioner. The body of that E-mail states, in its entirety:

I would like to thank the whole [petitioner] team for your commitment and responsiveness throughout the [Request for Proposal] process for project [REDACTED]. We had a good competitive set of proposal [sic] to select from and I am very glad to inform you that we have made the decision to award the [REDACTED] to [the petitioner]. We are confident that your team will maintain the same level of commitment to make the project execution also a success. Please proceed with preparing the contract details on your end working with the [REDACTED].<sup>4</sup>

I would also like to point out that due to delays in hardware installation schedule your team's engagement will not start in January as originally planned. [REDACTED] have discussed this and we will work together on the right time to onboard your team resources.

The AAO notes that this E-mail contains no indication that the petitioner provided personnel to [REDACTED] prior to January 6, 2012. It does appear to indicate that the beneficiary would provide no personnel to that company during that month. No SOW was provided pertinent to the [REDACTED]. As such, when it was to begin, when it was to end, and what services were to be provided pertinent to that project are not established. Further, the record contains no indication that [REDACTED] agreed that the beneficiary would work on that project.

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<sup>4</sup> Although it is unclear, the AAO believes that this acronym stands for [REDACTED]

Although the itinerary provided states that the beneficiary would work at the location of [REDACTED] throughout the period of requested employment, the evidence in the record is ambiguous on that point. The more recent employment contract between the petitioner and the beneficiary makes clear that the assignment at [REDACTED] is merely the beneficiary's "current" assignment. Both contracts between the petitioner and the beneficiary indicate that the petitioner will have exclusive control over the location of the beneficiary's work and the client for whom the beneficiary would perform services. Such a clause would be unnecessary if the petitioner did not contemplate assigning the beneficiary to other projects in other locations.

Further, the Master Services Agreement between the petitioner and Johnson & Johnson states: "Key Personnel" means the [petitioner's] Contract Executive, *the [petitioner's] Project Manager* [emphasis added], the [petitioner's] Quality Manger, [the petitioner's] Transition Manager and such other individuals identified as Key Personnel in an SOW." It further states: "[B]efore assigning an individual to a Key Personnel position, whether as an initial assignment or as a replacement, [the petitioner] shall . . . obtain [REDACTED] approval for such assignment." The agreement between the petitioner and [REDACTED] identifies Project Manager as a Key Personnel position. That agreement further states that [REDACTED] must approve, in advance, all assignments to Key Personnel positions. The petitioner has identified the proffered position as a Project Manager position. However, the record contains no indication that [REDACTED] has approved the assignment of the beneficiary to the position of Project Manager for the [REDACTED] project or for any other [REDACTED] project, or for his appointment to any other position on a [REDACTED] project. Nor does the record contain any evidence from [REDACTED] describing, in meaningful detail, the duties that the beneficiary would perform.

Counsel pointed to various portions of the Master Services Agreement as evidence that, if the beneficiary works on a [REDACTED] project, the petitioner would control his work. The AAO does not share counsel's view of that evidence but, in any event, even if the evidence were demonstrably conclusive on that particular point, it would have no weight in the decision in this matter, because the record contains insufficient evidence that the beneficiary would work at [REDACTED] throughout the period of requested employment, and insufficient indication, in fact, that he would work there during any part of it.

As such, the petitioner is unable to demonstrate that, during the beneficiary's work at the [REDACTED] location or during any portion of the period of requested employment, the petitioner would have an employer-employee relationship with the beneficiary.

The record of proceeding fails to establish the particular work that the beneficiary would perform, the specific end-user entities for which the work would be performed, who exactly would supervise and directly control the actual day-to-day work that the beneficiary would perform, and exactly where the work would be performed. In fact, the evidence provided does not establish that the petitioner has any work in the United States to which to assign the beneficiary, or that it ever has had any work to which to assign him in the United States. The evidence, therefore, is insufficient to

establish that the petitioner qualifies as a United States employer, as defined by 8 C.F.R. § 214.2(h)(4)(ii). The appeal will be dismissed and the petition will be denied on this basis.

The remaining basis for the director's decision of denial was his finding that the beneficiary had not demonstrated that, at the time the visa petition was submitted, the petitioner had work to which it would be able to assign the beneficiary throughout the period of requested employment. As explained above, the AAO finds that the evidence submitted does not demonstrate that the petitioner had work to which to assign the beneficiary throughout the period of requested employment. The AAO further finds that the evidence does not demonstrate that the petitioner had work to which to assign the beneficiary during any portion of the period of requested employment. The appeal will be dismissed and the visa petition denied for this reason as well.

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

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

Accordingly, as the petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position qualifies as a specialty occupation. Accordingly, the appeal will be dismissed and the petition will be denied on this basis. Thus, even if it were determined that the petitioner had overcome the director's grounds for denying this petition (which it has not), the petition could still not be approved.

The petitioner's failure to respond to the director's RFE further mandates denial of this petition. As noted above, the Master Services Agreement between the petitioner and [REDACTED] states the following:

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The purpose of this Agreement is to establish the general terms and conditions applicable to [the petitioner's] provision of information technology and consulting services to [redacted] as such services are described in SOWs.

The agreement continues: "This agreement contemplates the future execution of one or more [SOWs] for Services . . . ."

As the record lacked an SOW executed pursuant to the agreement, director stated the following in his September 27, 2011 RFE:

The term of the agreement between your company and [redacted] is determined by a [SOW], which was not provided. Please submit the required [SOW] to establish that a working agreement exists for the duration of the requested validity period.

Counsel did not provide the requested SOW. On appeal, counsel did provide the E-mail from an employee of Johnson & Johnson, described above. However, absent a feasible explanation of the unavailability of the specific evidence requested, the other evidence was not an acceptable substitute. As such, even if it had been submitted in response to the RFE, rather than on appeal, the provision of that E-mail would not have excused the failure to provide the requested evidence. Further, that E-mail was provided on appeal, and not in response to the RFE. Even if the requested SOW had been provided at that late date it would not have been considered, because evidence requested in an RFE but not timely provided will not be considered if subsequently provided on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988).

Given that the Master Services Agreement makes clear that [redacted] did not contemplate contracting for any services with the petitioner without issuing an SOW, and given the petitioner's assertion, central to its case, that the beneficiary would work at the location of [redacted] on one or more of its projects, the request for a copy of any relevant SOW was relevant to a material issue in this matter. However, counsel did not provide the requested SOW, and did explain the failure to do so. 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 visa petition will be denied for this additional reason.

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.