



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **NOV 21 2013** Office: CALIFORNIA 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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

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

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the California Service Center on October 29, 2012. On the Form I-129 petition, the petitioner describes itself as a telecom and information technology business established in 2009. In order to employ the beneficiary in a position to which it assigned the job title of "telecom engineer," the petitioner seeks to classify the beneficiary 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).

Upon reviewing the Form I-129 and the documentation submitted as support, the director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued a request for additional evidence (RFE). The petitioner was asked to submit documentation to establish, among other things, (1) that a valid employer-employee relationship will exist between the petitioner and the beneficiary for the duration of the requested H-1B validity period; and (2) that there is sufficient specialty occupation work for the beneficiary to perform at the entity ultimately using the beneficiary's services for the duration of the requested H-1B validity period.

After reviewing the petitioner's response to the RFE, the director denied the petition, finding that the petitioner failed to establish that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." The petitioner, through counsel, submitted a timely appeal of the decision. On appeal, counsel for the petitioner contends that the director's basis for denial of the petition was erroneous. In support of this contention, counsel for the petitioner submits a brief and additional evidence.

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

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

In addition, beyond the decision of the director, the AAO finds that the evidence in the record of proceeding does not establish (1) the petitioner's eligibility at the time of filing for the benefit sought; (2) that the petition was filed for non-speculative work for the beneficiary that existed as of the time of the petition's filing for the entire period requested; and (3) that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions.

The petitioner indicated on the Form I-129 that it intends to employ the beneficiary in a position designated as a telecom engineer, from October 29, 2012 to October 29, 2015, on a full-time basis, at a salary of \$110,240 per year. The Form I-129 indicates that the beneficiary will be employed off-site at [REDACTED]

In the Labor Condition Application (LCA) submitted in support of the instant petition, the petitioner indicated that the beneficiary will be employed at [REDACTED]

The LCA also indicates that the occupational category is designated as "Engineer, All Other," SOC (ONET/OES) code 17-2199; that the period of intended employment is from October 29, 2012 to October 29, 2015; and that the petitioner will pay the beneficiary an annual salary of \$110,240.

In the support letter dated October 23, 2012, the petitioner states that it is "in need of a Telecom Engineer who can assist us with wireless infrastructure testing and design" and that the position includes the following duties:

- Test and provide engineering support for [REDACTED] products.
- Lead validation of major software release on [REDACTED] features[.]
- Commission, integrate, System verification and acceptance and troubleshoot for various RBS configurations including NodeB and BTS combinations.
- Develop and maintain BSC projects, process, and documents for network deployment.
- Create test specifications including creating/updating/reviewing test documents (i.e. test plans, test cases, test reports, feature specification, instructions, etc[.]).
- Provide support to troubleshoot all [REDACTED] interfaces and resolve issues and escalations[.]
- Maintain stability lab GSM network elements[.]
- Execute FOA's, create MOPs, and execute trials.
- Support upgrades, network modifications and performance analysis.
- Ensure quality on the end-to-end RAN support function.
- Use Ericsson BSC AXE platform, BTS models and configurations[.]

The support letter also describes the requirements of the proffered position, stating:

[The proffered position] requires theoretical and practical application of a body of highly specialized knowledge and attainment of a bachelor's or higher degree in the specific specialty as a minimum for entry into the occupation in the United States. Specifically, the position requires the individual to have a degree in Electronics and Communications Engineering, Engineering, Networks, Computers, and Telecommunications or equivalent with related experience in telecom systems.

With the initial filing, the petitioner also submitted also submitted the following documents:

- A document entitled "Memo on End Client Location," which states, "[p]lease note that [the beneficiary] has been assigned by [the petitioner] to work on a project for [REDACTED]"

- A copy of a letter addressed to the beneficiary, entitled "Offer of Employment with [the petitioner]," dated October 18, 2012. The letter states that "[t]he effective date of your employment will be 25th Oct 2012."
- A copy of a document entitled "Confidentiality and Non-Compete Agreement" between the beneficiary and the petitioner, dated October 18, 2012.
- A copy of a document entitled "Professional Services Agreement", made on November 9, 2010, between the petitioner and [REDACTED] (hereinafter, the PSA). The AAO notes that the schedules that form a part of the PSA were not submitted into the record.
- A letter dated October 24, 2012, from the Vice President of [REDACTED], stating that the beneficiary, "an employee of [the petitioner], is assigned to [REDACTED] on a project involving the Testing and providing engineering support for [REDACTED] products." The letter states that the beneficiary's job title is "[REDACTED] Engineer"¹ and that his immediate supervisor is located at [REDACTED]. The letter reiterates the duties assigned to the beneficiary as noted in the petitioner's support letter, with the exception of "[u]se [REDACTED] BTS models and configurations[.]" The letter also states the following:

[The beneficiary] is contracted to [REDACTED] through us because we are the preferred vendor for [REDACTED]. Both [the petitioner] and [REDACTED] will provide technical support to [the beneficiary] when required. We do not have the ability to assign [the beneficiary] to a different employer nor do we have the right to control his employment.

On January 16, 2013, the director issued an RFE, requesting that the petitioner establish, among other things, (1) that a valid employer-employee relationship will exist between the petitioner and the beneficiary for the duration of the requested H-1B validity period; and (2) that there is sufficient specialty occupation work for the beneficiary to perform at the entity ultimately using the beneficiary's services for the duration of the requested H-1B validity period. Specifically, the director noted that the record did not contain information from the end-client, [REDACTED] describing the proffered position or information detailing the relationship between [REDACTED] and [REDACTED]. The director provided a list of some of the types of specific evidence that could be submitted in response to the RFE.

In a letter in response to the director's RFE, dated February 18, 2013, counsel for the petitioner stated:

¹ We note that the position title, [REDACTED] is inconsistent with the title of the proffered position listed on the Form I-129 and identified in the petitioner's support letter. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. Matter of Ho, 19 I&N Dec. 582, 591-92 (BIA 1988).

The beneficiary is contracted to work for [sic] a telecom project commissioned by [REDACTED] at its WA location through [REDACTED] preferred vendors. According to the company's policy, [REDACTED] does not provide employment verification letters on company stationery for contractors. In addition, the Petitioner does not have access to any contracts or agreements between [REDACTED] and its vendors, due to the confidential nature of such documentation. However, the letter from the vendor, [REDACTED] that was submitted with the petition confirms the beneficiary's placement with the [REDACTED] project. Please note that the letter clearly states that the beneficiary is not an employee of [REDACTED], but rather an employee of [the petitioner].

Counsel also submitted the following documents as additional supporting evidence:

- A copy of a series of e-mails between the beneficiary and his supervisors at [REDACTED] dated between January 8, 2013 and February 8, 2013. Counsel states that these e-mails demonstrate that "the beneficiary is performing specialty occupation work for the end client." The e-mails show the beneficiary using a [REDACTED] e-mail address and appear to indicate that [REDACTED] is guiding and controlling the beneficiary's day-to-day work.
- A copy of the beneficiary's Form I-9, Employment Eligibility Verification, dated October 19, 2012. The Form I-9 indicates that the portions to be completed and signed by the employer were left blank.
- A copy of the beneficiary's "Authorization for Automatic Payroll Deposit" form, authorizing the petitioner to initiate credit entries to the beneficiary's bank account, dated October 19, 2012.
- A copy of the beneficiary's temporary [REDACTED] identification card, dated November 8, 2012 and with an effective date of November 1, 2012.² The AAO notes that no employer information is listed on the temporary insurance card.
- A copy of the petitioner's "Acknowledgement of Time Submittal Requirements," dated October 19, 2012.
- A copy of two weekly time sheets for the beneficiary, on [REDACTED] time sheet form, for the weeks ending January 27, 2013 and February 3, 2013. The time sheet indicates that the customer is [REDACTED] and that the beneficiary's position is titled '[REDACTED]

² The temporary insurance identification card states that "it will automatically expire within 10 days after the date of its issuance." Thus, this document had already expired when it was submitted by the petitioner and counsel in response to the RFE on February 25, 2013.

- A copy of an invoice dated February 3, 2013 from the petitioner to [REDACTED] billing for the beneficiary's services from January 28, 2013 and February 3, 2013.
- A copy of an undated document on the petitioner's letterhead entitled "Telecom Engineer Position Description," listing job duties and the percentage of time devoted to each duty, as follows:
 - Test and provide engineering support for [REDACTED] products[.] (10%)
 - Lead validation of major software release on [REDACTED] features[.] (15%)
 - Commission, integrate, provide system verification and acceptance and troubleshooting for various RBS configurations including NodeB and BTS combinations[.] (20%)
 - Develop and maintain BSC projects, processes, and documents for network deployment[.] (10%)
 - Create test specifications including creating/updating/reviewing test documents (i.e. test plans, test cases, test reports, feature specification, instructions, etc[.])[.] (15%)
 - Provide support to troubleshoot all [REDACTED] interfaces and resolve issues and escalations. Support upgrades, network modifications and performance analysis[.] (10%)
 - Maintain stability lab GSM network elements. Execute FOA's, create MOPs, and execute trials[.] (10%)
 - Ensure quality on the end-to-end RAN support function. Use [REDACTED] models and configurations[.] (10%)
- A copy of the petitioner's performance review process, which indicates that the "[p]erformance review form is also sent to the employee supervisor³ to get their feedback" on a monthly basis.
- A copy of the petitioner's undated organizational chart. It is unclear where the beneficiary would fit into the petitioner's organization as neither his name or position title is listed.
- Paystubs from the beneficiary's prior employer.
- Paystubs from the petitioner showing that the beneficiary began working for the petitioner in the pay period ending October 28, 2012.

After reviewing the petitioner's response to the RFE, the director denied the petition finding that the petitioner failed to establish that it will be a "United States employer" having an employer-employee relationship" with the beneficiary as an H-1B temporary "employee." On appeal, the

³ The record indicates that the beneficiary's supervisor is located at [REDACTED]

petitioner, through counsel, submitted the following evidence:

- A copy of a document entitled [REDACTED] Master Agreement,” dated December 15, 2010 (the Effective Date), made by and between [REDACTED] and [REDACTED] (termed Supplier in the agreement) (hereinafter, the [REDACTED] Agreement).⁴ The agreement states that it will be in force from the Effective Date until December 15, 2012 and “will automatically extend month to month unless otherwise agreed to by the parties.” Although the agreement’s term is said to run on a month to month basis after December 15, 2012, the petitioner has not provided evidence that the [REDACTED] Master Agreement is still in force.

In regard to subcontractors and other personnel, section 11.2 of the [REDACTED] Agreement states:

All Supplier personnel assigned to perform Services hereunder shall be subject to interview and acceptance by [REDACTED] sole discretion. [REDACTED], in its sole discretion, may request removal of any Supplier personnel providing Services hereunder, and Supplier shall remove such personnel identified by [REDACTED] in accordance with each request . . . If supplier fails to pay its subcontractor for work performed or Deliverables delivered by subcontractor, [REDACTED] shall have the right, but not the obligation, to pay subcontractor and offset any amounts due to Supplier with amounts paid to subcontractor.

As an attachment to the [REDACTED] Master Agreement, the petitioner also submits a Statement of Work for Services (SOW) entered into by [REDACTED]. The SOW states that it is valid from December 15, 2010 to December 15, 2011. We note that this timeframe does not coincide with the requested H-1B validity period and that the SOW appears to be for a project that is unrelated to the work to be performed by the beneficiary.

⁴ In response to the director’s RFE, counsel asserted that this type of document between [REDACTED] could not be submitted for confidentiality reasons. Contrary to this assertion, counsel submitted the [REDACTED] Master Agreement on appeal, without explanation as to why this document was now available. The regulations indicate that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary in the adjudication of the petition. See 8 C.F.R. §§ 103.2(b)(8); 214.2(h)(9)(i). The purpose of the RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. § 103.2(b)(1), (8), and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO need not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). However, in order to fully evaluate the instant petition, we have reviewed the record in its entirety, including the additional materials submitted for the first time on appeal.

- A copy of a letter from the Vice President of [REDACTED] dated April 10, 2013, stating that “[the beneficiary,] an employee of [the petitioner] will be working as a[n] [REDACTED] Engineer on a contract basis at [REDACTED] in the Engineering Quality Assurance group at [REDACTED].” The letter further states:

[The beneficiary] is currently working on this project for the past five (5) months and it is an ongoing project, which could extend well over 3 years in duration. However, the project duration can be extended or terminated at any time depending on the varying requirements of [REDACTED] from time to time.

[The beneficiary’s] primary duties are as follows:

- Test and provide engineering support for [REDACTED] products.
- Lead validation of major software release on [REDACTED] and new [REDACTED] features[.]
- Commissioning, integrating, system verification & acceptance and troubleshooting for various RBS configurations including e-NodeB/NodeB and BTS combinations.
- Develop and maintain BSC projects, process, and documents for network deployment.
- Create test specifications including creating/updating/reviewing test documents (i.e. test plans, test cases, test reports, feature specification, instructions, etc[.])[.]
- Provide support to troubleshoot all [REDACTED] interfaces and resolve issues[.]
- Maintain stability lab GSM network elements[.]
- Execute FOA’s, create MOPs, and execute trials[.]
- Support upgrades, network modifications and performance analysis.
- Ensure quality on the end-to-end RAN support function[.]

In addition, the letter states the following:

During his contract and at all times, [REDACTED] would have no employment relationship with [the beneficiary]. [The beneficiary’s] primary employer, [the petitioner,] would be responsible for his salary, benefits, and training needed to perform his job duties at the work site, in addition to any discretionary decision making, such as hiring, firing, and performance evaluations.

- Copies of e-mails between Orchestra and [REDACTED] regarding the beneficiary’s hiring and start date. The e-mails indicate that [REDACTED] interviewed and hired the beneficiary and that the beneficiary reported for work at [REDACTED] on October 25, 2012.

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

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

The term "United States employer" is defined 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.

(Emphasis added); *see also* 56 Fed. Reg. 61111, 61121 (Dec. 2, 1991).

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

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

employee relationship" with a "United States employer." *Id.* Therefore, for purposes of the H-1B visa classification, these terms are undefined.

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

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

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

In this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. See generally 136 Cong. Rec. S17106 (daily ed. Oct. 26, 1990); 136 Cong. Rec. H12358 (daily ed. Oct. 27, 1990). On the contrary, in the context of the H-1B visa classification, the regulations define the term "United States employer" to be even more restrictive than the common law agency definition.⁷

⁷ 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). 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

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 318-319.⁸

ERISA, unlike the definition of 'employee,' clearly indicates legislative intent to extend the definition beyond the traditional common law definition." See, e.g., *Bowers v. Andrew Weir Shipping, Ltd.*, 810 F. Supp. 522 (S.D.N.Y. 1992), *aff'd*, 27 F.3d 800 (2nd Cir.), *cert. denied*, 513 U.S. 1000 (1994).

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

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

⁸ 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

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).⁹

Thus, 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

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))).

⁹ 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).

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." Contrary to counsel's assertions on appeal, the documents in the record indicate that the petitioner will not have a valid employer-employee relationship with the beneficiary. Specifically, the [REDACTED] Master Agreement states [REDACTED] hires and fires all personnel on its projects, a fact that is supported by the submitted emails which show that the beneficiary was interviewed and hired for the proffered position by [REDACTED]. Furthermore, the record establishes that the beneficiary will be working at the [REDACTED] site, using [REDACTED] instrumentation, communicating through a [REDACTED] e-mail address and will be supervised onsite by a [REDACTED] employee. Furthermore, the letter from [REDACTED] states that both [REDACTED] and the petitioner will provide technical support to the beneficiary.

While social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are still relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary's employer. Based on a review of the evidence, the AAO is unable to find that the requisite employer-employee relationship will exist between the petitioner and the beneficiary.

The evidence of record, 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 the petitioner exercises 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. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Moreover, beyond the decision of the director, the evidence submitted fails to establish

definitive, non-speculative employment for the beneficiary for the entire period requested. Although the petitioner requested, on the Form I-129, that the beneficiary be granted H-1B classification from October 29, 2012 to October 29, 2015, there is a lack of substantive documentation regarding work for the duration of the requested period. Rather, as noted above, the letter from the end-client states that the proffered position is slated to run until December 31, 2013, with the option of renewal.

The AAO finds that, while the position may be renewed, the petitioner has not provided documentary evidence to establish the existence of work available to the beneficiary as a telecom engineer, for the requested H-1B validity period. The petitioner also did not submit documentary evidence regarding any additional work for the beneficiary. Thus, the petitioner has failed to establish that the petition was filed for non-speculative work for the beneficiary that existed *as of the time of the petition's filing*, for the entire period requested. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). Thus, even if it were found that the petitioner would be the beneficiary's United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii), the petitioner has not demonstrated that it would maintain such an employer-employee relationship with the beneficiary for the duration of the period requested.¹⁰

Based on the 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). Furthermore, the petition must also be denied due to the

¹⁰ The agency made clear long ago that speculative employment is not permitted in the H-1B program. A 1998 proposed rule documented this position as follows:

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

63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998). While a petitioner is certainly permitted to change its intent with regard to non-speculative employment, e.g., a change in duties or job location, it must nonetheless document such a material change in intent through an amended or new petition in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E).

petitioner's failure to establish eligibility at the time of filing and to proffer non-speculative employment to the beneficiary. Accordingly, for all of these reasons, the petition must be denied.

Beyond the decision of the director, the AAO will now address whether the petitioner has provided sufficient evidence to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions.

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

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

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

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

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

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. See *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); see also *COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. See *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

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

The petitioner stated on the Form I-129 that the beneficiary would be employed in a telecom engineer position. However, to determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. As previously mentioned, the specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. See generally *Defensor v. Meissner*, 201 F.3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the evidence in the record of proceeding establishes that performance of the particular proffered position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in a specific specialty as the minimum for entry into the occupation, as required by the Act.

The AAO notes that, as recognized by the court in *Defensor, supra*, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job

requirements is critical. *See Defensor v. Meissner*, 201 F.3d at 387-388. The court held that the former INS had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. *Id.* at 384. Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work.

Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

One consideration that is preliminary to the issue of whether a proffered position qualifies as a specialty occupation, is whether the petitioner has provided substantive information and supportive documentation to establish that the beneficiary would be performing services for the type of position for which the petition was filed (here, a telecom engineer). Another such consideration is whether the petitioner has established that, at the time of the petition's filing, it had secured definite, non-speculative work for the beneficiary that accords with the petitioner's claims about the nature of the work that the beneficiary would perform in the proffered position.

The AAO finds that the petitioner has failed in each of these regards. The evidence in the record of proceeding fails to establish that, at the time the petition was filed, the petitioner had secured definite employment as a telecom engineer for the beneficiary for the requested period of H-1B employment. Here, the AAO finds that the record lacks evidence (1) corroborating that the petitioner has work that exists as an ongoing endeavor generating definite, non-speculative employment for the beneficiary's services for the period of employment specified in the Form I-129; (2) establishing the nature and duties of the work that the beneficiary would perform for the duration of the requested H-1B validity period; and (3) establishing that the beneficiary's duties, as described, would actually require the theoretical and practical application of at least a baccalaureate level of a body of highly specialized knowledge in a specific specialty, or its equivalent, as required by the Act.

For the reasons related in the preceding discussion, the AAO finds that the petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. Accordingly, for this additional reason, the petition cannot be approved.

Finally, the AAO notes that the beneficiary's admission and continued stay in the United States is conditioned on the maintenance of the H-1B "nonimmigrant status in which the alien was admitted or to which it was changed under section 248 [of the Act]" and compliance "with the conditions" of that status. Section 237(a)(1)(C)(i) of the Act, 8 U.S.C. § 1227(a)(1)(C)(i). In this matter, the petition for change of employer was filed on October 29, 2012. Pursuant to section 214(n)(1) of the Act, 8 U.S.C. § 1184(n)(1) the beneficiary was authorized to begin working at the new petitioning employer as of this date, but not before. As the record indicates that the beneficiary began working on October 25, 2012, he was working in unauthorized status. The unauthorized

employment of the beneficiary constitutes a failure to maintain and comply with the conditions of his H-1B nonimmigrant status under section 237(a)(1)(C)(i) of the Act. While the AAO observes that the beneficiary's prior H-1B nonimmigrant petition has not yet been revoked pursuant to 8 C.F.R. § 214.2(h)(11), the documentation contained in the current record of proceeding indicates that the beneficiary violated his prior, approved H-1B nonimmigrant status by working for the petitioner before a new H-1B petition had been filed on his behalf pursuant to section 214(n)(1) of the Act, 8 U.S.C. § 1184(n)(1). Accordingly, this unauthorized employment in itself disqualifies the beneficiary for the portability provisions of section 214(n)(1) of the Act, making all employment with the petitioner, even after the filing of the instant petition, unauthorized. *See* section 214(n)(2)(C) of the Act.

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

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

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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