



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

DATE: **SEP 27 2013**

OFFICE: CALIFORNIA SERVICE CENTER

FILE: [Redacted]

IN RE:

Petitioner:

Beneficiary: [Redacted]

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

ON BEHALF OF PETITIONER:

[Redacted]

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.

On the Form I-129 visa petition, the petitioner describes itself as an "IT Consulting" firm established in 2008. In order to employ the beneficiary in what it designates as a "Systems Analyst" position, the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner failed to (1) demonstrate the specific duties the beneficiary would perform under contract for the petitioner's clients, (2) establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions, and (3) establish that the beneficiary is qualified to perform services in a specialty occupation by virtue of possessing a baccalaureate degree in a specific field of study, or its equivalent, which is directly related to the position being offered. On appeal, counsel for the petitioner asserts that the director's bases for denial of the petition were erroneous and contends that the petitioner satisfied all evidentiary requirements.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; (5) the Form I-290B and supporting materials; (6) the AAO's RFE; and (7) the petitioner's response to the AAO's RFE. 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 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. The petition will be denied.

I. Factual and Procedural History

The petitioner indicates on the Form I-129 that it wishes to employ the beneficiary as a systems analyst on a full-time basis at the rate of \$28.32 per hour. In addition, the petitioner indicates in the petition that the beneficiary will work only in "Brea, CA."

In contrast, the petitioner indicates on the Labor Condition Application (LCA) that the beneficiary will work at the following three locations: (1) [REDACTED]; (2) [REDACTED]; and (3) [REDACTED].

[REDACTED] The LCA also states the occupational category is designated as "Computer Systems Analysts" at a Level I (entry) wage level.

In a support letter dated May 30, 2012, the petitioner's "Vice President HR" states that the petitioner is a "global management consulting and technology services company" that offers "Contract Staffing" and "Full time and Project Management." The petitioner's Vice President HR states that the beneficiary would be employed to perform the following duties (errors in original):

- Working under the supervision of the Team Lead, analyze user requirements, current operational procedures, functional specifications, and user's data.
- Identify and document business or test requirements to support the project.
- Perform object-oriented analysis and preliminary design/development of the solutions for client-server platform.
- Utilize object-oriented language and concepts and databases appropriate to the project.
- Follow Team Lead's direction in devising methods and approaches to the project.
- Follow Team Leader's direction in devising methods and approaches to solve problems and meet user's needs.
- Create algorithms as needed to manage and implement proposed solutions.
- Participate in test planning and test execution for the functional, system, integration, and performance testing.
- Work with test automation tools for recording/coding in object-oriented languages, execute in regression testing cycles.
- Document and track issues and issue related resolution.
- Support Team Lead in completing test objectives according to the schedule set forth by the project manager.
- Test and debug software.
- Complete ongoing training and learn new skills/program at company headquarters when required.

The petitioner also states that the nature of the proffered position's duties are "extremely specialized and complex and require the theoretical and practical application of highly specialized knowledge" which is "attained only through a Bachelor's Degree in Computer Science or Electrical Engineering or Management Information, Business Administration, or equivalent related field [sic]"

With the initial petition, the petitioner also submitted, *inter alia*, the following documents:

- An offer letter extending employment to the beneficiary by the petitioner. The letter was signed by the petitioner's director of human resources and the beneficiary on June 1, 2012. The offer letter states that the beneficiary will be paid an hourly wage of \$27.50 per hour and that the beneficiary will work for the petitioner's client in New York, NY.
- An Employment Agreement between the petitioner and the beneficiary. The agreement was signed by the petitioner's "HR/Payroll Mgr" and the beneficiary on June 28, 2012. The AAO notes that the beneficiary's job title is handwritten under her signature "Business Analyst."
- A copy of a "Examensbevis/Degree Certificate" stating that the beneficiary "has been awarded the Degree of Master of Science (120 credits)" on "28 oktober 2010."

- A letter from [REDACTED] stating that the beneficiary "carried out an internship in the External Logistic Dept." of that company from January 11, 2010, to June 25, 2010. The letter is signed; however, the signatory of that letter is not identified.
- A letter from the Human Resource Manager of [REDACTED] stating (1) that the beneficiary worked at that company on a full-time basis from July 20, 2006 to September 2, 2008, and (2) that she performed the following duties: "Preparing required specification and technical documents[;] Line sizing[; and] Preparing Process Flow Diagram and P & Id with technical software[.]"
- A letter from [REDACTED] Sales Operations Manager for [REDACTED] stating that the beneficiary worked as a "Market Research Intern" for that company for four months.
- A letter from [REDACTED] HR & Benefits Coordinator for [REDACTED] stating that the beneficiary worked as a "Market Research Intern from January 16, 2012 through March 16, 2012."
- A copy of the beneficiary's [REDACTED] Certificate in Marketing.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on October 3, 2012. The petitioner was asked to submit, *inter alia*, probative evidence to establish (1) that a valid employer-employee relationship will exist between the petitioner and the beneficiary, (2) that the proffered position qualifies for classification as a specialty occupation, and (3) that the beneficiary is qualified to perform services in a specialty occupation. The director outlined the specific evidence to be submitted.

On November 2, 2012, in response to the director's RFE, the petitioner provided additional supporting evidence, including the following documentation:

- A letter from counsel dated November 1, 2012.
- A letter from the petitioner dated October 31, 2012.
- A letter from [REDACTED] CEO of [REDACTED] dated October 5, 2012.
- An independent contractor agreement signed on June 1, 2012, by the petitioner and [REDACTED]
- An evaluation of the proffered position and the beneficiary's qualifications by [REDACTED] Former Dean of the School of Business & Economics, [REDACTED] dated October 30, 2012.
- A diploma awarding the beneficiary an "International Master in Industrial Management" degree to the beneficiary by [REDACTED] The following notation appears on the

diploma, "[t]he student awarded with this degree has been also awarded by agreement of the European Union and the partner universities with the following degrees: 'Master of Science International Master in Industrial Management' issued by [REDACTED] 'Master of Science with a major in Industrial Management' issued by [REDACTED]

- A translation of the beneficiary's bachelor's degree in chemical engineering awarded by the [REDACTED]

The petitioner stated in its letter that the beneficiary will work at [REDACTED] 10036, providing services to the petitioner's client [REDACTED] during the dates June 2012 to May 2014.

The letter from [REDACTED] states that [REDACTED] is a "leading provider of information technology services both on a consulting and staff recruiting basis" [REDACTED] also states that [REDACTED] is "using the services of [the petitioner] for our client, [REDACTED] located at [REDACTED] since 6/18/2012 and this project is anticipated to continue on an ongoing basis. These services are provided under the terms of an agreement with [the beneficiary's employer, the petitioner]."

[REDACTED] also states that "[t]his particular position requires at least a Bachelor [sic] degree to perform the job duties successfully." [REDACTED] also states that the beneficiary will perform the following job duties:

- Responsible for analysis, requirements gathering, documentation of functional/technical specifications, data mapping, development and unit testing of the application
- Analyze the requirements to come up with design specifications and application architecture
- Write SQL queries, pl/sql procedures functions, packages, triggers, materialized views as per the application needs
- Develop user interfaces using Oracle Forms and Oracle Reports as per the business standards of the client
- Develop UNIX shell scripts, SQL Loader control files
- Design and Develop XSD's for setting up xml standards
- Analyze Queries and Perform performance tuning at the database application level using different techniques
- Develop build scripts for code moves to different environments and for Production cut-over
- Involve in code walk through and develop strategies for Modifications and maintain quality standards
- Support the application in production environment and address the tickets raised and quickly resolve critical issues
- Co[-]ordinate with various teams for testing the applications and to resolve cross systems issues
- Involve in End user training and support them on [as] needed basis, document user manuals, trouble shoot various User interface related issues

- Document technical Specifications, Use cases, process flows diagrams

The director reviewed the documentation and found it insufficient to establish eligibility for the benefit sought. The director denied the petition on November 14, 2012. Counsel submitted an appeal of the denial of the H-1B petition. With the appeal, counsel submitted a brief and additional evidence. Specifically, the petitioner submitted the following:

- An evaluation of the beneficiary's qualifications by [REDACTED], dated December 10, 2012.
- An evaluation of the proffered position and the beneficiary's qualifications by [REDACTED] dated November 26, 2012.
- A second evaluation of the proffered position and the beneficiary's qualifications by [REDACTED] Former Dean of the School of Business & Economics [REDACTED], dated December 10, 2012.
- A letter from [REDACTED], stating that the beneficiary "trained and worked" for that company from March 2002 to June 2006.
- A letter from [REDACTED] stating that the beneficiary attended the "Continuing Education School in 2007, and had earned her certificate in System Analysis during the 9 months of the program."
- A letter from [REDACTED] President, Applications Development, Sales Systems" for [REDACTED] dated November 29, 2012.
- Amendment 1 to Statement of Work [REDACTED] Between [REDACTED] Corporation. The term of the work order is June 18, 2012 to June 30, 2013.

The letter from [REDACTED] states that the beneficiary will perform the following duties as an "IT consultant" pursuant to [REDACTED]

- Gather, document and gain sign-off on detailed business requirements via participating in detailed requirements definition sessions with key business users
- Identify and document gaps as part of a gap analysis in conjunction with Viacom and selected vendor
- Develop future state business process flows detailing key business processes as planned in new system
- Develop use cases to support application design, development, testing, and training
- Assist in development of detailed test plans in conjunction with the Quality

- Assurance team
- Assist in high-level quality assurance testing of system in conjunction with the Quality Assurance team and identify and document any defects encountered
 - Assist in the development of training documentation
 - Identify and report all project risks and issues identified during engagement
 - Report weekly status on progress of all tasks assigned
 - Participate in all status and steering committee meetings as requested

II. Law and Analysis

A. Standing to File the Petition as a United States Employer; Eligibility at the Time of Filing; Speculative Employment; and Failure to Provide Material, Requested Evidence

Beyond the decision of the director, and as a preliminary matter, the AAO will determine whether the petitioner has established that it meets the regulatory definition of a United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii). The AAO will now review the record of proceeding to determine whether the petitioner has established that it will have "an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." *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 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.

8 C.F.R. § 214.2(h)(4)(ii) (emphasis added); *see also* 56 Fed. Reg. 61111, 61121 (Dec. 2, 1991). In the instant case, the record is not persuasive in establishing that the petitioner will have an employer-employee relationship with the beneficiary.

Although "United States employer" is defined in the regulations at 8 C.F.R. § 214.2(h)(4)(ii), it is noted that the terms "employee" and "employer-employee relationship" are not defined for purposes of the H-1B visa classification. Section 101(a)(15)(H)(i)(b) of the Act indicates that an alien coming to the United States to perform services in a specialty occupation will have an "intending employer" who will file an LCA with the Secretary of Labor pursuant to section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). 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 legacy Immigration and Naturalization Service (INS) nor U.S. Citizenship and Immigration Services (USCIS) defined the terms "employee" or "employer-employee relationship" by regulation for purposes of the H-1B visa classification, even though the regulation describes H-1B beneficiaries as being "employees" who must have an "employer-employee relationship" with a "United States employer." *Id.* Therefore, for purposes of the H-1B visa classification, these terms are undefined.

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

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

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

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

¹ While the *Darden* court considered only the definition of "employee" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(6), and did not address the definition of "employer," courts have generally refused to extend the common law agency definition to ERISA's use of employer because "the definition of 'employer' in ERISA, unlike the definition of 'employee,' clearly indicates legislative intent to extend the definition beyond the traditional common law definition." *See, e.g., Bowers v. Andrew Weir Shipping, Ltd.*, 810 F. Supp. 522 (S.D.N.Y. 1992), *aff'd*, 27 F.3d 800 (2nd Cir.), *cert. denied*, 513 U.S. 1000 (1994).

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

The regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to employ persons in the United States, and to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "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).

of an express expansion of the definition regarding the terms "employee" or "employer-employee relationship" combined with the agency's otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition" or, more importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. *Cf. Darden*, 503 U.S. at 318-319.²

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).³

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,

² To the extent the regulations are ambiguous with regard to the terms "employee" or "employer-employee relationship," the agency's interpretation of these terms should be found to be controlling unless "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359, 109 S.Ct. 1835, 1850, 104 L.Ed.2d 351 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945))).

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

not all or even a majority of the listed criteria need be met; however, the fact finder must weigh and compare a combination of the factors in analyzing the facts of each individual case. The determination must be based on all of the circumstances in the relationship between the parties, regardless of whether the parties refer to it as an employee or as an independent contractor relationship. *See Clackamas*, 538 U.S. at 448-449; *New Compliance Manual* at § 2-III(A)(1).

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

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

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

As a preliminary issue, the AAO observes that the petitioner provides conflicting information as to the job title of the proffered position. For example, in the Form I-129, the petitioner referred to the proffered position as "Systems Analyst." In the Employment Agreement, however, the beneficiary's job title is listed as "Business Analyst." Further, [REDACTED] states that the beneficiary will work as an "IT consultant." No explanation for the inconsistencies was provided. Thus, the AAO must question the accuracy of the evidence provided and whether the information provided is correctly attributed to this particular position.⁴

In any event, counsel contends on appeal that the beneficiary is employed by the petitioner and that "ultimate control, supervision, [hiring,] and [firing] is done by the petitioner." The petitioner claims that the beneficiary will work for its client [REDACTED] however, the petitioner did not submit any document which outlined in detail the nature and scope of the beneficiary's employment from the end client, [REDACTED]. While the [REDACTED] letter lists the duties that the beneficiary will perform, the letter does not address the key element in this matter, which is who exercises control over 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

⁴ 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).

oversee and direct the work of the beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary's employer. Without full disclosure of all of the relevant factors, the AAO is unable to find that the requisite employer-employee relationship will likely exist between the petitioner and the beneficiary.

For example, the AAO notes that the petitioner has not established the duration of the relationship between the parties and the location(s) where the beneficiary will work. More specifically, on the Form I-129, the petitioner requested that the beneficiary be granted H-1B classification from October 1, 2012, to October 1, 2015, to work in "Brea, CA." The LCA, on the other hand, indicates that the beneficiary will work in the following three locations: (1) [REDACTED] (2) [REDACTED]

and (3) [REDACTED]

An itinerary submitted with the appeal states that the beneficiary will work from October 1, 2012, "Till September end 2015" and lists only one location – [REDACTED]

However, Work Order No. [REDACTED] which the petitioner claims covers the beneficiary's work during the requested H-1B validity period states that the "term of this Work Order shall commence as of June 18, 2012 and continue until June 30, 2013"

The above documentation provides conflicting information as to the work locations and the dates of the beneficiary's work. Rather than establish definitive, non-speculative employment for the beneficiary for the entire period requested, the petitioner submitted conflicting documentation that makes it impossible to determine the beneficiary's work locations and the dates that the beneficiary will work. The petitioner did not submit probative evidence substantiating additional projects or specific work for the beneficiary.

Therefore, the AAO also finds that 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. Thus, even if the petitioner established that it would be the beneficiary's United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii), which it has not, the petitioner has not demonstrated that it would maintain such an employer-employee relationship for the duration of the period requested.⁵

⁵ 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

Nevertheless, based on what evidence was provided on appeal with regard to where the beneficiary would work during the requested employment period, it must be noted that the record indicates that it is now the petitioner's intent to physically locate the beneficiary in the New York office of [REDACTED]. The petitioner is located in California, raising the additional issue of who would supervise, control and oversee the beneficiary's work.

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 in its letters that the petitioner exercises complete control over the beneficiary, without sufficient, corroborating evidence to support 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 prior to adjudication did not establish that the petitioner would act as the beneficiary's employer in that it will hire, pay, fire, or otherwise control the work of the beneficiary. Despite the director's specific request for evidence such as a letter from the end client, the petitioner failed to submit such evidence.

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). The petition must also be denied due to the petitioner's failure to provide material, requested evidence. Again, failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Moreover, the petition must also be denied due to the petitioner's failure to establish eligibility at the time of filing and to proffer non-speculative employment to the beneficiary.

B. Specialty Occupation Employment

The AAO will now address the petitioner's failure to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions.

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

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).

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 387. To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

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

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

In the instant case, the petitioner stated in its May 30, 2012 letter of support that its minimum educational requirement for the proffered position is a "Bachelor's Degree in Computer Science or Electrical Engineering or Management Information, Business Administration, or equivalent related filed [sic]" In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) (emphasis added).

In other words, while the statutory "the" and the regulatory "a" both denote a singular "specialty," the AAO does not so narrowly interpret these provisions to exclude positions from qualifying as specialty

occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. See section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). This also includes even seemingly disparate specialties providing, again, the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

Again, the petitioner states that its minimum educational requirement for the proffered position is a "Bachelor's Degree in Computer Science or Electrical Engineering or Management Information, Business Administration, or equivalent related field [sic]" Here and as indicated above, the petitioner, who bears the burden of proof in this proceeding, simply fails to establish that all of the disciplines are closely related fields. Absent this evidence, it cannot be found that the particular position proffered in this matter has a normal minimum entry requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, under the petitioner's own standards. Accordingly, as the evidence of record fails to establish a standard, minimum requirement of at least a bachelor's degree in a specific specialty, or its equivalent, for entry into the particular position, it does not support the proffered position as being a specialty occupation and, in fact, supports the opposite conclusion.

Further, and more importantly, the petitioner indicated that a general-purpose degree such as a degree in business administration is acceptable for the proffered position. Although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d at 147.⁶

Therefore, absent evidence of a direct relationship between the claimed degrees required and the duties and responsibilities of the position, it cannot be found that the proffered position requires anything more than a general bachelor's degree. As explained above, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. Again, USCIS has consistently stated that, although a general-purpose bachelor's degree may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d at 147.

⁶ Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

[t]he courts and the agency consistently have stated that, although a general-purpose bachelor's degree, such as a business administration degree, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify the granting of a petition for an H-1B specialty occupation visa. See, e.g., *Tapis Int'l v. INS*, 94 F.Supp.2d 172, 175-76 (D.Mass.2000); *Shanti*, 36 F. Supp.2d at 1164-66; cf. *Matter of Michael Hertz Assocs.*, 19 I & N Dec. 558, 560 ([Comm'r] 1988) (providing frequently cited analysis in connection with a conceptually similar provision). This is as it should be: otherwise, an employer could ensure the granting of a specialty occupation visa petition by the simple expedient of creating a generic (and essentially artificial) degree requirement.

Furthermore, 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's job requirements is critical. See *Defensor v. Meissner*, 201 F.3d at 387-388. That is, it is necessary for the end-client to provide sufficient information regarding the proposed job duties to be performed at its location in order to properly ascertain the minimum educational requirements necessary to perform those duties. *Id.* at 387-388. The court held that the legacy 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.

In the instant case, the record of proceeding is devoid of substantive information from Viacom regarding the job duties to be performed by the beneficiary or [REDACTED] specifications with regard to the educational credentials of persons to be assigned to its projects. The record of proceeding does not contain sufficient corroborating documentation on this issue from, or endorsed by, [REDACTED] the company that the petitioner claims will actually be utilizing the beneficiary's services.

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

Accordingly, as the petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position qualifies as a specialty occupation. For this reason, the director's decision will be affirmed, and the petition will be denied.

C. Beneficiary Qualifications

The director also found that the beneficiary would not be qualified to perform the duties of the proffered position if the job had been determined to be a specialty occupation. However, a beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the proffered position does not require a baccalaureate or higher degree in a specific specialty or its equivalent. Therefore, the AAO need not and will not address the beneficiary's qualifications further.

III. Conclusion

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal.

2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143 (noting that the AAO conducts appellate review on a *de novo* basis).

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

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate 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.