



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: JUN 27 2014

OFFICE: CALIFORNIA SERVICE CENTER

FILE: [REDACTED]

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

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

ON BEHALF OF PETITIONER:
[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.

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the California Service Center on April 8, 2013. In the Form I-129 visa petition, the petitioner describes itself as an information technology (IT) consulting company established in 2010. In order to employ the beneficiary in what it designates as an Oracle developer 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 on September 26, 2013, concluding that the petitioner failed to establish that the proffered position is a specialty occupation in accordance with the applicable statutory and regulatory provisions. Counsel for the petitioner subsequently filed an appeal. On appeal, counsel 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 us contains: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) counsel's response to the RFE; (4) the notice of decision; and (5) the Form I-290B and supporting materials. We reviewed the record in its entirety before issuing our decision.

For the reasons that will be discussed below, we agree with the director's decision that the petitioner has failed to establish 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. FACTUAL AND PROCEDURAL HISTORY

In this matter, the petitioner states in the Form I-129 that it seeks the beneficiary's services as an Oracle developer on a full-time basis at the rate of pay of \$60,000 per year. The petitioner also indicates that the beneficiary will work at [REDACTED]. In the March 25, 2013 letter of support, the petitioner provided a job description for the proffered position.

Further, the petitioner stated that "based on his educational background and professional experience, the beneficiary is ideally suited to serve as an Oracle developer." In support, the petitioner provided a copy of the beneficiary's Master of Science degree and academic transcript in Mechanical Engineering from the [REDACTED] as well as a copy of his foreign diploma and academic transcript in Mechanical Engineering.

In addition, the petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The petitioner indicated that the occupational classification for the proffered position is

¹ It appears that the petitioner provided an incorrect building number for this address in the Form I-129 and the LCA. The correct address is [REDACTED]

"Computer Programmers" – SOC (ONET/OES Code) 15-1131, at a Level II (qualified) wage. The beneficiary's place of employment is listed as [REDACTED]

On May 30, 2013, the director issued an RFE and outlined the specific evidence to be submitted. On August 15, 2013, counsel responded to the RFE with a brief and additional supporting evidence. The director reviewed the documentation and found it insufficient to establish eligibility for the benefit sought. The director denied the petition on September 26, 2013. Counsel submitted an appeal of the denial of the H-1B petition, along with a brief and additional evidence.²

II. BEYOND THE DECISION OF THE DIRECTOR

A. Employer-Employee

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

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

subject to section 212(j)(2), who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 214(i)(1) . . . , who meets the requirements for the occupation specified in section 214(i)(2) . . . , and with respect to whom the Secretary of Labor determines and certifies to the [Secretary of Homeland

² With regard to documentation submitted on appeal that was encompassed by the director's RFE, we note that this evidence is outside the scope of the appeal. The regulations indicate that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary in the adjudication of the petition. *See* 8 C.F.R. §§ 103.2(b)(8); 214.2(h)(9)(i). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1), (8), and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, we do not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted it with the initial petition or in response to the director's request for evidence. *Id.* The petitioner has not provided a valid reason for not previously submitting the evidence. Under the circumstances, we do not consider the sufficiency of the evidence submitted for the first time on appeal.

Nevertheless, we reviewed the evidence submitted. However, for the reasons discussed below, we find that the petitioner did not establish eligibility for the benefit.

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 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.³

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

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

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 318-319.⁴

Therefore, 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).⁵ 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)

U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844-845 (1984).

⁴ 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))).

⁵ 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).

(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 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).

Counsel repeatedly claims that the petitioner and the beneficiary have an employer-employee relationship. Specifically, in the letter dated August 13, 2013, counsel asserts that "the petitioner is the only one who has the power to hire, fire, assign to projects, pay, and provide benefits to the employee." Counsel also asserts that the beneficiary "will work under the supervision of the manager at [the petitioner's]," that the petitioner has the right to assign additional duties," and that the petitioner will pay and provide benefits.

We have considered the assertions within the context of the record of proceeding. However, as will be discussed, there is insufficient probative evidence in the record to support these assertions. 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)). 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."

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. See 8 C.F.R. § 214.2(h)(4)(iv)(A) and (B). In the instant case, the record contains an employment agreement between the petitioner and the beneficiary, dated September 26, 2011. Upon review of the employment agreement, we note that it fails to adequately establish several critical aspects of the beneficiary's employment. For example, the employment agreement does not provide specific information regarding the services the beneficiary will be expected to perform and where he will work. The agreement states that the petitioner "retains the [beneficiary] to provide computer consulting services for clients, vendors or end-clients," and that the beneficiary will be paid a salary of \$60,000 per year. Further, the agreement indicates that the beneficiary "agrees to work anywhere in the United States as assigned by the Company." According to the employment agreement, the beneficiary may be placed at various locations and not necessarily in Nebraska as stated in the instant petition. It does not indicate that the beneficiary is currently or will be assigned to the [redacted] project, nor does it indicate an intention by the petitioner to employ the beneficiary at the [redacted] facility for the duration of the requested H-1B period. The employment agreement also does not provide any level of specificity as to the beneficiary's duties and the requirements for the position. While an employment agreement 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.

In the Form I-129 and the LCA, the petitioner had indicated that the beneficiary will work at [redacted]. The petitioner did not indicate that the beneficiary will work at any other work locations. The dates of the intended employment are from October 1, 2013 to September 6, 2016.

Based on the documents submitted, it does not appear that the petitioner has sufficient work for the beneficiary for the duration of requested H-1B validity period. For example, in support of the Form I-129, the petitioner provided the following:

- An itinerary from the petitioner which states that the beneficiary will be working for [redacted] located at [redacted]
- A Master Services Agreement dated February 15, 2012 between the petitioner and [redacted] where the petitioner is identified as the contractor. Appendix A indicates that the end-client company is [redacted] and the beneficiary is the contractor. Scope of responsibilities is as an Oracle PL/SQL Developer. The start date is March 5, 2012, and the end date is "10+ months from Start date."

In response to the RFE, the petitioner submitted additional documents as follows:

- A letter dated August 6, 2013 from [redacted]. The letter confirms that the beneficiary is currently working at [redacted] location. The letter further states that the beneficiary is a contracted consultant

through [REDACTED] until June 28, 2014. The letter also indicates that the beneficiary "is on assignment as a Senior Developer providing application development duties, including design, development and support."⁶ In addition, the letter states that the "duration of the beneficiary's project assignment, as contractually provided through [REDACTED] is temporary and is subject to pending satisfactory performance of the assignment."

- A letter dated August 7, 2013 from [REDACTED]. The letter confirms that the beneficiary is contracted through the petitioner and placed at [REDACTED] as an Oracle developer. The letter also indicates that "[the beneficiary]'s duties at [REDACTED] are needed on an on-going basis with possibility of extension as per client requirements," and that "his current contract end date at [REDACTED] is June 28, 2014."

In other words, the petitioner did not provide evidence of an existing contract with [REDACTED] or any other contracts that would be valid until September 6, 2016. Rather than establish definitive, non-speculative employment for the beneficiary for the entire period requested, the petitioner simply claimed in the itinerary that the beneficiary would be working for [REDACTED]. However, according to the Master Agreement with [REDACTED] which identified the contractor as the beneficiary located at the end client, [REDACTED] the end date for the assignment is "10+ months from Start date," which would be January 2013. Therefore, it appears that the contract through [REDACTED] expired prior to the filing of the instant petition. Further, the letter from [REDACTED] and [REDACTED] indicated that the current contract end date at [REDACTED] is June 28, 2014 (approximately eight months *after* the petitioner's requested start date for H-1B employment). Moreover, the petitioner did not submit probative evidence substantiating additional projects or specific work for the beneficiary.

We find that the petitioner has failed to establish that the petition was filed for non-speculative work for the beneficiary, for the entire period requested, that existed as of the time of the petition's filing. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248. Thus, even if it were found that the petitioner would be the beneficiary's United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii), the petitioner has not demonstrated that it would maintain such an employer-employee relationship for the duration of the period requested.⁷

⁶ We observe that the letter does not indicate the proffered position of Oracle developer but rather a "Senior Developer." No explanation for the variance was provided by the petitioner or by the [REDACTED]. Further, there is no indication that the duties of an Oracle developer are the same as a senior developer.

⁷ 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:

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. The record of proceeding provides insufficient probative evidence on this issue. We note that the instant case has multiple vendors, and the petitioner failed to establish that it would control the work of the beneficiary for the duration of the H-1B petition.

As discussed earlier, the petitioner submitted (1) the master services agreement with [REDACTED] (2) the letter dated August 6, 2013 from [REDACTED] and (3) the letter dated August 7, 2013 from [REDACTED]

In response to the RFE, counsel asserted that the beneficiary is "working for [REDACTED] at [REDACTED] (End Client) through the Vendor [REDACTED] and the Prime Vendor [REDACTED]. However, as mentioned, the master services agreement with [REDACTED] that assigned the beneficiary at [REDACTED] had expired as of January 2013, and was not valid at the time of filing the instant petition. Further, the letter from [REDACTED] states that the "[beneficiary] has been contracted through [the petitioner] and placed at our client, [REDACTED] but does not mention [REDACTED] involvement in the contract. Therefore, the documents submitted do not establish who would control the work of the beneficiary.

In support of the H-1B petition, the petitioner submitted pay statements issued to the beneficiary from November 2012 to February 2013. We acknowledge 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, social security contributions, worker's compensation contributions, unemployment insurance 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

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).

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.

It is also noted that the beneficiary will be physically located at the end client's location in [REDACTED] NE, while the petitioner is located 1,260 miles away in [REDACTED] NJ. Accordingly, this raises questions as to who will supervise, control and oversee the beneficiary's work on a day-to-day basis. In the letter dated August 7, 2013, [REDACTED] claimed that the beneficiary "remains an employee of [the petitioner], who is solely responsible for paying [the beneficiary], providing benefits, withholding taxes, supervising him on a daily/weekly basis by means of an off-site/on-site manager employed by [the petitioner] and controlling where, when and how [the beneficiary] performs" (emphasis in the original). However, the petitioner did not establish how it will supervise, control and oversee the beneficiary's work on a day-to-day basis.

For example, in the itinerary, the petitioner provides the name of the manager at the client's place as [REDACTED]. However, there is no indication that [REDACTED] is an employee working for the petitioner.

In response to the RFE, the petitioner provided an organization chart. It is noted that [REDACTED] is not listed as an employee for the petitioner. The organization chart also does not provide information as to who will supervise, control and oversee the beneficiary but merely lists the names of the employees and their positions.

The record of proceeding also contains printouts from what appears to be a time reporting program called [REDACTED]. It appears to record time and billing for the beneficiary. For example, for the week of March 3, 2013 to March 9, 2013, the beneficiary worked 19 hours on "GP AIX to Linux" and 21 hours on "GP Small Enhancements." However, there is no information that substantiates who owns the program or to whom it reports to.

The record also contains "Monthly Time Sheet" for January to February 2013, and also May to July 2013 submitted to the petitioner by the beneficiary. It provides the date and the hours worked, as well as the highlights of tasks completed. It further states that the "monthly status report must be received in the First week of every month for the prior month" to the petitioner. However, it does not provide information on how the petitioner supervises, directs or guides the beneficiary on a day-to-day basis.

The petitioner also provided a performance appraisal form dated August 9, 2013, for the year 2012. The appraiser is named as [REDACTED] who is listed as an HR associate on the organization chart. The document is not signed. Upon review, the document lacks sufficient information regarding how work and performance standards were established, the methods for assessing and evaluating the beneficiary's performance, who prepared the report, the criteria for determining bonuses and salary adjustments, et cetera. Importantly, there is a lack of information as to how the day-to-day work of the beneficiary has been and will be supervised and overseen.

The petitioner also provided a photo identification badge stating [REDACTED] the beneficiary's name, the word "consultant." The badge does not contain validity dates, nor does it

appear to contain security features (e.g., access restrictions, bar code, holographic, digital signature, magnetic strip). There is no indication as to when the badge was produced, for what purpose, or by whom. It does not contain any information connecting the beneficiary to the petitioner.

As previously noted, when making a determination of whether the petitioner has established that it has or will have an employer-employee relationship with the beneficiary, we look at a number of factors, including who will provide the instrumentalities and tools required to perform the duties of the position. Upon review of the record of proceeding, the petitioner did not provide any information on this issue.

Upon review, we find that there is insufficient documentary evidence in the record corroborating what the beneficiary would do, where the beneficiary would work, and the availability of work for the beneficiary for the entire requested period of employment. 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). Again, 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. Without full disclosure of all of the relevant factors, we are unable to find that the requisite employer-employee relationship will exist between the petitioner and the beneficiary.

The evidence of record 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 the petitioner - from its remote relationship to the end-client - supervises the beneficiary does not establish that the petitioner exercises any substantial control over the beneficiary and the substantive work that he performs. Without evidence supporting the petitioner's claims, the petitioner has not established eligibility in this matter. 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. at 165.

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). Accordingly, the director's decision must be affirmed and the petition denied on this basis.

B. The LCA Does Not Correspond

As previously mentioned, the petitioner submitted an LCA in support of the instant H-1B petition. We note that the LCA designation for the proffered position corresponds to the occupational classification "Computer Programmers" – SOC (O*NET/OES Code) 15-1131. The petitioner designated the proffered position as a Level II (qualified) position.⁸

⁸ The "Prevailing Wage Determination Policy Guidance" issued by DOL provides a description of the wage levels. A Level II wage rate is described by DOL as follows:

In response to the RFE, counsel asserts that "the job duties for the offered position parallel the description given by the Department of Labor[']s Dictionary of Occupational Titles for the position of a Programmer Analyst, DOT Code: 030.162-014. We note that this DOT code corresponds to the O*NET code 15-1121, "Computer Systems Analysts."⁹ Further on appeal, counsel asserts that "this position is not that of a Computer Programmer, it is that of an Oracle Developer." Counsel further indicated that "since an Oracle Developer does not have a specific code in the FLCA data bases, we used this code based on its proximity to the job titles of "Programmer Analyst" [and] "Software Developer"[,] which are the reported job titles under the code 15-113[1]." Counsel also stated that "[i]f the duties of these positions are compared it is easy to see that the duties of a software developer, Programmer Analyst and an Oracle developer are the same or very similar."

With respect to the LCA, the U.S. Department of Labor (DOL) provides clear guidance for selecting the most relevant Occupational Information Network (O*NET) code classification. The "Prevailing Wage Determination Policy Guidance" states the following:

In determining the *nature of the job offer*, the first order is to review the requirements of the employer's job offer and determine the appropriate occupational classification. The O*NET description that corresponds to the employer's job offer shall be used to identify the appropriate occupational classification If the employer's job opportunity has worker requirements described in a combination of O*NET occupations, the [determiner] should default directly to the relevant O*NET-SOC occupational code for the highest paying occupation. For example, if the employer's job offer is for an engineer-pilot, the [determiner] shall use the education, skill and experience levels for the higher paying occupation when making the wage level determination.

See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

Level II (qualified) wage rates are assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation. They perform moderately complex tasks that require limited judgment. An indicator that the job request warrants a wage determination at Level II would be a requirement for years of education and/or experience that are generally required as described in the O*NET Job Zones.

See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

⁹ See Occupational Information Network (O*NET) Crosswalk Search, <http://www.onetonline.org/crosswalk/DOT?s=030.162-014&g=Go> (last visited June 25, 2014).

In determining the nature of the job offer, DOL guidance indicates that the first step is to review the requirements of the job offer and determine the appropriate occupational classification. The O*NET description that corresponds to the job offer is used to identify the appropriate occupational classification. If the petitioner believes that its position is described as a combination of O*NET occupations, then according to DOL guidance the petitioner should select the relevant occupational code for the highest paying occupation.

The Online Wage Library (OWL) lists the prevailing wage for "Computer Programmer" as \$52,832 per year at the time the petition was filed in this matter, for a Level II position in the area of intended employment. However, for "Computer Systems Analysts," the prevailing wage at Level II is \$61,547; for "Software Developers, Systems Software," it is \$71,968; and for "Software Developers, Applications," it is \$63,045 per year.¹⁰ Thus, the petitioner's offered wage of \$60,000 per year is lower than the prevailing wage for "Computer Systems Analysts" and both categories of "Software Developers." According to DOL guidance, if the proffered position is a combination of the occupations "Computer Programmers," "Computer Systems Analyst," and "Software Developers," the petitioner should have chosen the relevant occupational code for the highest paying occupation. However, the petitioner selected the occupational category for the lowest paying occupational category for the proffered position on the LCA.¹¹

We note that under the H-1B program, a petitioner must offer a beneficiary wages that are at least the actual wage level paid by the petitioner to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best

¹⁰ For more information regarding the occupational category Computer Systems Analysts OES/SOC Code 15-1121, see <http://www.flcdatcenter.com/OesQuickResults.aspx?code=15-1121&area=36540&year=13&source=1>; for Software Developers, Applications OES/SOC Code 15-1132, see <http://www.flcdatcenter.com/OesQuickResults.aspx?code=15-1132&area=36540&year=14&source=1>; and for Software Developers, Systems Software OES/SOC Code 15-1133, see <http://www.flcdatcenter.com/OesQuickResults.aspx?code=15-1133&area=36540&year=14&source=1> (last visited June 25, 2014).

¹¹ The petitioner classified the position in the LCA as falling under the occupational category "Computer Programmers." It must be noted that, where a petitioner seeks to employ a beneficiary in two distinct occupations, it may be appropriate for the petitioner to file two separate petitions, requesting concurrent, part-time employment for each occupation. While it is not the case here, if a petitioner does not file two separate petitions and if only one aspect of a combined position qualifies as a specialty occupation, USCIS would be required to deny the entire petition as the pertinent regulations do not permit the partial approval of only a portion of a proffered position and/or the limiting of the approval of a petition to perform only certain duties. See generally 8 C.F.R. § 214.2(h). Furthermore, the petitioner would need to ensure that it separately meets all requirements relevant to each occupation, such as the provision of certified LCAs for each occupation and the payment of wages commensurate with the hours worked in each occupation. Thus, filing separate petitions would help ensure that the petitioner submits the requisite evidence pertinent to each occupation and would help eliminate confusion with regard to the proper classification of the position being offered.

information available as of the time of filing the application. See section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A).

The petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the correct occupational category and wage level in order for it to be found to correspond to the petition. To permit otherwise would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, by allowing that petitioner to simply submit an LCA for a different occupation at a lower prevailing wage than the one that it claims it is offering to the beneficiary. As such, the petitioner has failed to establish that it submitted a certified LCA that properly corresponds to the claimed occupation and duties of the proffered position and that it would pay an adequate salary for the beneficiary's work, as required under the Act, if the petition were granted. As a result, even if it were determined that the petitioner overcame the other independent reason for the director's denial, the petition could still not be approved for this additional reason.

III. THE DIRECTOR'S DECISION

Specialty Occupation

We will now address the issue of whether the petitioner's proffered position qualifies as a specialty occupation. 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 knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 387. To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

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

The petitioner asserted that the beneficiary would be employed as an Oracle developer. However, 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.

As a preliminary matter, we note that in the itinerary the petitioner indicated that the educational requirement is a bachelor's degree for the proffered position.¹² However, the petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly to the position in question. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at 147 (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). There must be a close correlation between the required specialized studies and the position; thus, the mere requirement of a degree, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988) (stating that "[t]he mere requirement of a college degree for the sake of general education, or to obtain what an employer perceives to be a higher caliber employee, also does not establish eligibility"). Thus, while a general-purpose degree or a degree in any discipline may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at 147. Thus, the petitioner's claim that a general-purpose degree is acceptable is tantamount to an admission that the proffered position is not in fact a specialty occupation.

We note 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 legacy Immigration and Naturalization Service 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

¹² We note that in the briefs, submitted in response to the RFE and on appeal, counsel claimed that the proffered position requires "a Bachelors [sic] degree in computer science, Engineering, Information Science, or the equivalent through a combination of education or work experience." Counsel's briefs were not endorsed by the petitioner and the record of proceeding does not indicate the source of the educational requirement that counsel attributes to the proffered position. 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).

be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work.

In response to the RFE, counsel submitted a letter dated August 6, 2013 from the end-client, (according to the petitioner) [REDACTED]. In the letter, [REDACTED] stated the beneficiary's duties and responsibilities. We observe that [REDACTED] did not state that the position has any particular academic requirements.¹³ In a letter submitted in response to the director's RFE, [REDACTED] claims that the duties require "a Bachelor's Degree in Computer Science, Engineering, Information Technology, Mathematics, or Science, or other related field in addition to relevant work experience." Thus, the record contains inconsistent information with regard to the requirements of the proffered position.

Further, upon review of the job descriptions, the petitioner and its client did not provide any information with regard to the order of importance and/or frequency of occurrence with which the beneficiary will perform the functions and tasks. Thus, the record fails to specify which tasks are major functions of the proffered position. Moreover, the evidence does not establish the frequency with which each of the duties will be performed (e.g., regularly, periodically or at irregular intervals). As a result, the record does not establish the primary and essential functions of the proffered position.

Upon review of the record of proceeding, we note that while the petitioner has identified its proffered position as that of an Oracle developer, the descriptions of the beneficiary's duties, as provided by the petitioner and the client, lack the specificity and detail necessary to support the petitioner's contention that the position is a specialty occupation. While a generalized description may be appropriate when defining the range of duties that are performed within an occupation, such generic descriptions generally cannot be relied upon by the petitioner when discussing the duties attached to specific employment for H-1B approval. In establishing such a position as a specialty occupation, especially one that may be classified as a staffing position or labor-for-hire, the description of the proffered position must include sufficient details to substantiate that the petitioner has H-1B caliber work for the beneficiary. Here, the job descriptions fail to communicate (1) the actual work that the beneficiary would perform on a day-to-day basis; (2) the complexity, uniqueness and/or specialization of the tasks; and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty.

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 satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a

¹³ [REDACTED] does not claim that the position requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent, as the minimum requirement for entry into the occupation, as required by the Act. See section 214(i)(1) of the Act.

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

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

IV. BENEFICIARY'S QUALIFICATIONS

We do not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient evidence to demonstrate that the proffered position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation.

V. CONCLUSION AND ORDER

An application or petition that fails to comply with the technical requirements of the law may be denied by us 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 we deny a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that we abused our discretion with respect to all of our 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.