



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: FEB 14 2014

Office: CALIFORNIA SERVICE CENTER

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

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

Thank you,

N. B.
Rr

Ron Rosenberg
Chief, Administrative Appeals Office

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

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the California Service Center on April 8, 2013. On the Form I-129 petition, the petitioner describes itself as a computer software development and consulting business established in 2006. In order to employ the beneficiary in a position to which it assigned the job title of "business analyst/financial analyst," the petitioner seeks to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

Upon reviewing the Form I-129 and the documentation submitted as support, the director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued a request for additional evidence (RFE). The petitioner was asked to submit documentation to establish (1) that a valid employer-employee relationship will exist with the beneficiary for the duration of the requested validity period, and (2) that the proffered position qualifies as a specialty occupation. The director provided a list of some of the types of specific evidence that could be submitted.

After reviewing the petitioner's response to the RFE, the director denied the petition, finding that the record did not establish (1) that a valid employer-employee relationship will exist with the beneficiary for the duration of the requested validity period, and (2) that the position offered to the beneficiary is a specialty occupation. Counsel for the petitioner submitted a timely Form I-290B, Notice of Appeal or Motion, on August 9, 2013, and indicated that a brief and/or additional evidence would be submitted to the AAO within 30 days. As of this date, however, the AAO has not received any additional evidence into the record. Therefore, the record is considered complete as currently constituted.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's RFE; (3) the petitioner's response to the RFE; (4) the director's notice denying the petition; and (5) the petitioner's Form I-290B. 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, and the petition will be denied.

In addition, beyond the decision of the director, the AAO finds that the evidence in the record of proceeding does not establish the petitioner's eligibility at the time of filing for the benefit sought, and that the petition was filed for non-speculative work that existed at the time of filing for the entire period requested.¹

¹ The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

I. FACTUAL AND PROCEDURAL HISTORY

The petitioner indicated on the Form I-129 that it intends to employ the beneficiary in a position designated as a business analyst/financial analyst from October 1, 2013 to August 21, 2016 on a full-time basis at a salary of \$58,302 per year. The Form I-129 indicates that the beneficiary will be employed off-site at [REDACTED]

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

The LCA also indicates that the occupational category is designated as "Financial Analysts," SOC (ONET/OES) code 13-2051 at a Level I (entry level) wage; that the period of intended employment is from August 22, 2013 to August 21, 2016; and that the petitioner will pay the beneficiary an annual salary of \$58,302.

In a support letter dated March 20, 2013, the petitioner stated that the job duties of the proffered position are as follows:

- Perform detailed cost and financial analyses[.]
- Perform specific task[s] related to rate development, including identifying, cost centers and their related expenses, and calculating recovery rates (recharge, indirect cost), prepare related reports.
- Provide technical [sic] in designing cost accounting or reporting systems and related documents.
- Perform specialized financial cash-flow analysis.
- Perform trending of financial data such as contribution analysis, head count, dashboard updates.
- Assist in reviews of financial and internal controls to determine whether such controls are adequate to meet management objectives and ensure the safeguarding of assets.
- Interact with Business Users and conducting [sic] user interviews/JAD sessions with relevant business Units and developers for the requirement clarification and brainstorming.
- Work as an Interface between the users and different teams involving [sic] in the application development for the better understanding of the business and Business Process Analysis.
- Working knowledge of requirement gathering by conducting personal interviews, developing questionnaire, brainstorming, or role playing to get a better understanding of client business processes and creating requirements traceability matrix for tracking the requirements[.]
- Correct the application manual according to the business workflow and analyze software requirements and specifications documents.

The support letter also stated that "[t]o perform the above mentioned duties, a strong background in Masters of Business Administration is required, because the personnel must understand the industrial and business systems in order to analyze the problem, [and] should also understand the nature of the job to be performed, which is in itself complex."

With the initial filing, the petitioner also submitted a copy of a letter dated March 18, 2013 from the [REDACTED]. In an unsigned cover letter dated March 31, 2013, counsel for the petitioner indicated that the [REDACTED] was submitted in lieu of an itinerary. The [REDACTED] states:

This letter is to verify that [the beneficiary], an employee of [the petitioner], is working at [REDACTED] location and has been contracting [sic] through [REDACTED] Services (TCS) to our company [REDACTED] as Business System Analyst to work on migration of [REDACTED]. This is an ongoing project and we consider this project to go on for at least 12 months & extendable.

[The petitioner] retains all control over [the beneficiary's] employment including but not limited to right to hire, fire, pay, supervise and control her work. [The petitioner] will be responsible for administering her project work time, performance review and salary payment.

The letter also states that the beneficiary's responsibilities, "[i]n her current role as Business System Analyst," are:

- 1) Analyze, Design and Review of Business and Software Requirement Specifications; Development and Testing as per the Software Development Life Cycle (SDLC), and processes.
- 2) Apply theory and principles from information systems and Unified Modeling Language (UML).
- 3) Interacting with business users to identify information needs and initiating process changes, gathering requirements and authoring User Cases, Use case diagrams, Sequence diagrams, Activity Diagrams, Collaboration Diagrams, Class diagram, State-chart diagrams, Component diagram, Deployment diagram based on UML methodology using CASE tools like MS Visio.
- 4) Conduct Joint Application design (JAD) sessions and interviews, written correspondence, reports, implementation requirements, project status, oral presentations and email, to keep executive staff and team members apprised of goals, project status, and resolving issues and conflicts.
- 5) Defining Business process, risk analysis, cost-benefit analysis, base lining acceptance criteria, deliverables and project management methods.

Regarding the minimum qualifications of the position, the letter states that the beneficiary's "role as Business System Analyst is a specialty occupation and requires at least a Master[']s degree."

On May 6, 2013, the director issued an RFE, requesting evidence (1) to establish that the

petitioner would have an employer-employee relationship with the beneficiary through the right to control the manner and means by which the product or services are accomplished, for the duration of the requested H-1B validity period, and (2) that the proffered position qualifies as a specialty occupation.

On June 28, 2013, in response to the director's RFE, counsel for the petitioner submitted the following documents:

- A copy of a document entitled "Employment Agreement" dated March 1, 2013, between the petitioner and the beneficiary. The employment agreement includes a section entitled "Job Description" and states the following:

The Employee shall be employed as a Programming / Computer Specialist, responsible for providing services to [the petitioner's] Client and/or Clients, as directed and/or required by [the petitioner], involving for example, technical assistance in design, development, implementation, programming, training, consulting, project management, and/or related data processing and services. The Employee agrees and understands that he/she is not employed by [the petitioner's] Client or Clients and that at all times Employee shall report to, and be accountable for his/her performance, solely to [the petitioner].

- A copy of a document entitled "[redacted] Contract Agreement" (hereinafter, the [redacted] Agreement states that it was made between [redacted] and the petitioner and entered into effect on December 11, 2012.

The [redacted] also includes an attached Purchase Order between [redacted] and the petitioner, dated December 11, 2012. The Purchase Order states the following:

- I. End-Client: [redacted]
- II. Scope of Responsibilities: Business System Analyst
- III. Consultant to Perform Services: [redacted]

...

VI. Start Date: 1/2/2013³ Duration: 12+ Months

- A copy of the petitioner's employee handbook.
- A copy of Form I-9, Employment Eligibility Verification, dated April 5, 2012, filled out with the beneficiary's information as the employee and the petitioner's information as the employer.

² We note that this is not the beneficiary's name.

³ In contrast, on the Form I-129, the petitioner stated that the start date for the proffered position is October 1, 2013.

- A copy of the beneficiary's 2012 Form W-4, Employee's Withholding Allowance Certificate.
- A copy of the petitioner's "Medical Insurance Opt Out Form," dated April 5, 2012, showing that the beneficiary elected to accept group coverage under the petitioner's medical insurance plan.
- A copy of the petitioner's "Performance Appraisal Form" with the beneficiary's name listed as the employee and [REDACTED] listed as the client.
- Copies of computer screenshots with the header "Integrated Project Management System, [REDACTED] The screenshots, although somewhat illegible, appear to be of a time recording/billing program. The petitioner submitted fourteen pages of screenshots, highlighting the beneficiary's name as the User and [REDACTED] as the Project Name when this information appears on the screen.
- Pictures of the petitioner's office space.
- The petitioner's promotional brochure.
- A copy of the petitioner's unsigned 2012 New Jersey Corporation Business Tax Return.
- A copy of the petitioner's unsigned 2012 Form 1120S, U.S. Income Tax Return for an S Corporation.
- A duplicate copy of the [REDACTED] dated March 18, 2013, which was submitted with the original petition.
- A copy of a document entitled, "[REDACTED]" dated June 21, 2013, by [REDACTED]

After reviewing the evidence in the record, including the petitioner's RFE response, the director denied the petition finding that the petitioner had failed to establish that it would have an employer-employee relationship with the beneficiary for the duration of the requested validity period, and that the proffered position qualifies as a specialty occupation.

On appeal, counsel for the petitioner submitted a statement asserting that the director erred in her findings, but did not submit a brief or any additional evidence.

II. LAW AND ANALYSIS

A. Inconsistencies in the Petition

Upon review of the entire record of proceeding and the totality of the evidence presented, the AAO notes, as a preliminary matter, that there are numerous inconsistencies and discrepancies in

the petition and supporting documents, which undermine the petitioner's credibility. When a petition includes numerous discrepancies, those inconsistencies raise serious concerns about the veracity of the petitioner's assertions. Accordingly, the AAO will discuss these issues first before addressing the grounds of ineligibility identified by the director.

Specifically, in this matter the job description provided by the petitioner in the support letter and the job description provided by [REDACTED] in a letter dated March 18, 2013 are inconsistent with one another. Most notably, the job description from [REDACTED] does not contain duties related to a financial analyst position. We also note that the job description and title stated in the employment agreement are inconsistent with the information regarding the proffered position in the petitioner's support letter and the information provided in the [REDACTED] letter. In addition, the consultant named in the Purchase Order is not the beneficiary. No explanation for the inconsistencies was provided. Thus, the AAO must question the credibility and the accuracy of the later assertions made by the petitioner and its counsel in support of the petition.⁴

Furthermore, the AAO finds that there are various inconsistencies in the record of proceeding with regard to the beneficiary's dates of intended employment. For instance, in the LCA, the petitioner indicates that the dates of intended employment for the proffered position are August 22, 2013 to August 21, 2016. The Form I-129 indicates that the dates of intended employment are October 1, 2013 to August 21, 2016. As previously noted, however, the Purchase Order indicates that the project will start on January 2, 2013 and run from January 2, 2013 to January 2, 2014 with possible extension. No explanation for the inconsistencies was provided.

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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* In this case, the discrepancies and errors catalogued above undermine the credibility of the petition.

Furthermore, an inaccurate statement anywhere on the Form I-129 or in the evidence submitted in connection with the petition mandates its denial. *See* 8 C.F.R. § 214.2(h)(10)(ii) (stating in pertinent part that an H "petition will be denied if it is determined that the statements on the petition were inaccurate"); *see also* 8 C.F.R. § 103.2(b)(1) (clarifying that "[a]ny evidence submitted in connection with a [petition] is incorporated into and considered part of the [petition]"). Accordingly, based on the inaccurate statements identified in the petition, *supra*, the AAO here finds that for this reason alone, and independent of the other issues herein, this petition may not be approved.

B. Lack of Standing to File the Petition as a United States Employer

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).

The AAO will now address the director's first basis for denying the petition, namely whether the petitioner has established that it meets the regulatory definition of a "United States employer" as that term is defined in the Code of Federal Regulations at 8 C.F.R. § 214.2(h)(4)(ii). The AAO will 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 at 8 C.F.R. § 214.2(h)(4)(ii) as follows:

United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) *Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee;* and
- (3) Has an Internal Revenue Service Tax identification number.

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

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

part," i.e., the H-1B beneficiary, and that this relationship be evidenced by the employer's ability to "hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer").

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

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

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

Darden, 503 U.S. at 323-324 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. at 751-752); see also *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 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.⁵

⁵ While the *Darden* court considered only the definition of "employee" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(6), and did not address the definition of

Specifically, the regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to engage a person to work within the United States, and to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee" or "employer-employee relationship" combined with the agency's otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition" or, more importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. *Cf. Darden*, 503 U.S. at 318-319.⁶

"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).

⁶ To the extent the regulations are ambiguous with regard to the terms "employee" or "employer-employee relationship," the agency's interpretation of these terms should be found to be controlling unless "plainly

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).⁷

Therefore, in considering whether or not one will be an "employee" in an "employer-employee relationship" with a "United States employer" for purposes of H-1B nonimmigrant petitions, USCIS must focus on the common-law touchstone of "control." *Clackamas*, 538 U.S. at 450; see also 8 C.F.R. § 214.2(h)(4)(ii) (defining a "United States employer" as one who "has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise *control* the work of any such employee . . ." (emphasis added)).

The factors indicating that a worker is or will be an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. *Darden*, 503 U.S. at 323-324; *Clackamas*, 538 U.S. at 445; see also *Restatement (Second) of Agency* § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. See *Clackamas*, 538 U.S. at 445; see also *New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1) (adopting a materially identical test and indicating that said test was based on the *Darden* decision); see also *Defensor v. Meissner*, 201 F.3d 384, 388 (5th Cir. 2000) (determining that hospitals, as the recipients of beneficiaries' services, are the "true employers" of H-1B nurses under 8 C.F.R. § 214.2(h), even though a medical contract service agency is the actual petitioner, because the hospitals ultimately hire, pay, fire, supervise, or otherwise control the work of the beneficiaries).

It is important to note, however, that the factors listed in *Darden* and *Clackamas* are not exhaustive and must be evaluated on a case-by-case basis. Other aspects of the relationship between the parties relevant to control may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met; however, the fact finder must weigh and compare a combination of the factors in analyzing the facts of each individual case. The determination must be based on all of the circumstances in the relationship between the parties, regardless of whether the parties refer to it as an employee or as an independent contractor relationship. See *Clackamas*, 538 U.S. at 448-449; *New Compliance Manual* at § 2-III(A)(1).

erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359, 109 S.Ct. 1835, 1850, 104 L.Ed.2d 351 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945)).

⁷ That said, there are instances in the Act where Congress may have intended a broader application of the term "employer" than what is encompassed in the conventional master-servant relationship. See, e.g., section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F) (referring to "unaffiliated employers" supervising and controlling L-1B intracompany transferees having specialized knowledge); section 274A of the Act, 8 U.S.C. § 1324a (referring to the employment of unauthorized aliens).

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

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

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

Contrary to counsel's assertions on appeal, the documents in the record do not indicate that the petitioner will have a valid employer-employee relationship with the beneficiary. Specifically, the record lacks documentation, such as work orders, contracts or purchase orders, establishing the relationship between the petitioner and the ultimate end-client. As it stands, the record includes only an agreement and purchase order between the petitioner and [REDACTED]. However, according to the information provided by [REDACTED] the beneficiary will be subcontracted to [REDACTED], which will further subcontract the beneficiary to [REDACTED]. The absence of documentation governing the relationship between the numerous parties involved in the beneficiary's employment precludes the AAO from determining that the petitioner will have an employer-employee relationship with the beneficiary. On appeal, counsel for the petitioner states the following:

[T]he Petitioner has no privity of contract with the end user, [REDACTED]. The letter issued by the subcontractor, ([REDACTED] who has a contract with [REDACTED] should be given great weight and if the Adjudicator had any doubts he/she should/could have contacted them to check the veracity of the Petitioner[']s assertions.

The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). If a required document does not exist or cannot be obtained, the petitioner must demonstrate this and submit secondary evidence pertinent to the facts at issue. *Id.* Where a record does not exist, the petitioner must submit an original written statement from the relevant government or other authority establishing this as fact. The statement must indicate the reason the record does not exist and indicate whether similar records for the time and place are available. 8 C.F.R. § 103.2(b)(2)(ii). Thus, there is insufficient documentary evidence in the record corroborating what the beneficiary would do, where the beneficiary would work, and the availability of work for the beneficiary for the entire requested period of employment. 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)).

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

The evidence of record, therefore, is insufficient to establish that the petitioner qualifies as a "United States employer," as defined by 8 C.F.R. § 214.2(h)(4)(ii). Merely claiming that the beneficiary is the petitioner's employee and that the beneficiary will work on a project for the petitioner at [REDACTED] location does not establish that the petitioner exercises any substantial control over the beneficiary and the substantive work that she would perform. Without documentary evidence supporting the petitioner's claims, the petitioner has not established eligibility in this matter. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190).

C. Speculative Employment and Failure to Establish Eligibility at the Time of Filing

Moreover, beyond the decision of the director, the evidence submitted fails to establish non-speculative employment for the beneficiary for the entire period requested. Although the petitioner requested, on the Form I-129, that the beneficiary be granted H-1B classification from October 1, 2013 to August 21, 2016, there is insufficient documentation regarding work for the beneficiary for the duration of the requested period. As previously noted, the Purchase Order states that the project's start date was January 2, 2013 and that the duration of the project is "12+ months," indicating that the project is scheduled to run from January 2, 2013 to January 2, 2014. The March 18, 2013 letter from [REDACTED] also states "we consider this project to go on for at least 12 months & extendable." In addition, the Purchase Order names another individual as the consultant and therefore does not establish the availability of work for the beneficiary, even for the timeframe noted above.

Furthermore, the AAO finds that, while the Purchase Order may have been extendable at the time the petition was filed, it was not extended prior to the date the petition was filed. The petitioner also did not submit documentary evidence regarding any additional work for the beneficiary. Thus, the petitioner has failed to establish that the petition was filed for non-speculative work for the beneficiary that existed *as of the time of the petition's filing*, for the entire period requested. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). Thus, even if it were found that the petitioner would be the beneficiary's United States employer as that term is defined at 8 C.F.R. §

214.2(h)(4)(ii), the petitioner has not demonstrated that it would maintain such an employer-employee relationship with the beneficiary for the duration of the period requested.⁸

Based on the above, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii). Furthermore, the petition must also be denied due to the petitioner's failure to establish eligibility at the time of filing and to proffer non-speculative employment to the beneficiary. Accordingly, for all of these reasons, the petition must be denied.

D. Failure to Establish that Proffered Position Qualifies as a Specialty Occupation

The AAO will now address the director's second basis for denying the petition, namely that the petitioner has not established that the proffered position is a specialty occupation. Based upon a complete review of the record of proceeding, the AAO agrees with the director and finds that the evidence fails to establish that the proffered position qualifies as a specialty occupation.

For an H-1B petition to be granted, the petitioner must also provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. 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 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190). 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).

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

⁸ The agency made clear long ago that speculative employment is not permitted in the H-1B program. A 1998 proposed rule documented this position as follows:

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

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

occupation that requires:

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

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

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

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

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise

interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

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

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

As a preliminary matter, the petitioner's claim that a master's degree in "business administration" is a sufficient minimum requirement for entry into the proffered position is inadequate to establish that the proposed position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

To prove that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that

the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As discussed *supra*, 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. Although a general-purpose master'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 139, 147 (1st Cir. 2007).¹

Again, the petitioner in this matter claims that the duties of the proffered position can be performed by an individual with only a general-purpose degree, i.e., a degree in business administration. This assertion is tantamount to an admission that the proffered position is not in fact a specialty occupation. The director's decision must therefore be affirmed and the petition denied on this basis alone.

When determining whether a position is a specialty occupation, the AAO must look at the nature of the business offering the employment and the description of the specific duties of the position as it relates to the particular employer. To ascertain the intent of a petitioner, USCIS looks to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

One consideration that is fundamental to the issue of whether a proffered position qualifies as a specialty occupation, is whether the petitioner has provided substantive information and supportive documentation to establish that the beneficiary would be performing services for the type of position for which the petition was filed (here, a business analyst/financial analyst). In the instant case, the proffered position has been inconsistently described throughout the record. The job title and duties listed in the petitioner's support letter, [REDACTED] letter, and employment contract are inconsistent. Specifically, while the petitioner's support letter characterizes the position as a combination of a business analyst and a financial analyst, the other documents in the record do not support the petitioner's assertion that the proffered position includes the duties of a financial analyst, but instead describe the position as a business systems analyst, with corresponding duties. The AAO finds that the above noted differences with regard to the characterization of the proffered position are materially inconsistent and constitute attestations about the nature of the proffered position that are unreliable because of their materially conflicting information. 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). Also, doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

Furthermore, as recognized in *Defensor v. Meissner*, it is necessary for the end-client to provide sufficient information regarding the proposed job duties to be performed at its location(s) in order to properly ascertain the minimum educational requirements necessary to perform those duties. *See Defensor v. Meissner*, 201 F.3d at 387-388. In other words, as the nurses in that case would provide services to the end-client hospitals and not to the petitioning staffing company, the petitioner-provided job duties and alleged requirements to perform those duties were irrelevant to a specialty occupation determination. *See id.* Here, the record of proceeding in this case is similarly devoid of sufficient information from the end-client, [REDACTED] regarding the specific job duties to be performed by the beneficiary for that company. Specifically, there is no documentation or description of the position from [REDACTED] itself. The petitioner's submission of the position description from the middle vendor, [REDACTED], is not sufficient to establish the nature of the position to be performed at the ultimate end-client, [REDACTED].

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.

Another such consideration that is fundamental to the issue of whether a proffered position qualifies as a specialty occupation, is whether the petitioner has established that, at the time of the petition's filing, it had secured non-speculative work for the beneficiary that accords with the petitioner's claims about the nature of the work that the beneficiary would perform in the proffered position. Although the petitioner requested, on the Form I-129, that the beneficiary be granted H-1B classification from October 1, 2013 to August 21, 2016, there is insufficient documentation regarding work for the beneficiary for the duration of the requested period. As previously noted, the Purchase Order states that the project's start date was January 2, 2013 and that the duration of the project is "12+ months," indicating that the project is scheduled to run from January 2, 2013 to January 2, 2014. The March 18, 2013 letter from [REDACTED] also states "we consider this project to go on for at least 12 months & extendable." Furthermore, the Purchase Order names another individual as the consultant and therefore does not establish the availability of work for the beneficiary, even for the timeframe noted above. Moreover, the AAO notes that the petitioner did not submit probative evidence establishing any additional projects or specific work for the beneficiary for the remainder for the requested H-1B validity period, through August 21, 2016.

Therefore, the AAO finds that the record lacks evidence (1) corroborating that the petitioner has work that exists as an ongoing endeavor generating non-speculative employment for the

beneficiary's services for the period of employment specified in the Form I-129; (2) establishing the nature and duties of the work that the beneficiary would perform at the end-client; and (3) establishing that the beneficiary's duties, as described, would actually require the theoretical and practical application of at least a baccalaureate level of a body of highly specialized knowledge in a specific specialty, or its equivalent, as required by the Act.

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

As the grounds discussed above are dispositive of the petitioner's eligibility for the benefit sought in this matter, the AAO will not address and will instead reserve its determination on the additional issues and deficiencies that it observes in the record of proceeding with regard to the approval of the H-1B petition.

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 145 (noting that the AAO conducts appellate review on a *de novo* basis).

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

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

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