



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

DATE: FEB 21 2014 OFFICE: CALIFORNIA SERVICE CENTER [Redacted]

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

ON BEHALF OF PETITIONER:

[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 enterprise engaged in technology sourcing consulting that was established in 1993. In order to employ the beneficiary in what it designates as an operations research analyst position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner failed to provide a certified LCA that corresponds to the petition. On appeal, counsel for the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's requests for evidence (RFE); (3) the petitioner's responses to the RFEs; (4) the notice of decision; and (5) the Form I-290B and supporting materials. 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.

I. PROCEDURAL AND FACTUAL BACKGROUND

In the petition signed on March 28, 2013, the petitioner indicates that it wishes to employ the beneficiary as an operations research analyst on a full-time basis. In addition, the petitioner indicates that the beneficiary will work at [REDACTED]. The petitioner did not request any other work sites.

In the support letter dated March 29, 2013, the petitioner states that the beneficiary will be responsible for the following duties:

Our Operations Research Analyst will manage projects and perform detailed data and business process analysts – along with the following:

- Interface with clients day-to-day[;]
- Manages technical/functional content, budgets and staff resources[;]
- Performs detailed data and business process analysis[;]
- Prepares and delivers presentations to client senior management[;]

- Researches, conduct creative analysis, synthesizes and reports on business issues[;]
- Facilitates and/or participates in client meetings and working sessions[;]
- Support clients in all aspects of their key business transactions[;]
- Assess vendor fragmentation across clients' enterprises with specific functional areas[;]
- Generates requests for proposals, assesses vendors, negotiate contracts and program management implementation of new services[;]
- Evaluates client telecom infrastructures and recommends sourcing approaches[.] Evaluates client supply chain processes and systems to generate improvement recommendations[;]
- Performs project portfolio management and IT governance assessments[;]
- Assists the program management of critical IT transformation initiatives[;]
- Develops operation and technical implementation plans[;]
- Contributes to the development of proposals for new projects[; and]
- Lead, coach and develop junior staff.

In addition, the petitioner claims that "[t]he above position is a professional one requiring a highly skilled individual requiring a Master's degree in Operations research, Information Systems management, or Management Science and Engineering." The petitioner further states that "[t]he prerequisites for the offered position clearly mark it as a professional one requiring a person of distinguished merit and ability."¹

¹ The petitioner claims that the proffered position is "a professional one requiring a person of distinguished merit and ability." However, to clarify, the AAO notes that the term "distinguished merit and ability" was defined in the regulations as "one who is a member of the professions . . . or who is prominent in his or her field." See 8 C.F.R. § 214.2(h)(4) (1991). The *Immigration Act of 1990* ("IMMACT 90") deleted the term "distinguished merit and ability" from the general H-1B description and replaced it with the requirement that the position be a "specialty occupation." Pub. L. No. 101-649, 104 Stat. 4978, 5020. The implementation of this change occurred on April 1, 1992. The *Miscellaneous and Technical Immigration and Naturalization Amendments of 1991* ("MTINA"), which was enacted on December 2, 1991, modified the H-1B definition to include fashion models of distinguished merit and ability. Pub. L. No. 102-232, 105 Stat. 1733. While the term "distinguished merit and ability" is still used with regard to fashion models, it must be noted that the term has not been applicable to the general H-1B classification ("specialty occupations") for over 20 years.

With the initial petition, the petitioner submitted a copy of the beneficiary's academic credentials and related documentation regarding the beneficiary. The documentation indicates that the beneficiary received (1) a Master of Science degree in Management Science and Engineering from [REDACTED] and (2) a Bachelor of Science degree in Systems Engineering from The

In support of the petition, the petitioner also submitted several documents, including the following:

- A Labor Condition Application (LCA).² The occupational category is designated as "Operations Research Analysts" at a Level II wage level. The LCA lists the place of employment as [REDACTED] (San Francisco Office, Metropolitan Division).³ No other work sites are provided.
- Printouts from the petitioner's website. The documentation indicates that the petitioner's San Francisco office is located at 455 Market Street, Suite 1220, San Francisco, CA.
- An offer of employment letter from the petitioner to the beneficiary, along with an Attachment A – Confidentiality Agreement and Attachment B – Non-Solicitation Agreement. The letter is dated November 16, 2010. The documents have not been signed by the beneficiary.
- Letters (dated February 22, 2013 and February 28, 2012) from the petitioner to the beneficiary regarding the beneficiary's potential compensation.

² The instructions to the LCA (ETA Form 9035 & 9035E) state the following:

It is important for the employer to define the place of intended employment with as much geographic specificity as possible. The place of employment address listed . . . must be a physical location and cannot be a P.O. Box. The employer may use this section to identify up to three (3) physical locations and corresponding prevailing wages covering each location where work will be performed and the electronic system will accept up to 3 physical locations and prevailing wage information.

Thus, the instructions require that the employer list the place of intended employment "with as much geographic specificity as possible" and, further notes that the employer may identify up to three physical locations, including street address, city, county, state, and zip code, where work will be performed. Additionally, the U.S. Department of Labor (DOL) regulations state that "[e]ach LCA *shall state . . . [t]he places of intended employment.*" 20 C.F.R. § 655.730(c)(4) (emphasis added).

³ With certain limited exceptions, the applicable DOL regulations define the term "place of employment" as the worksite or physical location where the work actually is performed by the H-1B nonimmigrant. See 20 C.F.R. § 655.715. The Office of Management and Budget established Metropolitan Statistical Areas to provide nationally consistent geographic delineations for collecting, tabulating and publishing statistics. See 44 U.S.C. § 3504(e)(3); 31 U.S.C. § 1104(d); Exec. Order No. 10,253, 16 Fed. Reg. 5605 (June 11, 1951); 75 Fed. Reg. 37,246, 37,246-252 (2010) (discussing and defining, *inter alia*, Metropolitan Statistical Areas).

- An unsigned Benefits Welcome Letter from the petitioner to the beneficiary. The letter is dated September 1, 2011.
- The beneficiary's Year End Performance Evaluation – FY2012. Notably, the document is not signed by the beneficiary, the reviewer, or the partner.
- A Statement of Work (SOW) submission from the petitioner to [REDACTED], along with an Attachment A. The SOW is dated August 21, 2012. The project team does not include the beneficiary. The project timeline is a 12-week period. The SOW is not signed by either the petitioner or [REDACTED].
- A SOW from the petitioner to [REDACTED], dated May 6, 2012. The document indicates that the beneficiary will serve as a project analyst. The project timeline is a 6-week period. In addition, the document indicates that "[t]he team will be predominantly based in [REDACTED] campus, with limited travel required to additional locations." The SOW is not signed by either the petitioner or [REDACTED].
- A SOW from the petitioner to [REDACTED], along with an Attachment A. The SOW is dated October 12, 2011. The document indicates that "[the beneficiary] will perform the activities in this SOW." In addition, the document indicates that "[the beneficiary], who holds a master's degree in Engineering Management, will support [REDACTED] in the analysis of the data." The duration of the project is 2-weeks or less. The SOW is not signed by either the petitioner or [REDACTED].
- A SOW from the petitioner to [REDACTED] of North America, along with an Attachment A. The SOW is dated October 6, 2012. The beneficiary is not listed a part of the project team. The timeline is a 7-week period. The SOW is not signed by either the petitioner or [REDACTED] Company of North America.
- Three SOWs (SOW #4, SOW #6, and SOW #9) between the petitioner and [REDACTED]. The SOWs have not been signed by either the petitioner or [REDACTED].

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on April 24, 2013. The director outlined the specific evidence to be submitted.

On May 8, 2013, counsel responded to the RFE. In a letter dated May 7, 2013, submitted in response to the RFE, counsel stated the following:

Please note that the various Beneficiary's Statement of Work (SOW's) previously submitted were prepared from September 29, 2012 to the present of which the

Beneficiary had already worked on- pursuant to his EAD which is valid to February 28, 2014. Please refer to the two new SOW's below.⁴

* * *

- *The name of the new project(s) the beneficiary is assigned to:*

[Redacted]

- *The addresses where the beneficiary perform the work:*

[Redacted]

* * *

- *The contracted employment date:*

April 15, 2013 – June 21, 2013

In response to the RFE, counsel submitted a SOW from the petitioner to [Redacted]. The SOW is dated April 4, 2013. The document indicates that "[t]he work is targeted to commence in the middle of April and be completed by the end of June 2013." Notably, the document is not signed by either the petitioner or [Redacted]. In addition, counsel submitted copies of documents previously submitted with the initial petition.

The director found the evidence insufficient to establish eligibility for the benefit sought, and issued

⁴ In the April 24, 2013 letter, counsel stated that two new SOWs were included with the response to the RFE. However, upon complete review of the record of proceeding, the AAO finds that counsel submitted only one new SOW. The SOW is from the petitioner to [Redacted], dated April 4, 2013. The AAO observes that counsel also submitted an SOW from the petitioner to [Redacted] of North America, dated August 21, 2012. However, this document was previously submitted with the initial petition.

a second RFE on May 15, 2013. The director outlined the specific evidence to be submitted.

On June 3, 2013, counsel responded to the RFE. In a letter dated May 30, 2013, submitted in response to the RFE, counsel stated, "No other LCA's are submitted at this time since the locations of future work to be performed by the Beneficiary in H-1B status will not start until October 1, 2013 and his place of employment has not been determined at this time." Counsel also stated that "[t]he nature of the petitioners [sic] business is such that they cannot predict where their employees will work that far in advance." In addition, counsel claims that "[o]nce the locations are established an LCA will be submitted for the new locations."

Further, counsel asserts that the petitioner has the ability to provide full-time employment to 50 employees. In support of this assertion, counsel submitted the following documents: (1) excerpts of the petitioner's Forms 1065, U.S. Return of Partnership Income for 2010, 2011, and 2012;⁵ (2) lists of the petitioner's clients from 2010, 2011, and 2012; (3) the petitioner's Quarterly Wage Report for the 1st quarter of 2013;⁶ (4) copies of SOWs previously submitted with the initial petition and in response to the first RFE – which are labeled as "(Are Pursuing)";⁷ and (5) copies of SOWs between the petitioner and [REDACTED] – which are labeled as "(Already Pursued)."

The director reviewed the response, and found the evidence insufficient to establish eligibility for the benefit sought. The director denied the petition on June 7, 2013. Counsel submitted an appeal of the denial of the H-1B petition. With the appeal, counsel submitted a brief, along with copies of documents previously submitted with the initial petition and in response to the director's RFEs.

II. ISSUES NOT ADDRESSED BY THE DIRECTOR'S DECISION

A. Employer-Employee Relationship

The AAO reviewed the record of proceeding in its entirety. As a preliminary matter, the AAO will discuss an issue, beyond the decision of the director that precludes the approval of the petition.⁸ More specifically, the petitioner has not established that it meets the regulatory definition of a United States employer. 8 C.F.R. § 214.2(h)(4)(ii). Specifically, the petitioner has not established that it will have "an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." *Id.*

⁵ The AAO observes that the petitioner did not submit all of the pages of the Forms 1065, U.S. Return of Partnership Income for 2010, 2011, and 2012. No explanation for failing to provide the entire documents was provided. Moreover, the 2010 and 2012 tax returns are not signed.

⁶ The reports are for the following states: Virginia, Illinois, and Massachusetts.

⁷ As previously noted, the SOWs have not been signed by the petitioner and the companies.

⁸ The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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

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

The term "United States employer" is defined in the Code of Federal Regulations at 8 C.F.R. § 214.2(h)(4)(ii) as follows:

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

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

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

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

Neither the legacy Immigration and Naturalization Service ("INS") nor USCIS defined the terms "employee" or "employer-employee relationship" by regulation for purposes of the H-1B visa classification, even though the regulation describes H-1B beneficiaries as being "employees" who

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

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

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

Darden, 503 U.S. at 323-324 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. at 751-752); see also *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 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.⁹

⁹ 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

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 318-319.¹⁰

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.

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).

¹⁰ 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))).

§ 214.2(h).¹¹

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

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

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

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

¹¹ 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).

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 matter, the petitioner has provided inconsistent information regarding the beneficiary's work site. For instance, in the Form I-129 (page 4), the petitioner provides the following information:

Will the beneficiary work off-site? No Yes

However, in the Form I-129 (page 19), the petitioner indicates the following:

Part D. Off-Site Assignment of H-1B Beneficiaries

No Yes a. The beneficiary of this petition will be assigned to work at an off-site location for all or part of the period for which H-1B classification is sought.

In the Form I-129 and LCA, the petitioner indicates that the beneficiary will work at its offices located at [REDACTED]. The petitioner also provided documentation indicating that it provides services off-site.

Thereafter, the petitioner was provided with an opportunity to clarify the location of the beneficiary's work site(s). However, in response to the director's first RFE, counsel indicated that the beneficiary had been assigned to a new project located at [REDACTED]. Counsel continued by stating that the project would end prior to the requested H-1B start date. Subsequently, in a letter dated May 30, 2013, submitted in response to the second RFE, counsel stated that "the Beneficiary in H-1B status will not start until October 1, 2013 and his place of employment has not been determined at this time."

Upon review of the record, the AAO notes that the petitioner also has not established the duration of the relationship between the parties. The petitioner submitted Statements of Work (SOW) that it prepared for several companies. However, none of the documents are signed and there is a lack of documentary evidence demonstrating that the parties agreed to the terms as stated in the SOWs.

¹² Both worksites are located in metropolitan statistical areas differing from the worksite listed on the petition and LCA.

Moreover, while the SOWs provide general descriptions as to the work to be performed by the petitioner, the documentation does not specify the beneficiary's duties and responsibilities. The SOWs do not establish that H-1B caliber work exists for the beneficiary, and the petitioner did not submit probative evidence establishing other projects or specific work for the beneficiary.

Although the petitioner requested the beneficiary be granted H-1B classification from October 1, 2013, to September 12, 2016, there is a lack of substantive documentation regarding any work for the duration of the requested period. Rather than establish non-speculative employment for the beneficiary for the entire period requested, counsel claims that there will be work available for the beneficiary beginning on October 1, 2013. However, the petitioner did not submit probative evidence in support of counsel's claim. Moreover, counsel's statement is not corroborated by documentation indicating that an ongoing project exists that will generate employment for the beneficiary's services (e.g., documentary evidence regarding the project scope, staging, time and resource requirements; supporting contract negotiations; documentation regarding the business analysis and planning for specific work; statement of work; work order).

The documentation provided appears to support the assertion that the petitioner is engaged in some business activities. However, the lack of evidence relevant to the beneficiary in the context of the petitioner's normal staffing operations leaves unanswered a number of material questions, such as the location where the beneficiary will be employed, the duration of the work, whether the work would be continuous, the type and level of work to be performed, the actual duties of the position, and who would control that work. Thus, the record does not demonstrate that the petitioner will maintain an employer-employee relationship for the duration of the validity of the requested period.¹³ 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).

Further, in the instant case, the petitioner claims that it will pay the beneficiary's salary. The AAO acknowledges that the method of payment of wages can be a pertinent factor to determining the petitioner's relationship with the beneficiary. However, while such items such as wages, contributions, federal and state income tax withholdings, and other benefits are relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., where will the work be located, who will provide the instrumentalities and tools, who will oversee and direct the work of the beneficiary, 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.

¹³ The H-1B classification is not intended as a vehicle 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. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248.

For H-1B classification, the petitioner is required to submit written contracts between the petitioner and the beneficiary, or if there is no written agreement, a summary of the terms of the oral agreement under which the beneficiary will be employed. The regulation at 8 C.F.R. § 214.2(h)(4)(iv) states, in pertinent part, the following:

(A) General documentary requirements for H-1B classification in a specialty occupation. An H-1B petition involving a specialty occupation shall be accompanied by:

* * *

(B) Copies of any written contracts between the petitioner and beneficiary, or a summary of the terms of the oral agreement under which the beneficiary will be employed, if there is no written contract.

With the initial petition, the petitioner provided an offer of employment letter, along with an Attachment A – Confidentiality Agreement and an Attachment B – Non-Solicitation Agreement. The letter is dated November 16, 2010. The AAO observes that the offer of employment letter is dated over three years prior to the filing of the H-1B petition and indicates that the position offered to the beneficiary is an analyst. In addition, the offer of employment letter and attachments are not signed by the beneficiary. The petitioner also submitted an unsigned Benefits Welcome Letter for the beneficiary, dated September 1, 2011. However, a substantive determination cannot be inferred regarding these "benefits" as no further information regarding the plan, including eligibility requirements, was provided to USCIS. The offer of employment letter and the Benefits Welcome Letter do not provide any level of specificity as to the duties and the requirements for the proffered position. While the letters may provide some insights into the relationship of a petitioner and a beneficiary, it must be noted again that 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.

When making a determination of whether the petitioner has established that it will have an employer-employee relationship with the beneficiary, the AAO looks at a number of factors, including the beneficiary's role in hiring and paying assistants. Upon review of the record of proceeding, the petitioner did not provide information on this issue.

Additionally, the AAO considers information regarding who will provide the instrumentalities and tools required to perform the duties of the position. The petitioner provided letter dated September 1, 2011, stating that it would provide the beneficiary with a computer. However, the letter is unsigned, and dated 19 months prior to the H-1B submission. The petitioner did not further address or provide any further documentation on this issue.

In addition, a key element in this matter is who would have the ability to hire, fire, supervise, or otherwise control the work of the beneficiary for the duration of the H-1B petition. In the May 7, 2013 letter, submitted in response to the director's first RFE, counsel indicates that the beneficiary will be supervised by [REDACTED] for the petitioning company. Although the petitioner

indicated that the beneficiary has been serving in the proffered position since September 2011, it must be noted that the record of proceeding does not contain probative evidence to establish that [REDACTED] has supervised or will supervise the beneficiary. There is a lack of documentation establishing that [REDACTED] has supervised, directed, guided or even contacted the beneficiary.

The petitioner also submitted a copy of its Year End Performance Evaluation – FY2012 for the beneficiary. The AAO observes that the evaluation is not signed by the beneficiary, the reviewer, and the partner. Notably, the record does not contain any information from the petitioner regarding the purpose of the performance report; the methods used for accessing and evaluating the beneficiary's performance; how work and performance standards are established; and the criteria for determining bonuses and salary adjustments. Although the petitioner provided a brief description of its performance review process, it must be noted that the letter lacks information regarding how the petitioner determines and rates an employee on these criteria, as well as whether the petitioner measures the details of how the work is performed or the end result. Further, the petitioner did not provide the identity of the reviewer and partner who would perform the evaluation. Thus, the petitioner has failed to satisfactorily establish the probative value and relevancy of the document to the matter here.

The AAO finds that, while the petitioner may be able to eventually locate some work for the beneficiary, it 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*.¹⁴ There is insufficient documentary evidence in the record corroborating the availability of work for the beneficiary for the requested period of employment and, consequently, what the beneficiary would do, where the beneficiary would work, as well as how this would impact the circumstances of his relationship with the petitioner. USCIS regulations affirmatively require a petitioner to establish eligibility for the

¹⁴ The agency made clear long ago that speculative employment is not permitted in the H-1B program. For example, 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).

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). Moreover, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act. The petitioner has failed to establish that, at the time the petition was submitted, it had located H-1B caliber work for the beneficiary that would entail performing the duties as described in the petition, and that was reserved for the beneficiary for the duration of the period requested.

Upon complete review of the record of proceeding, the AAO finds that the evidence in this matter is insufficient to establish that the petitioner qualifies as a United States employer, as defined by 8 C.F.R. § 214.2(h)(4)(ii). Merely claiming that the petitioner exercises control over the beneficiary, without evidence supporting the claim, does not establish eligibility in this matter. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (*citing Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). 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).

Moreover, there is a lack of probative evidence to support the petitioner's assertions. It cannot be concluded, therefore, that the petitioner has satisfied its burden and established that it qualifies as a United States employer with standing to file the instant petition in this matter. *See* section 214(c)(1) of the Act (requiring an "Importing Employer"); 8 C.F.R. § 214.2(h)(2)(i)(A) (stating that the "United States employer . . . must file" the petition); 56 Fed. Reg. 61111, 61112 (Dec. 2, 1991) (explaining that only "United States employers can file an H-1B petition" and adding the definition of that term at 8 C.F.R. § 214.2(h)(4)(ii) as clarification). Accordingly, beyond the director's decision, the petition must be denied on this basis.

B. Specialty Occupation

Beyond the decision of the director, the AAO will enter an additional basis for denial, i.e., 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.

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 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.

Moreover, when determining whether a position is a specialty occupation, USCIS 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."

When determining whether a proffered position qualifies as a specialty occupation, USCIS must determine, *inter alia*, whether the petitioner (1) has provided sufficient evidence to establish that the beneficiary will perform the duties of the proffered position as stated in the petition; and (2) has established that, at the time of filing, it had secured non-speculative work for the beneficiary that is in accordance with the petitioner's claims about the nature of the work that the beneficiary would perform in the proffered position.

The petitioner in this matter provided a list of the beneficiary's proposed duties. As observed above, USCIS in this matter must review the actual duties the beneficiary will be expected to perform to

ascertain whether those duties require at least a baccalaureate degree in a specific specialty, or its equivalent, as required for classification as a specialty occupation. To accomplish that task in this matter, USCIS must analyze the actual duties in conjunction with the specific project(s) to which the beneficiary will be assigned. To allow otherwise, results in generic descriptions of duties that, while they may appear to comprise the duties of a specialty occupation, are not related to any actual services the beneficiary is expected to provide.

In that regard, the AAO has reviewed the information in the record regarding the petitioner's technology sourcing consulting business. Upon review of this information, the AAO finds that the record of proceeding lacks documentation regarding the petitioner's business activities and the actual work that the beneficiary will perform to sufficiently substantiate the claim that the petitioner has H-1B caliber work for the beneficiary for the period of employment requested in the petition. That is, the record does not include any work product or other documentary evidence to confirm that the petitioner has ongoing projects to which the beneficiary will be assigned. Thus, the petitioner has not provided the underlying documentation necessary to corroborate that the beneficiary would perform the claimed duties set out in the petitioner's letter of support. As previously noted, 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)). Furthermore, as discussed, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). Evidence that the petitioner creates after the issuance of an RFE is not considered independent and objective evidence for establishing eligibility for the benefit sought.

Here, as previously discussed, the petitioner has failed to establish that the petition was filed for non-speculative work for the beneficiary that existed as of the time the H-1B petition was filed. The petitioner did not submit probative evidence corroborating that, when the petition was filed, the beneficiary would be assigned to perform services pursuant to any specific contract(s), work order(s), and/or statement(s) of work for the requested validity period and/or that the petitioner had a need for the beneficiary's services during the requested validity dates. 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 requested period of employment. 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. 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 (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).

Without statements of work describing the specific duties the petitioner requires the beneficiary to perform, as those duties relate to specific projects, USCIS is unable to discern the nature of the position and whether the position indeed requires the theoretical and practical application of a body of highly specialized knowledge attained through a baccalaureate program. Again, going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of

proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. Without a meaningful job description within the context of non-speculative employment, the petitioner may not establish any of the alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Thus, based upon a complete review of the record of proceeding, the AAO finds that the petitioner has failed to establish (1) the substantive nature and scope of the beneficiary's employment; (2) the actual work that the beneficiary would perform; (3) the complexity, uniqueness and/or specialization of the tasks; and/or (4) the correlation between that work and a need for a particular educational level of highly specialized knowledge in a specific specialty (or its equivalent). Consequently, this precludes a determination that the petitioner's proffered position qualifies as a specialty occupation under the pertinent statutory and regulatory provisions.

The AAO acknowledges the petitioner's assertion that the position of operations research analyst requires a theoretical and practical application of highly specialized knowledge; however, an assertion without supporting evidence is insufficient for a petitioner to satisfy its burden of proof. The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

While the petitioner submitted an offer of employment letter, a Benefits Welcome Letter, several SOWs, the first pages of the Forms 1065, U.S. Return of Partnership Income for 2010, 2011, and 2012, lists of clients for 2010, 2011, and 2012, Quarterly Wage Report for the 1st quarter of 2013, and printouts from its website, those documents do not establish the substantive nature of the work to be performed by the beneficiary and that the proffered position qualifies as a specialty occupation.

In the May 30, 2013 letter, submitted in response to the second RFE, counsel states that "the locations of future work to be performed by the Beneficiary in H-1B status will not start until October 1, 2013 and his place of employment has not been determined at this time." While the AAO reviewed and considered the evidence submitted, the AAO again notes that the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248.

On appeal, counsel asserts that the petitioner "will be able to outsource the alien." However, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence.

Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

For the reasons discussed above, it cannot be found that the proffered position qualifies as a specialty occupation. For this additional reason, the appeal must be dismissed and the petition denied.

C. Bona Fide Offer of Employment

Next, the AAO will consider whether the petitioner failed to establish that it had sufficient work during the requested validity period for the beneficiary to perform when the petition was filed. In the May 30, 2013 letter, submitted in response to the second RFE, counsel states that "the locations of future work to be performed by the Beneficiary in H-1B status will not start until October 1, 2013 and his place of employment has not been determined at this time." By not submitting evidence demonstrating the work that the beneficiary will perform during the requested H-1B validity dates, the petitioner precluded the director from establishing whether the petitioner has made a *bona fide* offer of employment to the beneficiary and that it has sufficient work for the beneficiary to perform for the duration of the petition. Furthermore, there are no contracts or other evidence in the record demonstrating that any particular work exists for the requested employment period. Therefore, beyond the decision of the director, the AAO finds that the petitioner has failed to establish that it has made a *bona fide* offer of employment to the beneficiary.

III. REVIEW OF THE DIRECTOR'S DECISION

Certified LCA that Corresponds to the Petition

The AAO will now address the director's determination that the petitioner failed to provide a certified LCA that corresponds to the petition.

With the H-1B petition, the petitioner submitted a certified LCA indicating that the beneficiary will work at the petitioner's office located in San Francisco, California. Subsequently, in response to the director's first RFE, counsel indicated that the beneficiary was assigned to a new project located in Milwaukee, Wisconsin and Minneapolis, Minnesota. Thereafter, in response to the director's second RFE, counsel stated that "[n]o other LCA's are submitted at this time since the locations of future work to be performed by the Beneficiary in H-1B status will not start until October 1, 2013 and his place of employment has not been determined at this time." In addition, counsel claimed that "[o]nce the locations are established an LCA will be submitted for the new locations."

While DOL is the agency that certifies an LCA before it is submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. See 20 C.F.R. § 655.705(b), which states, in pertinent part (emphasis added):

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the

DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary.

In turn, section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A) (2012), requires an employer to pay an H-1B worker the higher of either the prevailing wage for the occupational classification in the "area of employment" or the actual wage paid by the employer to other employees with similar experience and qualifications who are performing the same services.¹⁵ *See* 20 C.F.R. § 655.731(a); *Venkatraman v. REI Sys., Inc.*, 417 F.3d 418, 422 & n.3 (4th Cir. 2005); *Michal Vojtisek-Lom & Adm'r Wage & Hour Div. v. Clean Air Tech. Int'l, Inc.*, No. 07-97, 2009 WL 2371236, at *8 (Dep't of Labor Admin. Rev. Bd. July 30, 2009).

Implemented through the LCA certification process, section 212(n)(1) is intended to protect U.S. workers' wages by eliminating economic incentives or advantages in hiring temporary foreign workers. *See, e.g.*, 65 Fed. Reg. 80,110, 80,110-111, 80,202 (2000). The LCA currently requires petitioners to describe, *inter alia*, the number of workers sought, the pertinent visa classification for such workers, their job title and occupational classification, the prevailing wage, the actual rate of pay, and the place(s) of employment.

To promote the U.S. worker protection goals of a statutory and regulatory scheme that allocates responsibilities sequentially between DOL and the U.S. Department of Homeland Security (DHS), a prospective employer must file an LCA and receive certification from DOL before an H-1B petition may be submitted to USCIS. 8 C.F.R. § 214.2(h)(4)(i)(B)(1); 20 C.F.R. § 655.700(b)(2).¹⁶ If an employer does not submit the LCA to USCIS in support of an H-1B petition, the process is incomplete and the LCA is not certified to the Secretary of Homeland Security. *See* section 101(a)(15)(H)(i)(b) of the Act; 8 C.F.R. § 214.2(h)(4)(i)(B)(1); 20 C.F.R. § 655.700(b); *see also* 56 Fed. Reg. 37,175, 37,177 (1991); 57 Fed. Reg. 1316, 1318 (1992) (discussing filing sequence).

¹⁵ The prevailing wage may be determined based on the arithmetic mean of the wages of workers similarly employed in the area of intended employment. 20 C.F.R. § 655.731(a)(2)(ii).

¹⁶ Upon receiving DOL's certification, the prospective employer then submits the certified LCA to USCIS with an H-1B petition on behalf of a specific worker. 8 C.F.R. § 214.2(h)(2)(i)(A), (2)(i)(E), (4)(iii)(B)(1). DOL reviews LCAs "for completeness and obvious inaccuracies," and will certify the LCA absent a determination that the application is incomplete or obviously inaccurate. Section 212(n)(1)(G)(ii) of the Act. In contrast, USCIS must determine whether the attestations and content of an LCA correspond to and support the H-1B visa petition, including the specific place of employment. 20 C.F.R. § 655.705(b); *see generally* 8 C.F.R. § 214.2(h)(4)(i)(B).

A change in the terms and conditions of employment of a beneficiary which may affect eligibility under section 101(a)(15)(H) of the Act is a material change. *See* 8 C.F.R. § 214.2(h)(2)(i)(E); *see also id.* § 214.2(h)(11)(i)(A). Because section 212(n) of the Act ties the prevailing wage to the "area of employment," a change in the beneficiary's place of employment to a geographical area not covered in the original LCA would be material for both the LCA and the Form I-129 visa petition, as such a change may affect eligibility under section 101(a)(15)(H) of the Act. *See, e.g.,* 20 C.F.R. § 655.735(f). If, for example, the prevailing wage is higher at the new place of employment, the beneficiary's eligibility for continued employment in H-1B status will depend on whether his or her wage for the work performed at the new location will be sufficient. As such, for an LCA to be effective and correspond to an H-1B petition, it must specify the beneficiary's place(s) of employment.¹⁷

Here, there is a lack of documentary evidence sufficient to corroborate the claim that the beneficiary would be serving as an operations research analyst in San Francisco, California for the period sought in the petition. The petitioner has not established the beneficiary's work site, the duration of his employment, the duties he will perform, the terms and conditions of the employment, or other relevant aspects necessary for the petition to be approved. There is insufficient evidence to establish that the LCA corresponds to the petition and that the beneficiary's employment would be in accordance with the petitioner's statements in the petition and LCA. Thus, the petition must also be denied on this additional basis.

IV. CONCLUSION AND ORDER

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; *see e.g., Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

¹⁷ A change in the beneficiary's place of employment may impact other eligibility criteria, as well. For example, at the time of filing, the petitioner must have complied with the DOL posting requirements at 20 C.F.R. § 655.734. Additionally, if the beneficiary will be performing services in more than one location, the petitioner must submit an itinerary with the petition listing the dates and locations. 8 C.F.R. § 214.2(h)(2)(i)(B); *see also id.* § 103.2(b)(1).

ORDER: The appeal is dismissed.