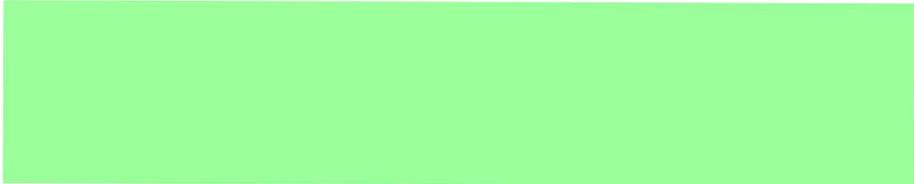


(b)(6)

U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services



DATE: JUN 02 2014

OFFICE: CALIFORNIA SERVICE CENTER

FILE:



IN RE:

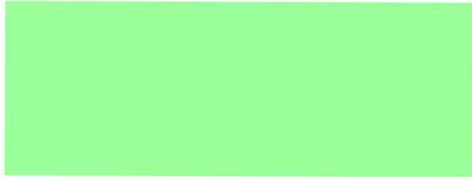
Petitioner:

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 in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

*Michael T. Kelly*  
Ron Rosenberg  
Chief, Administrative Appeals Office

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

On the Form I-129 visa petition, the petitioner describes itself as a computer aided design engineering and development company. In order to employ the beneficiary in what it designates as a "Product Engineer" position,<sup>1</sup> 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).

The director denied the petition on the basis of two separate and independent grounds, namely, her determinations (1) that the petitioner had failed to demonstrate that the proffered position qualifies for classification as a specialty occupation; and (2) that, as the petitioner's lease for the employment location listed on the Labor Condition Application (LCA) appeared to have expired, it is questionable that the beneficiary would be employed in compliance with that LCA's requirements.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's letter denying the petition; and (5) the Form I-290B and supporting documentation.

At the outset, we withdraw the director's second basis for denial, in that the petitioner's submission on appeal establishes that the petitioner still maintains the same office location where it states that the beneficiary would be employed. However, for the reasons that will be discussed below we find that the evidence of record supports the director's denial of the petition for its failure to establish the proffered position as a specialty occupation. Accordingly, the appeal will be dismissed, and the petition will be denied.

## I. FACTUAL AND PROCEDURAL BACKGROUND

In the petition signed on March 19, 2013, the petitioner indicates that it is seeking the beneficiary's services as a product engineer on a full-time basis at the rate of pay of \$60,000 per year. In its March 14, 2013 letter of support, the petitioner states that it provides "digital mechanical and electrical engineering consulting services including full life-cycle product development from concept to beta testing and project-based design services to companies in the automotive, aerospace, manufacturing, electronics and off-road, heavy equipment industries."

Regarding the engineering services it provides, the petitioner claimed that these services "require persons intimately familiar with the proprietary data conversion and design process and technologies developed by [the petitioner], with a minimum four year mechanical or electrical

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<sup>1</sup> The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for the SOC (O\*NET/OES) Code 17-2141, the associated Occupational Classification of "Mechanical Engineers," and a Level II prevailing wage rate.

engineering education, related work experience including computer-aided engineering expertise, design experience, and knowledge of equipment manufacturing processes."

Regarding the proffered position, the petitioner stated that the beneficiary would be employed as a product engineer, noting that the beneficiary would be working at the petitioner's office located in Peoria, Illinois. Specifically, the petitioner stated:

By working from office in Peoria, [the beneficiary] can support multiple teams on projects we have under contract with [redacted] and [redacted] [redacted] in the Burr Ridge, IL and Aurora, IL. He will make onsite visits to engage in meetings with the customer engineering teams, which is why we need him to work from our office in Peoria. It is centrally located to the various project facilities we support and, therefore, makes it possible for the meetings to take place without incurring travel expenses and wasted time traveling long distances to get to customer locations. With our central location, we are able to quickly and effectively support the multiple engineering projects under contract in that region.

Among the documents filed with the petition is a four-page "Job Description" document which lists the "Essential Duties and Responsibilities" of the proffered Product Engineer position and the estimated percentages of associated work time<sup>2</sup> required for each as follows:

1. Provide analytical assessment of technical engineering data including technical drawings in order to analyze, recommend, identify and correct engineering design problems for each specific product throughout the product development lifecycle. Requires correct analysis of empirical data as well as intuitive judgment of data. (25%)
2. Prepare, check and / or review technical specification documents, design calculations and data to ensure proper design of product(s) to meet customer requirements. (15%)
3. Examine technical engineering design documents for completeness and accuracy and use that data to write product performance requirements and engineering design specification packets for production personnel based upon and communicate those requirements to the on-site and off-shore design teams. (15%)
4. Provide technical review, input and guidance to engineering production design teams. (10%)

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<sup>2</sup> When added together, the percentages of time required for the listed tasks amount to greater than 100%.

5. Communicate with engineering, technical and manufacturing personnel on technical product specifications throughout product development life-cycle including prototype and production stages of project. (10%)
6. Support supplier qualification and selection process through technical inquiries and evaluation to ensure conformance with contracted deliverables. (10%)
7. Utilize computer aided drafting and mechanical design software applications to design mechanical and electro-mechanical products that meet customer project specifications. (20%)
8. Analyze project proposal to determine feasibility, cost, and time-lines required to complete project development lifecycle. Ensure all assigned deliverables are executed in accordance with technical specifications and are within cost parameters and schedule requirements. (20%)
9. Support Lead Product Engineers and Project Managers in responding to inquiries from customers, partners, and suppliers. (5%)
10. Maintain and track all project information and related data in neat [sic] and organized manner according to company process definitions and guidelines for efficient retrieval of information from the various internal departments of [the petitioner] as well as from the customer. (5%)
11. Complete other duties as assigned.

The Job Description document asserts that the proffered position requires a minimum of a Bachelor's degree and two to five years of related experience, or a Master's degree and one to two years of related experience.

The LCA which the petitioner submitted had been certified for a job prospect within the occupational classification of "Mechanical Engineers" - SOC (ONET/OES Code) 17-2141, at a Level II wage.

The documents filed with the Form I-129 also included: (1) a copy of the beneficiary's resume; (2) a copy of an evaluation of the beneficiary's foreign academic credentials; (4) a copy of the petitioner's commercial lease agreement; (5) copies of two [redacted] "Statement of Work" documents; (6) copies of petitioner invoices; (7) copies of the petitioner's 2010 federal tax return and related corporate tax documents; (8) a copy of the petitioner's employee handbook and benefits overview; (9) copies of documents relating to the petitioner's employee appraisal procedures; and (10) various informational materials regarding the petitioner services.

With regard to the two Statement of Work documents, we note that the petition was filed on a date (April 15, 2013) after the Estimated Completion Dates that the Statements of Work reference (i.e., 06/30/2012 and 12/31/2012). Further, we note that the latest date appearing on the invoices and "SOW Program Change Request" filed with the Form I-129 – that is, 03/02/2012 – predates the filing of the petition.

The director found the evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on June 5, 2013. The petitioner was asked to submit probative evidence to establish that a specialty occupation position exists for the beneficiary. Noting the nature of the petitioner's business, the director requested specific evidence, such as contracts and work orders, demonstrating that specialty occupation work was available for the beneficiary for the entire requested validity period.

On August 26, 2013, counsel for the petitioner responded to the RFE. Included in the response was a letter from the petitioner dated August 26, 2013, in which it claimed that the petitioner's multiple clients in the Peoria area "serve to prove that we have ample work that needs to be completed."

The petitioner's letter further stated that, with regard to the requested statements of work, "our customers will not sign statements of work (SOW's) for the projects [the beneficiary] will be working on" until the beneficiary arrives. The petitioner essentially states that it must "win" its projects, including those upon which the beneficiary will work, by proving it has "sufficient headcount to handle the number of hours for each project." We find these statements very significant as an additional indication that, in fact, at the time of the filing of the petition the petitioner had not yet secured definite, non-speculative work for the beneficiary for the period of employment specified in the petition. In this respect, we also find that the statements dovetail with the record's lack of documentary evidence of the existence of any particular project that would require the beneficiary's services in the proffered position. 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). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

The petitioner concluded by providing a generic overview of engineering tasks the beneficiary would perform, claiming that at all times he will remain an employee of the petitioner and will be supervised by [REDACTED] one of the petitioner's account managers.

Counsel submitted additional documentary evidence in response to the RFE, including: (1) a copy of the Master Engineering Services Agreement between the petitioner and [REDACTED] (2) a copy of the Consulting Services Agreement between the petitioner and [REDACTED] (3) a copy of the Master Professional Services Agreement between the petitioner and [REDACTED] Inc.; (4) a copy of a 20-page document entitled [REDACTED] Development Agreement[.] [REDACTED] and Selected Partner," which is unsigned; (5) a copy of the petitioner's organizational chart; and (6) sample

copies of the petitioner's Long-Term Assignment agreement and Memorandum of Understanding for foreign employees. Counsel also resubmitted several documents previously submitted in support of the initial filing.

Those various agreement documents submitted in response to the RFE deserve some separate comments at this point, and we will address them in the order in which they appear as exhibits in the RFE response.

Whether entitled "Master Engineering Services Agreement," "Consulting Services Agreement," "Master Professional Services Agreement," the language of each of those documents indicates that it consists of terms and conditions that would be automatically incorporated into any particular agreement for specific work that would fall within its scope. That is to say that, without follow-on contractual commitments for specific work in such forms as Statements of Work, Schedules, Wrappers, or Purchase Orders, these Agreement documents do not indicate that the petitioner has secured any definite work to be performed for any particular period. The [REDACTED] Development Agreement[:] [REDACTED] and Selected Partner" is unsigned, contains as yet-to-be-determined terms, nowhere references the petitioner but only speaks in terms of an unnamed "Selected Partner," and indicates that it is a precursor of a "firm fixed price bid" by the "Selected Partner" which may or may not be accepted by [REDACTED]. We find that, while all of the documents indicate that the petitioner has had a business relationship with the other companies, they do not establish that those relationships actually had generated work that the beneficiary would perform in accordance with the duties and responsibilities that the petitioner ascribed to the proffered position.

The director reviewed the information provided by the petitioner and counsel to determine whether the petitioner had established eligibility for the benefit sought. The director determined that the petitioner failed to establish that specialty occupation work existed for the beneficiary for the duration of the requested validity period, and likewise found that the petitioner would be unable to comply with the terms and conditions set forth in the LCA. The director denied the petition on October 9, 2013. On appeal, counsel for the petitioner submitted a brief and contends that the director's findings were erroneous.

## II. LAW AND ANALYSIS

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

As a preliminary matter and beyond the decision of the director, the AAO will first discuss whether the petitioner has established that it meets the regulatory definition of a "United States employer" and 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" as set out at 8 C.F.R. § 214.2(h)(4)(ii).<sup>3</sup>

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<sup>3</sup> 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.

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

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

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

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

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

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

*Darden*, 503 U.S. at 323-324 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. at 751-752); see also *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440, 445 (2003) (hereinafter "*Clackamas*"). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).

In this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. See generally 136 Cong. Rec. S17106 (daily ed. Oct. 26, 1990); 136 Cong. Rec. H12358 (daily ed. Oct. 27, 1990). On the contrary, in the context of the H-1B visa classification, the regulations define the term "United States employer" to be even more restrictive than the common law agency definition.<sup>4</sup>

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<sup>4</sup> 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.,

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.<sup>5</sup>

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).<sup>6</sup>

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

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*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).

<sup>5</sup> 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))).

<sup>6</sup> 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).

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, and 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."

We note at the outset that the petitioner acknowledges that it has not entered into an employment agreement with the beneficiary with regard to the proffered position and would not do so until after

the beneficiary is accorded H-1B status.

We note the petitioner's assertion that the beneficiary will work at its office in Peoria, Illinois, to ensure that he would be centrally located so that he could "quickly and efficiently support the multiple engineering projects under contract in that region." However, the record of proceeding does not establish what such projects are that would require the beneficiary to perform the duties and responsibilities that the petitioner ascribed to the proffered position. In this regard we here incorporate our earlier comments and findings with regard to the documentary evidence that the petitioner submitted as indicia of its business relationships with various companies. As there reflected, the record of proceeding does not contain persuasive evidence that any of the agreements referenced by the petitioner had actually produced projects that would engage the beneficiary in the proposed duties and responsibilities during the period of requested employment.

The record lacks relevant Statements of Work, Schedules, Wrappers, Purchase Orders, or any like documents that would establish the existence of projects that would engage the beneficiary to perform the duties that the petitioner ascribes to the proffered position. Further, we also note that the evidence of record does not establish how any actually existing project requires the beneficiary to perform the duties and responsibilities that the petitioner ascribes to the proffered position. Although the petitioner submitted copies of various master agreements and sample statements of work for projects that have since expired, there is no evidence in the record establishing the nature of the beneficiary's proposed employment for the requested period.

Additionally, the record contains various other documents that suggest that the beneficiary's ultimate assignments, and supervisors, may vary. For example, in response to the RFE, counsel submitted copies of the petitioner's Memorandum of Understanding for foreign workers, which states as follows:

10. [The petitioner] reserves the right to assign the employee to any location in the US during the Employee's tenure. It is reasonable to expect that the employee could be located at various customer sites for extended periods.
11. Employees assigned to work at customer locations will be subject to various terms and conditions regarding reimbursement of housing and expenses as determined on a case-by-case basis. This will be dependent upon unknown and variable factors such as Employees previous location, customer agreements, etc. Employee agrees to not enter into a lease-term in excess of six (6) months in case of transfer to another customer work location.

Finally, we again note that the petitioner's claim in its August 26, 2013 letter that it must "win" contracts by demonstrating to clients that it has the required workforce to meet clients' needs on a particular project. This statement, combined with the statements from the Memorandum of Understanding and in light of the absence of any contracts or contractual documents for the beneficiary's services, renders it impossible to conclude that the petitioner will maintain the requisite employer-employee relationship with the beneficiary.

As a result, the record is devoid of any documentation indicating and/or corroborating that the beneficiary would be the individual assigned to perform services pursuant to any contract(s), work order(s), and/or statement(s) of work for the requested, three-year validity period at the petitioner's Peoria, Illinois location.

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. 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). Consequently, we cannot reasonably conclude that the petitioner is engaging the beneficiary to perform work in the United States – as the existence of such work for the beneficiary has not been established.

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. While we have considered the petitioner's attestations that it alone would control the beneficiary and his work, because the evidence of record does not establish either an actual project that would require the beneficiary's services, or the actual scope of such services that would be required, or the contractual terms set by whatever client would generate such a project, we cannot conclude that it is more likely than not that the petitioner - and not a client or intermediate party between the petitioner and the client - would have the requisite employer-employee relationship. In short, we will not speculate about relevant indicia of control in a case, as here, where the actual work to be performed has not been established. Without full disclosure of all of the relevant factors relating to the end-client, including evidence corroborating the beneficiary's actual work assignment, the AAO is unable to find that the requisite employer-employee relationship will exist between the petitioner and the beneficiary; and such disclosure is precluded where there is no definite employment.

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 in its letters that the beneficiary is the petitioner's employee and that one of its managers will supervise the beneficiary does not establish that the petitioner exercises any substantial control over the beneficiary and the substantive work that he performs. Nor do clauses in overarching agreements such as Master Services Agreements, Master Engineering Services Agreements, Consulting Services Agreements, or Master Professional Services Agreements carry probative weight in the absence, as here, of specific contractual documents that bring such agreements into play with regard to work for which it is shown that the beneficiary would be employed.

The petitioner's reliance on evidence that it would pay the beneficiary's salary, provide health and employment benefits, and withhold federal and state income tax is misplaced. First of all, as we

have noted, the existence of actual work for the beneficiary has not been established. As the record of proceeding before us does not document actual work that a particular project would generate for the beneficiary, the terms and conditions of such work, and the supervisory lines that would determine, evaluate, and control the beneficiary's day-to-day work, we do not have before us a sufficiently comprehensive record to identify and weigh all of the indicia of control that should be assessed to determine the employer-employee issue. We will not speculate where those indicia would lie.

Additionally, as we already noted, the evidence of record does not establish the petitioner as performing the essential U.S. Employer function of engaging the beneficiary to come to the United States for actual work established for the beneficiary at the time of the petition's filing.

In short, the petitioner has not provided documentary evidence sufficient to establish actual work that the beneficiary would do and the actual nature of any business relationship that would exist between the beneficiary and the petitioner with regard to such work. Without evidence supporting the petitioner's claims, the petitioner has not established eligibility in this matter. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190). For this additional reason, the petition may not be approved.

Furthermore, it is unclear whether the beneficiary would continue to work at the Peoria, Illinois location for the duration of the requested validity period, given that the evidence of record establishes that (1) there are no contracts or statements of work currently in effect for projects in that area; and (2) the petitioner requires employees not to enter into leases in excess of six months due to the likelihood of relocation to other geographical areas or client worksites.

#### B. Failure to Establish that the Proffered Position Qualifies as a Specialty Occupation

As reflected in the preceding section's discussion and findings, a materially determinative aspect of the evidence of record is its failure to establish that, at the time of the petition's filing, the petitioner had secured definite, non-speculative employment for the beneficiary. Thus, we concur with the director's determination that the evidence submitted fails to establish non-speculative employment for the beneficiary for the period specified in the petition.

This feature of the evidence of record is also a determinative factor in our concluding that the evidence of record fails to establish the proffered position as a specialty occupation.

Although the petitioner requested, on the Form I-129, that the beneficiary be granted H-1B classification from October 1, 2013 to September 4, 2016, there is a lack of substantive documentation regarding work for the beneficiary for that period. As stated above, the record contains no contracts, statements of work, work orders, or other contractual documents demonstrating that the beneficiary will be assigned to work for a particular project or projects. In fact, the petitioner admitted in its August 26, 2013 letter that it must first "win" contracts for projects upon which the beneficiary will be assigned, and can only win such projects by

demonstrating the availability of the beneficiary and his inclusion in a "headcount" of engineers to present to a client.

The AAO finds that the petitioner has not provided documentary evidence to establish the existence of work, and specifically specialty occupation work, available to the beneficiary as a product engineer, for the requested H-1B validity period. The petitioner also did not submit documentary evidence regarding any additional work for the beneficiary. Thus, the petitioner has failed to establish that the petition was filed for non-speculative work for the beneficiary that existed *as of the time of the petition's filing*, for the period requested.<sup>7</sup> 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).

Now, to meet its burden of proof with regard to the specialty occupation issue, 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

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<sup>7</sup> 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).

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 at 387. To avoid this 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.

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

As previously noted, the petitioner indicated on the Form I-129 and in supporting documentation that it seeks the beneficiary's services in a position titled "Product Engineer," to work on a full-time basis at a salary of \$60,000 per year.

One consideration that is necessarily preliminary to, and logically even more foundational and fundamental than the issue of whether a proffered position qualifies as a specialty occupation, is whether the petitioner has provided substantive information and supportive documentation sufficient to establish that, in fact, the beneficiary would be performing services for the type of position for which the petition was filed (here, a product engineer). Another such fundamental

preliminary consideration 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 corresponds with the petitioner's claims about the nature of the work that the beneficiary would perform in the proffered position. The AAO finds that the petition has failed in each of these regards.

As discussed above, the record does not establish that, at the petition's filing, the petitioner had secured any work for the period of intended employment that would require the beneficiary to perform the duties of the proffered position for the period specified in the petition. In fact, the petitioner acknowledged that its clients would not sign statements of work for the beneficiary's services; rather, the petitioner had to demonstrate the availability of the beneficiary, and other such engineers, in order to "win" such projects.

Additionally, we find that the record is devoid of any documentation establishing in-house work that would require the beneficiary to perform the duties and responsibilities that the petitioner has attributed to the proffered position.

While the AAO notes counsel's assertions on appeal, and the submissions of such documents as the petitioner's Standard Operating Procedures & Work Instructions, as well as the internal Global Product Specifications for [REDACTED] Inc., the fact remains that the record contains no evidence establishing the true nature of the beneficiary's employment during the requested validity period. While these documents provide some general details regarding potential tasks and their associated level of complexity, there is no documentation establishing the true nature of the duties the beneficiary would actually perform.

Accordingly, as the petitioner has not provided documentary evidence substantiating the beneficiary's actual work, the AAO cannot conclude that the petitioner established that it would employ the beneficiary in a specialty occupation.

That is, 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 entry into 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. Thus, the petitioner has failed to establish that the proffered position is a specialty occupation under the applicable provisions.

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, the petition cannot be approved for this additional reason.

### III. CONCLUSION

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (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.