



U.S. Citizenship
and Immigration
Services

(b)(6)

SEP 04 2013

DATE: OFFICE: CALIFORNIA SERVICE CENTER

FILE: [REDACTED]

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

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

ON BEHALF OF PETITIONER:

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 revoked the approval of the visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will remain revoked.

The petitioner submitted a Petition for Nonimmigrant Worker (Form 1-129) to the California Service Center on September 6, 2011. The petitioner stated on the Form 1-129 that it is an enterprise engaged in information technology (IT) solutions, business processes and services with 20 employees. In order to employ the beneficiary in what it designates as a "Systems Analyst" position, 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, 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The petition was initially granted. Thereafter, the director issued a notice of intent to revoke (NOIR) the approval of the petition, stating that USCIS had obtained new information indicating that the petitioner has not established that it will have an employer-employee relationship with the beneficiary. The NOIR advised the petitioner of the derogatory information considered by USCIS and offered an opportunity for the petitioner to submit evidence in support of the petition and in opposition to the grounds alleged for revocation of the approval of the petition. The petitioner and counsel did not submit a response to the NOIR.

On December 11, 2012, the director revoked the approval of the petition. The director stated in the Notice of Revocation of Nonimmigrant Petition (NOR) that the petitioner failed to respond to the NOIR and that the grounds for revocation of the approval of the petition had not been overcome. On January 11, 2013, counsel submitted a Notice of Appeal or Motion (Form I-290B), accompanied by a brief and additional evidence, contending that the petitioner did not receive the NOIR and that the approval of the petition should not have been revoked.

Specifically, counsel for the petitioner claimed that "the [petitioner] did not receive your [NOIR] but based its response on the discussion it had with [the beneficiary]." Counsel also stated: "I have changed my mailing address. See Form G-28." Counsel for the petitioner also submitted an affidavit from [REDACTED], an employee of the petitioner, dated December 29, 2012, with the appeal.

In the affidavit, [REDACTED] claims that the petitioner did not receive the NOIR. However, the record indicates that the NOIR was sent to counsel's address of record, and USCIS records do not indicate that the mailing was returned as undeliverable. Counsel does not assert that he did not receive the NOIR. Although counsel contends on appeal that his address has changed, a review of USCIS computer records indicates that counsel did not submit a change of address to USCIS between the date the Form 1-129 petition was filed on behalf of the petitioner and the date the NOIR was issued.¹ The AAO also notes that the petitioner does not assert that its counsel failed to receive the NOIR.

¹ Counsel does not assert that he advised USCIS of a change of address before the NOIR.

Nevertheless, whether or not the petitioner received the NOIR when it was issued is, at this point in time, inconsequential. It is clear from a reading of the petitioner's letter and counsel's brief that the petitioner and counsel, having received a copy of the NOIR with the NOR, have addressed the issue discussed in the NOIR on appeal. The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). While the petitioner and counsel appear to request a remand to the service center in this matter based on the claim that the petitioner was not served the NOIR, the claimed error by the service center, even if true, is now remedied by the AAO's *de novo* review of the matter.

The AAO now turns to the basis for the director's revocation, and whether this basis provided the director with sufficient grounds for revoking the H-1B petition under the language at 8 C.F.R. § 214.2(h)(11)(iii)(A), the regulation outlining the circumstances under which an H-1B Form I-129 petition's validity will be rescinded.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's NOIR, dated August 20, 2012; (3) the petitioner's response to the NOIR; (4) the director's December 11, 2012 notice of revocation (NOR); and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

A brief summary of the factual and procedural history between the approval and the decision revoking it follows below.

As stated earlier, on September 6, 2011, the petitioner filed the Form I-129 petition, claiming that it is engaged in information technology solutions, and business processes and services. It further claims to have been established in 1997, and that it had 20 employees at the time the petition was filed. The petitioner seeks to employ the beneficiary as a systems analyst.

In a letter of support dated January 3, 2012, the petitioner claimed that the beneficiary would be working as a programmer analyst for its client, [REDACTED]. According to that letter, the petition, and the certified Labor Condition Application (LCA) filed therewith, the beneficiary's work location would be onsite at [REDACTED]. The petitioner claimed that the beneficiary's work at [REDACTED] would be pursuant to a Master Agreement between the two companies, and claimed that he would report to [REDACTED]. The petitioner also claimed that it would "be responsible for paying the salary, benefits and expenses of [the beneficiary]" and that the petitioner would "control and supervise [the beneficiary's] overall work at the [REDACTED] site."

The petitioner submitted copies of two Statements of Work (SOW) with [REDACTED]. The first was for "Java Developer for Mobile Experience" dated May 15, 2011, and the second was for "Marketing IT Vignette Portal Lead Specialist" dated November 17, 2010. The petitioner also submitted a statement from [REDACTED] Head HR at [REDACTED], stating that the beneficiary has been employed by the company in [REDACTED] since September 1,

2008.

The AAO notes that each SOW discussed above provides a section identifying the personnel and name of the "resource" assigned to each project. The Java Developer SOW states that the name of the person assigned by the petitioner is "TBD" and does not list any names. In the Marketing IT Vignette Portal Lead Specialist SOW, the resource is identified as [REDACTED]. Neither SOW identifies the beneficiary as a resource assigned to any [REDACTED] project. Moreover, despite referring to a Master Agreement with [REDACTED], a copy of said agreement was not submitted.

The director initially approved the petition on November 16, 2011. Upon receipt of new information conveyed by the beneficiary during his consular interview in [REDACTED] on January 5, 2012, the director issued an NOIR on August 20, 2012. As noted above, USCIS records indicate that this notice was mailed to counsel at his address of record. The director found that, based upon the statements of the beneficiary regarding the lack of control the petitioner would exercise over the beneficiary in the United States, there did not appear to be the requisite employer-employee relationship. Specifically, the director noted that, according to the beneficiary, there would be no onsite supervision by an employee of the petitioner, and that the petitioner's interaction with the beneficiary would be limited to a weekly visit and a one-hour meeting to gain updates on the project status. The director noted that this information, coupled with the fact that the petitioner was engaged in outsourcing computer personnel to end clients on an as-needed basis, rendered it impossible to find that an employer-employee relationship existed.

On appeal, counsel for the petitioner claims that the director erroneously afforded weight to the unsupported statements of the beneficiary, noting that he does not set the terms of his own employment. Moreover, counsel contends that the beneficiary has never been to the end client's site and therefore was unqualified to comment on the nature and extent of the petitioner's supervision. The affidavit, sworn by [REDACTED] on behalf of the petitioner, also confirms these statements and claims that the petitioner hires, fires, assigns work, and supervises the beneficiary and its other employees. A letter from [REDACTED] Vice President of [REDACTED] is also submitted, which confirms that the beneficiary is only a contractor and that the petitioner will supervise the beneficiary's work.

Finally, counsel's appeal brief restates the claims set forth by [REDACTED] and [REDACTED], and claims that the SOWs submitted into the record in support of the petition clearly outline the nature of the petitioner's relationship with the beneficiary. Counsel concludes that "the evidence speaks for itself that it need not be over flogged."

Upon review, the AAO concurs with the director's finding that the petitioner has not established that it meets the regulatory definition of a United States employer. 8 C.F.R. § 214.2(h)(4)(ii). Specifically, the petitioner has not established that it will have "an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." *Id.*

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

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

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

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

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

Neither the 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. 440, 445 (2003) (hereinafter "*Clackamas*"). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).

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.²

² 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

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.*

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).

Darden, 503 U.S. at 318-319.³

Accordingly, in the absence of an express congressional intent to impose broader definitions, both the "conventional master-servant relationship as understood by common-law agency doctrine" and the *Darden* construction test apply to the terms "employee" and "employer-employee relationship" as used in section 101(a)(15)(H)(i)(b) of the Act, section 212(n) of the Act, and 8 C.F.R. § 214.2(h).⁴

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

³ 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))).

⁴ 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).

weigh and compare a combination of the factors in analyzing the facts of each individual case. The determination must be based on all of the circumstances in the relationship between the parties, regardless of whether the parties refer to it as an employee or as an independent contractor relationship. *See Clackamas*, 538 U.S. at 448-449; *New Compliance Manual* at § 2-III(A)(1).

Furthermore, when examining the factors relevant to determining control, USCIS must assess and weigh each actual factor itself as it exists or will exist and not the claimed employer's right to influence or change that factor, unless specifically provided for by the common-law test. *See Darden*, 503 U.S. at 323-324. For example, while the assignment of additional projects is dependent on who has the *right to* assign them, it is the *actual* source of the instrumentalities and tools that must be examined, not who has the *right to* provide the tools required to complete an assigned project. *See id.* at 323.

Lastly, the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450. "Rather, . . . the answer to whether [an individual] is an employee depends on 'all of the incidents of the relationship . . . with no one factor being decisive.'" *Id.* at 451 (quoting *Darden*, 503 U.S. at 324).

Applying the *Darden* and *Clackamas* tests to this matter, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee."

Specifically, the petitioner claims that the beneficiary will be assigned to work for [REDACTED] pursuant to a Master Agreement between the two companies, and further claims that the SOWs submitted in support of the petition establish this relationship.

The record, however, is devoid of sufficient evidence to establish this relationship. First, the petitioner clearly states in its January 3, 2012 letter of support that the beneficiary's work assignment with [REDACTED] is arranged pursuant to the Master Agreement. However, despite referring to and relying upon this document, the petitioner fails to submit this agreement. On appeal, counsel claims that the submitted work orders clearly outline the nature of the beneficiary's employment with the petitioner and his assignment on the [REDACTED] project. The AAO disagrees.

As discussed previously, the SOWs submitted with the petition are not applicable to the beneficiary and his claimed assignment. The petitioner claims on the Form I-129 that the beneficiary will be assigned to work onsite for [REDACTED] for a period of three years, from October 1, 2011 to September 30, 2014. The LCA which is certified for work performed at the [REDACTED] site is for the same validity period. However, the SOWs submitted are for: (1) a Java Developer position, from May 15, 2011 to June 30, 2013; and (2) a Marketing IT Vignette Portal Lead Specialist, from December 5, 2010 to August 15, 2013. Neither of these agreements pertains to the beneficiary, because (1) they do not identify the beneficiary as personnel or a "resource" assigned to the particular project; (2) the position titles and duties associated therewith differ from that of the beneficiary, who is

intended as a programmer analyst;⁵ and (3) the duration of each project does not correspond to the duration of the beneficiary's intended employment.

Therefore, the key element in this matter, which is who exercises control over the beneficiary, has not been substantiated.

It is likewise noted that the beneficiary appears to have been working abroad for [REDACTED] in [REDACTED] since September of 2008. According to the claims of the beneficiary during his consular interview, the beneficiary will have no onsite supervision from the petitioner and minimal interference by or interaction with members of the petitioner's organization. These statements, coupled with the lack of definitive evidence regarding the actual nature of the beneficiary's intended employment, preclude a finding that the petitioner will have the requisite employer-employee relationship with the beneficiary.

The record is devoid of evidence establishing who will oversee and direct the work of the beneficiary, and who will provide the instrumentalities and tools. Without full disclosure of all of the relevant factors, the AAO is unable to find that the requisite employer-employee relationship will exist between the petitioner and the beneficiary. Although both the petitioner and counsel claim that the petitioner will exercise complete control of the beneficiary during the duration of his employment, there is insufficient evidence to support these contentions. Moreover, the fact that the beneficiary is currently an employee of [REDACTED] in [REDACTED] coupled with his statements that the petitioner will have little or no supervisory authority over his work for [REDACTED] in the United States, further undermine the claims of the petitioner regarding the nature of its control over the beneficiary. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

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). Merely claiming that the petitioner exercises complete control over the beneficiary, without evidence supporting the claim, does not establish eligibility in this matter. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. The evidence of record does not establish that the petitioner would act as the beneficiary's employer in that it will hire, pay, fire, or otherwise control the work of the Based on the tests outlined above, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii).

⁵ As noted above, the petitioner claims on the Form I-129 that the petitioner will be employed as a "Systems Analyst."

Pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A)(2), an approved petition is revocable if the statement of facts contained in the petition or on the application for a temporary labor certification was not true and correct, inaccurate, fraudulent, or misrepresented a material fact. In this matter, the widespread yet unresolved discrepancies in the record lead to the conclusion that the statement of facts contained in the petition is not true and correct. A few errors or minor discrepancies are not reason to question the credibility of an alien or an employer seeking immigration benefits. *See, e.g., Spencer Enterprises Inc. v. U.S.*, 345 F.3d 683, 694 (9th Cir. 2003). However, anytime a petition includes numerous errors and discrepancies, and the petitioner fails to resolve those errors and discrepancies after USCIS provides an opportunity to do so, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions. Doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N at 591. In this case, the discrepancies and errors catalogued above lead the AAO to conclude that the evidence of the beneficiary's eligibility is not credible. Accordingly, the petitioner has not established the beneficiary's eligibility for the requested nonimmigrant visa classification.

Lastly, 8 C.F.R. § 214.2(h)(11)(iii)(A)(4) calls for the revocation of a petition on notice where the petitioner violated the requirements of section 101(a)(15)(H) of the Act or 8 C.F.R. § 214.2(h). In failing to establish that it will maintain the requisite employer-employee relationship with the beneficiary in the proffered position as required by the pertinent H-1B statutory and regulatory requirements, the petition's approval was subject to revocation on notice for this additional reason, and the assertions and evidence presented on appeal have failed to demonstrate that the petitioner did not violate these provisions.

The appeal will be dismissed and the approval of the petition revoked for these reasons.

Even if the petitioner had established the requisite employer-employee relationship, the matter would have to be remanded to the director for a determination on whether or not the proffered position qualifies for classification as a specialty occupation.

The nature of the petitioner's business and the documentation contained in the record indicate that the petitioner is engaged in the outsourcing of personnel to client sites as needed. Based on this, it is apparent that the exact nature of the beneficiary's assignments throughout the validity period may vary based on client needs during the duration of the petition. Therefore, the very nature of the petitioner's business, as evidenced by the statements of the petitioner, confirms that the beneficiary's duties and responsibilities are subject to change in accordance with client requirements.

Although the petitioner submits a letter of support dated January 3, 2012, as well as a letter from [REDACTED] of [REDACTED] which provides a brief description of the beneficiary's proposed duties, the fact that the petitioner failed to establish that this assignment actually exists confirms that the beneficiary's ultimate employment during the duration of the validity period is subject to change based on client needs. Based on this uncertainty, it cannot be properly analyzed whether the beneficiary will be performing the duties of a specialty occupation.

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

The court in *Defensor* also found that for the purpose of determining whether a proffered position is a specialty occupation, the petitioner acting as an employment contractor is merely a "token employer," while the entity for which the services are to be performed is the "more relevant employer." *Id.* at 388. The *Defensor* court recognized that evidence of the client companies' job requirements is critical where the work is to be performed for entities other than the petitioner. *Id.* The *Defensor* court held that the legacy Immigration and Naturalization Service (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.*

In this matter, the job description provided by the petitioner, as well as various statements from the petitioner both prior to revocation and on appeal, indicate that, contrary to its original claim, the beneficiary may be working on different projects throughout the duration of the petition. For example, the petitioner submits no SOW covering the beneficiary's assignment for the entire requested validity period and there is insufficient documentary evidence establishing the petitioner's contractual relationship with [REDACTED] or the beneficiary's intended assignment to [REDACTED]. It is apparent that the duties of the beneficiary are dictated by the specific needs of an end-client on a given project. Therefore, absent clear evidence of the beneficiary's particular duties on a particular project for the entire requested validity period, it cannot be determined that the beneficiary's proposed duties would require at least a baccalaureate degree in a specific specialty, or its equivalent, as required for classification as a specialty occupation.

The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation." Moreover, the regulation at 8 C.F.R. § 214.2(h)(4)(iv)(A)(1) indicates that contracts are one of the types of evidence that may be required to establish that the services to be performed by the beneficiary will be in a specialty occupation.

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2;

(3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.⁶

The AAO conducts appellate review on a de novo basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. § 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed. The approval of the petition is revoked.

⁶ It is noted that, even if the proffered position were established as being that of a programmer analyst, a review of the U.S. Department of Labor's *Occupational Outlook Handbook* (hereinafter the *Handbook*) does not indicate that such a position qualifies as a specialty occupation in that the *Handbook* does not state a normal minimum requirement of a U.S. bachelor's or higher degree in a specific specialty or its equivalent for entry into the occupation of programmer analyst. *See* Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook*, 2012-13 Edition, "Computer Systems Analysts," <http://www.bls.gov/ooh/Computer-and-Information-Technology/Computer-systems-analysts.htm#tab-4> (last visited August 30, 2013). As such, absent evidence that the position of programmer analyst qualifies as a specialty occupation under one of the alternative criteria available under 8 C.F.R. § 214.2(h)(4)(iii)(A), the instant petition should not be approved for this additional reason.