



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **MAR 12 2014** OFFICE: CALIFORNIA SERVICE CENTER

IN RE: Petitioner:
Beneficiary:

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

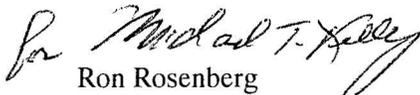
ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,


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 an IT solutions provider¹ that was established in 2002. In order to employ the beneficiary in what it designates as a "QA Analyst" position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).²

The director denied the petition on each of two separate and independent grounds, namely, that the evidence in the record of proceeding failed to establish (1) the existence of an employer-employee relationship between the petitioner and the beneficiary as needed to establish the petitioner as a U.S. employer as defined in the H-1B regulations, and (2) that the proffered position is a specialty occupation.

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.

Upon review of the entire record of proceeding, the AAO finds that the evidence of record as supplemented by the submissions on appeal does not overcome the director's grounds for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

I. Evidentiary Standard

As a preliminary matter, and in light of counsel's references to the requirement that the AAO apply the "preponderance of the evidence" standard, the AAO affirms that, in the exercise of its appellate review in this matter, as in all matters that come within its purview, the AAO follows the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010). In pertinent part, that decision states the following:

¹ On the Labor Condition Application (LCA) submitted with the petition, the petitioner provided a North American Industry Classification System (NAICS) Code of 541511, which corresponds to "Custom Computer Programming Services." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "541511 Custom Computer Programming Services," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

² The record indicates that the beneficiary, who currently holds F-1 status, has been employed by the petitioner since October 2012 and seeks to change his nonimmigrant status to H-1b under this petition.

Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.

* * *

The “preponderance of the evidence” of “truth” is made based on the factual circumstances of each individual case.

* * *

Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is “more likely than not” or “probably” true, the applicant or petitioner has satisfied the standard of proof. *See INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing “more likely than not” as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Id.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In doing so, the AAO applies the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon its review of the present matter pursuant to that standard, however, the AAO finds that the evidence in the record of proceeding does not support counsel’s contentions that the evidence of record requires that the petition at issue be approved.

Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, the AAO finds that the director’s determinations in this matter were correct. Upon its review of the entire record of proceeding, and with close attention and due regard to all of the evidence, separately and in the aggregate, submitted in support of this petition, the AAO finds that the petitioner has not established that its claims are “more likely than not” or “probably” true. As the evidentiary analysis of this decision will reflect, the petitioner has not submitted relevant, probative, and credible evidence that leads the AAO to believe that the petitioner’s claims are “more likely than not” or “probably” true.

II. Factual and Procedural History

A. General Overview

The record of proceeding presents four (4) entities as connected to some degree or other with arranging the work cited as the basis of the petition. These are (1) [REDACTED] of Columbus, Ohio;

[REDACTED] Texas.

The petition identifies [REDACTED] as the business entity generating project work that would require the beneficiary's services at its Columbus, Ohio offices. The petitioner asserts that such project work will constitute a specialty-occupation level position for the beneficiary as an applications software developer working under the job title "QA Analyst."

According to the petition, [REDACTED] New Jersey, to handle the project work to which the beneficiary would be assigned. According to the [REDACTED] letter of March 28, 2013, [REDACTED] in turn contracted with the third entity - [REDACTED], New Jersey - to provide [REDACTED] with "programming, system, analysis, and engineering (IT) related services" which would be "for [the [REDACTED] project at [REDACTED] Ohio.

That same [REDACTED] letter includes statements that the beneficiary has been "sourced through [REDACTED] Inc." and "selected to work as a QA Analyst on our project."

In its letter, also of March 27, 2013, [REDACTED] reiterates the information provided in the [REDACTED] letter, and indicates what is also apparent in the record, that is, that a contract between the end-client [REDACTED] and its prime [REDACTED] would have determined the scope of any [REDACTED] project to which the beneficiary would be assigned as well as the scope of the work which the beneficiary would perform on assignment to [REDACTED] as "a QA Analyst."

We will next state certain preliminary findings that we have made in reviewing the evidence of record. They are an integral part of our overall analysis of the merits of the appeal, and they should therefore be regarded as so incorporated, whether or not we mention them again.

The AAO finds that, although [REDACTED] project work is supposedly the basis of the specialty occupation claim, the record of proceeding lacks any documentary evidence from [REDACTED] that (1) provides any information about any project or projects upon which the beneficiary would work; (2) provides any information about any terms of any contract under which [REDACTED] would accept assignment of the beneficiary; (3) in any way corroborates any of the petition's claims regarding the beneficiary's assignment to work at [REDACTED]

We also observe that, despite the fact that the director's RFE and denial decision clearly conveyed the relevance of such contractual documentation, the petitioner provided none to which [REDACTED] was a party.

We also note that the record does not indicate that the petitioner would have any other personnel at that asserted Ohio work-location, let alone supervisory or management personnel at that location who would exercise substantive control over either the beneficiary's day-to-day work assignments or over the means and instrumentalities that the beneficiary would use or how he would use them.

Next, not only does the record show that the petitioner is geographically remote from [REDACTED], that entity to which the beneficiary would be assigned, but the record contains no documentary evidence that the petitioner was a party to any discussions, negotiations, or contractual documents setting the scope of the project to which it is said the beneficiary would be assigned.

Next, we are not persuaded by the petitioner's asserting that relevant contractual evidence was not provided because of confidentiality concerns. We first note that there is no documentary corroboration of this claim. Second, there is no statutory or regulatory authority relieving an H-1B specialty-occupation petitioner from providing evidence necessary to meet its burden of proof on the grounds that a person or business entity declines to provide evidence.

Also, the AAO finds that the absence of relevant documentary evidence from the end-client (such as, for instance, contracts, statements of work, contract specifications and conditions, and other documents delineating the specific work to be done in pursuit of the much-referenced [REDACTED] project) is in this case a material deficiency that precludes an adequate factual foundation for the AAO to identify, assess, and weigh enough employer-employee indicia for a reasonable determination that the petitioner has the requisite employer-employee relationship with the beneficiary.

Likewise, we also find that, within this particular record of proceeding, the absence of evidence from the end-client [REDACTED] relating to the substantive nature of whatever work the beneficiary would perform for it constitutes a material deficiency, as does the absence of evidence regarding whatever minimal educational requirements - if any - that [REDACTED] may have specified for such work. Further, those deficiencies are not overcome by any of the petitioner's assertions about the specialty-occupation nature of what the beneficiary would do on the assignment to [REDACTED]. 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. 1972)). 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).

B. Additional Details of the Record of Proceeding

In a letter of support dated March 28, 2013, the petitioner claims that it is a "leading unique information technology firm providing innovative B2B, enterprise integration and e-commerce solutions." It claims that it has developed products such as "[REDACTED]" which "enhance customers' productivity while saving costs." The petitioner further claims that it provides business solutions to a broad spectrum of industries including

telecommunications, transportation, financial services, insurance, retail and other digital markets worldwide.

As we already noted, the petitioner claims and [REDACTED] appear to confirm that the beneficiary would work onsite at the offices of end-client [REDACTED] on a project governed by a contract between [REDACTED]

Specifically, the petitioner claims that it has a contractual agreement with [REDACTED], and claims that [REDACTED] "are believed to have [a] contractual relationship," thus demonstrating the linear link between the petitioner and end-client [REDACTED]. The petitioner further claims that [REDACTED] and [REDACTED] "are in Contract." In support of this contention, the petitioner submitted: (1) an end-client ID card for the beneficiary; (2) the aforementioned letter from [REDACTED] dated March 28, 2013; (3) the aforementioned March 27, 2013 letter from [REDACTED]; (4) a contractor agreement and statement of work dated February 18, 2013 between the petitioner and [REDACTED]; (5) a job offer letter from the petitioner to the beneficiary dated March 1, 2013; and (6) copies of the beneficiary's paystubs from November 26, 2012 to January 6, 2013.³

Regarding the proposed duties of the beneficiary at [REDACTED] the petitioner claimed in its March 28, 2013 letter that they would include the following tasks:

- Generate Test Cases, Test Strategy, and Test Plan based on the nonfunctional business requirements to meet the expected performance of various applications.
- Work as a Performance Tester/Analyst in a complex and dynamic testing (Quality Assurance) environment.
- Execute Load test, Stress test, Benchmark profile test, Fail-Over test, Fail-Back test against supported configurations by uploading the Jmeter scripts into Apache Jmeter.
- Involve in all stages of SDLC during projects, Analyzed designed and tested the new requirement for performance, efficiency and maintainability using Jmeter and other in house tools.
- Monitor the CPU, memory, and network utilizations of Web, Application and database servers using Wily introscope, Site Scope and other monitoring tools.
- Collaborate with architecture and development teams to analyze the application's core functionalities and its various dependencies for effectively identifying potential bottlenecks.

The petitioner claimed that this position requires an individual with a bachelor's degree in the same or related field and/or relevant experience. Finally, the petitioner stated that it "also employs some specialty occupation professionals in the contractor positions sourced through IT vendors," and that "the beneficiary can be placed in place of any one of those contractor positions."

³ The petitioner also submitted various documents pertaining to the beneficiary's educational background. As the beneficiary's qualifications are not as issue in this proceeding, they will not be discussed further.

The director issued an RFE on April 23, 2013. Specifically, the director noted that the record contained insufficient evidence to demonstrate the contractual relationship between the petitioner and the end-client, [REDACTED]. The director noted that, while the record contained documentation establishing the nature of the relationship between the petitioner and the intermediate vendors [REDACTED] and [REDACTED] the record was devoid of evidence establishing the nature of the work agreement for the beneficiary's services at [REDACTED]. The director requested documentation to establish the nature of this relationship, as well as additional documentation demonstrating the petitioner's right to control the work of the beneficiary while working onsite at [REDACTED].

In a 24-page letter dated July 9, 2013, counsel for the petitioner responded to the director's request. In addition to providing additional documentary evidence, counsel addressed the merits of the director's findings in the RFE and provided various legal arguments in support of the petitioner's eligibility, which will be discussed in detail later in this decision.

Throughout the response, counsel contended that all documentary evidence submitted "passes" the preponderance of the evidence standard. Regarding the petitioner's relationship and involvement in the [REDACTED] project, counsel stated that the petitioner was unable to produce a letter, contract, or statement of work from [REDACTED] because such documentation was believed to constitute confidential or privileged information that was not accessible to the petitioner. However, counsel contends that other probative evidence had previously been submitted to satisfy this requirement, such as the beneficiary's ID card,⁴ the letters from [REDACTED] and the contractor agreement and statement of work dated February 18, 2013 between the petitioner and [REDACTED]. Counsel also relied on newly-submitted evidence in response to the RFE, such as: (1) copies of emails between the beneficiary and [REDACTED]; (2) a "Professional Services Agreement" (hereinafter referred to as the [REDACTED]) and Statement of Work between [REDACTED], dated April 1, 2013 (hereinafter, the [REDACTED]); (3) photographs of the beneficiary at the [REDACTED] offices; (4) the petitioner's invoices to [REDACTED] for the beneficiary's services; (5) a copy of the beneficiary's timesheet; (6) a document entitled "Employer-Employee Relationship Terms," signed by the petitioner and the beneficiary; and (7) documentation showing the benefits paid for by the petitioner on behalf of the beneficiary.

Regarding the employment of the beneficiary, counsel's RFE-reply letter states that, based on the beneficiary's academic and professional accomplishments, the beneficiary "is an alien of distinguished merit and ability."⁵ Counsel's letter also provided an updated overview of the duties to

⁴ The AAO notes that the beneficiary's ID card contains no identifying data indicating who issued this ID card or for whom the beneficiary is employed. Therefore, this evidence is not probative.

⁵ Counsel states that the beneficiary will serve "as an alien of distinguished merit and ability." However, to clarify, the AAO notes that the term "distinguished merit and ability" was defined in the regulations as "one who is a member of the professions . . . or who is prominent in his or her field." See 8 C.F.R. § 214.2(h)(4) (1991). The *Immigration Act of 1990* ("IMMACT 90") deleted the term "distinguished merit and ability" from the general H-1B description and replaced it with the requirement that the position be a "specialty occupation." Pub. L. No. 101-649, 104 Stat. 4978, 5020. The implementation of this change occurred on April 1, 1992. The *Miscellaneous and Technical Immigration and Naturalization Amendments of 1991* ("MTINA"), which was enacted on December 2, 1991, modified the H-1B definition to include fashion models of distinguished merit and ability. Pub. L. No. 102-232, 105 Stat. 1733. While the term

be performed during the requested validity period at [REDACTED] including a breakdown of the percentage of time the beneficiary would devote to his various tasks. Specifically, counsel stated that the beneficiary's duties would be broken down as follows:

Analysis of the user needs 25%:

This involves the review and analysis of the existing programs, applications, and systems. The beneficiary needs to confer with the existing user of the systems and to understand the users' needs and applications. The beneficiary will be involved in analyzing user requirements, procedures and problems to automate processing and improve existing computer systems and applications.

This will require the beneficiary to study and analyze the existing programs and system on which the development work will be carried out. This will require the beneficiary to interact with the users of the programs and systems – understand the functionality of the programs and systems, the specifications and the requirements of the users.

Responsible for planning, coordinating, design and development of the initial/modification/enhancements of applications to meet the client needs 45%.

Based on the feedback received from the users and the on [sic] the understanding of their needs the beneficiary is responsible for design of the new programs, systems and modifications needed to be implemented. The beneficiary will design and develop the applications, programs and any modifications and enhancement to meet the business needs. The beneficiary will formulate/define systems scope objectives and write a detailed description of the user needs, program functions and steps required to develop or tailor computer programs. The beneficiary will utilize his knowledge and experience in the field for designing, enhancing, integrating, creating and implementing new applications and systems as well as customizing.

Testing and implementation of the proposed applications, programs, modifications, enhancements and providing support if necessary 20%.

Once the design and development is in place the beneficiary will work on the implementation of applications, programs, modifications, enhancements, test the same and work with the users to provide them the necessary support. The beneficiary will configure and customize various modules based on user requirements and will be involved in the systems integration, systems configuration, program specifications, coding, testing and unit integration. The beneficiary will extensively interact with user groups with regard to various functionalities and provided application support during the advanced stages of implementation.

"distinguished merit and ability" is still used with regard to fashion models, it must be noted that the term has not been applicable to the general H-1B classification ("specialty occupations") for over 20 years.

Miscellaneous 10%

The balance of the beneficiary's time is spent on miscellaneous activities documentation etc including coordinating with other professionals involved in the project.

It should be noted that, aside from the question of whether or not the evidence of record supports them, the above descriptions generally comport with the Software Developers occupational category to which the petitioner claims the position it belongs. However, as will be discussed later, the evidence of record does not establish that in fact the beneficiary would more likely than not perform the duties here claimed by counsel. In this regard, we will also later discuss the various position descriptions provided in the documentary evidence, particularly, the submissions from the entities involved in the procurement of the beneficiary to serve on the project at [REDACTED]. We find that these descriptions are materially inconsistent and consequently fail to provide a coherent and reliable picture of what the beneficiary would actually do if this petition were approved.

Counsel also submitted additional documentary evidence pertaining to the petitioner, including but not limited to a printout from the petitioner's website, copies of the beneficiary's paystubs for the period from April 1, 2013 through May 12, 2013, and copies of various federal tax documents for both the petitioner and the beneficiary.

The director denied the petition on July 19, 2013, finding that submitted documentation was insufficient to establish eligibility for the benefit sought. On appeal, counsel submitted a brief and additional evidence and contends that the findings of the director were erroneous.

III. Analysis

As already stated, the AAO finds that the record of proceeding is fundamentally incomplete with regard to both the employer-employee issue and the specialty occupation issue. The record lacks copies of the keystone documents that would best show both the relative extent of the petitioner's supervision and control over the beneficiary and also the substantive nature of the beneficiary's work. Consequently, the record of proceeding lacks an adequate evidentiary basis to support reasonable findings that the petitioner more likely than not (1) has the requisite employer-employee relationship with the beneficiary and (2) has proffered a specialty occupation position.

A. Employer-Employee Relationship

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

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

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

The term "United States employer" is defined in the Code of Federal Regulations 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.⁶

⁶ 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

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 318-319.⁷

section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. Instead, in the context of the H-1B visa classification, the term "United States employer" was defined in the regulations to be even more restrictive than the common law agency definition. A federal agency's interpretation of a statute whose administration is entrusted to it is to be accepted unless Congress has spoken directly on the issue. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-845 (1984).

The regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to employ persons in the United States, and to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee," "employed," "employment" or "employer-employee relationship" indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition." Therefore, in the absence of an intent to impose broader definitions by either Congress or USCIS, the "conventional master-servant relationship as understood by common-law agency doctrine," and the *Darden* construction test, apply to the terms "employee," "employer-employee relationship," "employed," and "employment" as used in section 101(a)(15)(H)(i)(b) of the Act, section 212(n) of the Act, and 8 C.F.R. § 214.2(h). That being said, there are instances in the Act where Congress may have intended a broader application of the term "employer" than what is encompassed in the conventional master-servant relationship. *See, e.g.*, section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F) (referring to "unaffiliated employers" supervising and controlling L-1B intracompany transferees having specialized knowledge); section 274A of the Act, 8 U.S.C. § 1324a (referring to the employment of unauthorized aliens).

⁷ 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))).

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).⁸

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

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

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

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

⁸ 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).

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).

In the case before us, the petitioner claims that it has an employer-employee relationship with the beneficiary. In its aforementioned its March 28, 2013 letter, the petitioner claims that its management has the "right to control and/or actual control" over the beneficiary's employment. In response to the RFE, counsel asserts that the record contains numerous documents that establish the petitioner's right to control the beneficiary, and provides numerous statements in support of this contention, including the following:

- Without petitioner's approval/permission, the beneficiary would not be working on [REDACTED] projects
- Petitioner has the right to move the beneficiary to other projects [REDACTED] [REDACTED] doesn't have this power – Only petitioner has this power)
- Petitioner can recall the beneficiary from [REDACTED] projects

With regard to the first bullet-point above, we note that according to the scenario presented in this petition, there is no evidence of record that [REDACTED] was obliged to accept the beneficiary's services at all or that [REDACTED] was not free to hire, terminate, control and pay for the beneficiary's services on whatever contractual terms it found to its liking. Thus, we accord no probative weight to this first assertion.

We also accord no evidentiary weight to either the second or third bullet-point. The record has no documentary evidence of whatever contractual terms would address and determine what control, if any, the petitioner would maintain over the beneficiary in relation to the [REDACTED] project. Again, the assertions of counsel will not satisfy the petitioner's burden of proof and they do not in themselves constitute vidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

Counsel also submitted various documents regarding the benefits available to the beneficiary through his employment with the petitioner. For example, counsel submitted a copy of the petitioner's Summary of Benefits for employees, outlining the health, life and retirement benefits available to the beneficiary, as well as payroll documents evidencing the amount withheld toward these benefits from the beneficiary's paychecks. Counsel concluded that "few to some of the above points or items are more than sufficient to prove that there is an employer-employee relationship between the petitioner and the beneficiary and petitioner's right to control over the beneficiary through September 17, 2016 even when placed at a client site."

The AAO acknowledges that the method of payment of wages, along with evidence of withholdings demonstrating the beneficiary's participation in various employment benefit plans issued through the petitioner, 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 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. However, as already noted, the evidence of record lacks sufficient evidence to establish most of what we referred to above as those "other incidents of the relationship."

The AAO has considered these 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 and, contrary to counsel's contentions, the claims set forth in the RFE are not supported by independent, objective evidence. Once again, we note that the unsupported assertions of counsel will not satisfy the petitioner's burden of proof, and that the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506 (BIA 1980). 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 offer of employment letter between the petitioner and the beneficiary, agreed upon and signed by both parties on October 1, 2013. The employment agreement indicates the beneficiary's job title and salary; however, upon review of the document, the AAO notes that it 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.

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, the AAO looks at a number of factors, including who will provide the instrumentalities and tools required to perform the duties; the provision of employee benefits; and the beneficiary's role in hiring and paying assistants.⁹ Upon review of the record of proceeding, the petitioner did not provide probative evidence on these issues.

⁹ The AAO notes that, in response to the RFE, counsel contends that USCIS erroneously "adopted" the common law definition of employer under *Darden*, asserting that the common law definition only applies in

Further, upon review of the record, the AAO notes that the petitioner has not established the duration of the relationship between the parties. The petitioner and counsel repeatedly claim throughout the record that the beneficiary will be employed on [REDACTED] project work for the duration of the requested validity period, and they depict the path of this contractual relationship as follows:

Petitioner → [REDACTED]

The record contains the following documents pertinent to this claim:

- Contractor Agreement dated February 18, 2013 between [REDACTED] and the petitioner, accompanied by a Statement of Work contracting the beneficiary's services to [REDACTED] for a 12-month period commencing February 21, 2013;
- Letter from [REDACTED] dated March 27, 2013, stating that the beneficiary has been selected to work as a QA analyst for a [REDACTED] project at [REDACTED];
- Professional Services Agreement dated April 1, 2013 between [REDACTED] and [REDACTED] accompanied by a Statement of Work contracting the beneficiary's services to [REDACTED] commencing February 21, 2013;
- Letter from [REDACTED] dated March 28, 2013, stating that the beneficiary is currently working for [REDACTED] as a QA analyst for a project at [REDACTED]

However, the record does not contain a written agreement between the [REDACTED] and [REDACTED] or the petitioner and [REDACTED] establishing that H-1B caliber work exists for the beneficiary for the duration of the requested period. Although the March 28, 2013 letter states that [REDACTED] contract for IT services is directly with [REDACTED]" the petitioner failed to submit said contract or other evidence supporting this claim.

the absence of a statutory or other legal definition. Counsel further asserts that the director's interpretation of an employer-employee relationship, including the 20 factors to determine whether the petitioner is an employer as set forth under *Darden*, was erroneous, and does not have a place in current immigration laws and regulations in light of a January 8, 2010 memorandum issued by USCIS (the "Neufeld memo"). See Memorandum from Donald Neufeld, Acting Director, Service Center Operations, U.S. Citizenship and Immigration Services, Department of Homeland Security, *Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements*, HQ 70/6.2.8 (Jan. 8, 2010). According to counsel, the petitioner has established eligibility under the Neufeld memorandum and thus the petition should be approved. We disagree with counsel's analysis. We find that counsel's claims as to the sufficiency of evidence to prevail on the weighing of the indicia noted in the Neufeld memo is not supported by evidence of record and therefore have no merit. In this regard, we also find that the same evidentiary deficiencies that we have detailed in this decision also equally apply to the application of the memo's methodology. Accordingly, the petition fails both under the common-law test enunciated by the Supreme Court and also by application of the employer-employee indicia specified in the memo – and this record establishes very few such indicia for consideration.

It is noted that, on appeal, counsel submits for the first time a letter from [REDACTED] to USCIS, dated April 10, 2012. The letter states: "This will confirm that [REDACTED] has engaged the services of [REDACTED] to provide IT consulting services. As a part of this agreement, [REDACTED] places IT professionals at our work sites." Several reasons compel the AAO to accord no weight to this letter. The letter predates the petition's filing by approximately one year, and therefore on its face it is obvious that the letter does not address whatever circumstances were in play at the time when the petition was filed. Further, a substantial portion of the letter's content has been redacted, thereby masking the full import of whatever the author had intended to convey.

Also included on appeal is an email message dated August 7, 2013 from [REDACTED] presumably a representative of [REDACTED] the beneficiary. This email states that, pursuant to its contract with [REDACTED] will not issue any letter verifying the beneficiary's project work at [REDACTED]. This message neither reduces nor advances the petitioner's burden of proof. It does however materially undermine the weight of [REDACTED] submissions bearing upon the nature of the proffered position and/or the duration, extent, and substantive nature of the [REDACTED] project-work that is purported to be the basis for the specialty-occupation claim.

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). In this case, the RFE and the denial decision clearly placed the petitioner on notice with regard to the need for documentary evidence substantiating its claims. Yet the petitioner has not responded with such evidence.

In addition, a key element in this matter is who would have the ability to hire, fire, supervise, or otherwise control the work of the beneficiary for the duration of the H-1B petition. The AAO observes that in the RFE, the director specifically requested that the petitioner provide documentation to clarify the petitioner's employer-employee relationship with the beneficiary. The director provided a list of the types of evidence that would be relevant, which included a request that the petitioner submit an organizational chart, and a brief description of who will supervise the beneficiary along with the person's duties and/or other similarly probative documents. However, the petitioner failed to provide specific information regarding the beneficiary's supervisor (e.g., job title, duties, location).

In the March 28, 2013 letter, the petitioner briefly claims that it has the right to control the beneficiary. However, the AAO observes that the petitioner did not provide any information regarding how work and performance standards are established, the methods for assessing and evaluating the beneficiary's performance, who will prepare the reports, the criteria for determining bonuses and salary adjustments, et cetera. Although the AAO notes the submission of a blank performance appraisal in response to the RFE, which serves as a sample of how the petitioner will evaluate the performances of its employees, the document submitted is vague, generic, and provides little information as to who evaluations are performed and who will actually assess the beneficiary's work. Moreover, the beneficiary's timesheets for the [REDACTED] project, submitted in response to the RFE, are managed by [REDACTED], not the petitioner. Most importantly, there are no substantiated

statements as to how the day-to-day work of the beneficiary will be evaluated, supervised and/or overseen – but we do again note the absence of evidence of any management or supervisory personnel of the petitioner at the [REDACTED] work location .

Finally, beyond the decision of the director, the evidence submitted fails to establish non-speculative employment for the beneficiary for the entire period requested. Although the petitioner requested, on the Form I-129, that the beneficiary be granted H-1B classification from October 1, 2013 to September 17, 2016, there is insufficient documentation regarding work for the beneficiary for the duration of the requested period. As previously noted, the contract and statement of work between the petitioner and [REDACTED] state that the beneficiary's employment would commence on February 21, 2013 and would continue for 12 months. The only documentation pertaining to any work assignment for the beneficiary, therefore, covers only five months of the requested three-year validity period. Thus, the record does not demonstrate that the petitioner will maintain an employer-employee relationship for the duration of the validity of the requested period. The petitioner acknowledged in its March 28, 2014 letter of support that it routinely employs specialty occupation professionals in contractor positions through IT vendors, and further claimed that the beneficiary could be placed in any of those positions in the event the [REDACTED] project was terminated prior to the end of the requested validity period. Furthermore, in response to the RFE, counsel asserts that even if the [REDACTED] project "ends abruptly," the beneficiary will be called back to the petitioner's headquarters in Irving, Texas "to work out of this location for the rest of the H-1B duration." Given the previous statement, where the petitioner claims that the beneficiary "can" be outsourced to other contractor positions through various IT vendors, it is clear that the beneficiary's employment for the requested validity period was speculative at the time of filing.

The AAO finds that, while the statement of work between the petitioner and [REDACTED] notes that the project may be extendable beyond February 20, 2014, it was not renewed prior to the date that the petition was filed. The petitioner also did not submit documentary evidence regarding any additional work for the beneficiary for the remainder of the requested H-1B validity period.¹¹ Thus,

¹¹ In response to the RFE, counsel asserts that the petitioner complied with this requirement and asserts that it was not required to submit a complete itinerary for all potential work assignments for the beneficiary at the time of filing. Counsel relies on a Memorandum from Michael L. Aytes, Assistant Commissioner, Immigration and Naturalization Service, Department of Justice, *Interpretation of the Term "Itinerary" Found in 8 C.F.R. 214.2(h)(2)(i)(B) as it Relates to the H-1B Nonimmigrant Classification*, HQ 70/16.2.8 (Dec. 29, 1995) (hereinafter the "Aytes memo"), a policy memorandum issued by the legacy Immigration and Naturalization Service ("INS"), in support of this assertion. However, the Aytes memo specifically qualifies its guidance as being subject to the exercise of the adjudicating officer's discretion. This is evident in the memo's statements that the itinerary requirement has been met "[a]s long as the officer is convinced of the bona fides of the petitioner's intentions with respect to the alien's employment," and that "[s]ervice officers are encouraged to use discretion in determining whether the petitioner has met the burden of establishing that it has an actual employment opportunity for the alien."

Counsel also contended in response to the RFE that the director must follow the prior action of the AAO in *Aditi Corporation* (LIN 99 243 50365, May 23, 2000). However, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision.

the petitioner has failed to establish that the petition was filed for non-speculative work for the beneficiary that existed *as of the time of the petition's filing*, for the entire period requested. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). Thus, even if it were found that the petitioner would be the beneficiary's United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii), the petitioner has not demonstrated that it would maintain such an employer-employee relationship with the beneficiary for the duration of the period requested.¹²

The evidence of record does not establish that the petitioner would act as the beneficiary's U.S. employer as defined in the H-1B regulatory context. Despite the director's specific request for evidence on this issue, and the content of the director's decision, the petitioner still has not submitted sufficient evidence to corroborate its claim. It bears repeating that 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.

As related above, the evidence of record is just too skeletal for the petitioner to establish that it will

Nevertheless, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. Therefore, the AAO does not find its prior holding in the matter of *Aditi Corporation* relevant to or binding on these proceedings.

¹² 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).

be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii). Furthermore, the petition must also be denied due to the petitioner's failure to establish eligibility at the time of filing and to proffer non-speculative employment to the beneficiary.

B. Specialty Occupation

The AAO 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 AAO notes that, as recognized by the court in *Defensor, supra*, where, as here, 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 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.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not rely simply upon a proffered position's title. The specific duties of the position, combined with the nature of the petitioning entity's business operations, are factors to be considered to determine whether the position qualifies as a specialty occupation. USCIS must examine the extent and substance of whatever documentary evidence is provided with regard to the substantive nature of the specific work that the end-client (in this case, JPMC) may require as the ultimate employment of the beneficiary. *See generally Defensor v. Meissner*, 201 F. 3d at 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 finds that the critical, decisive evidence for determining the specialty occupation issue in this appeal is the extent and quality of the evidence that the record of proceeding presents with regard to both particular substantive work that the beneficiary would actually perform, and also the nature and educational level of substantive knowledge in a specific specialty that the beneficiary would have to practically and theoretically apply in order to perform that work.

As reflected in the earlier discussions herein regarding the petitioner's assertions and the documentary evidence contained in the record, it appears that the actual, day-to-day work to be performed by the beneficiary would be ultimately determined by [REDACTED] the end-client, or by [REDACTED] in consultation with [REDACTED] based upon whatever [REDACTED] contractual obligations to [REDACTED] would be. As reflected in the discussions and analyses throughout this decision, the record lacks sufficient evidence from these entities to establish the actual nature of the beneficiary's duties and the educational level of substantive knowledge in any specific specialty that the beneficiary would have to employ.

Again the AAO notes first that the record of proceeding is devoid of a copy of any contractual documentation between [REDACTED] and [REDACTED], the entity identified as requiring the beneficiary's services. Such documentation is material for an understanding of the nature and requirements of the asserted project in which the beneficiary would be involved.

In addition to that lack of fundamental evidence, there is no documentary evidence that either [REDACTED] or [REDACTED] ever endorsed the accuracy of the range of duties that the petitioner and/or counsel ascribed to the proffered position. In fact, we find that the duties as presented by the petitioner are materially different than those that other entities ascribe to the petition.

To highlight the material inconsistencies among the petitioner's assertions themselves as well as between those assertions and representations from the other entities, and also to show the record's lack of consistent information about the proffered position, we will now cite representative statements from the different entities involved.

From the petitioner

Of course, by statements and various submissions in the petition, such as the related *Handbook* chapter, and by virtue of the type of position for which the LCA had been certified, the petitioner maintained that the beneficiary would perform the services of a Software Developer, Applications.

For the relatively high levels of related IT knowledge and expertise and leadership ability in Software Development that the petitioner asserted as required for the proffered position, we need only repeat the following representations, in counsel's RFE-response letter, regarding the constituent duties of the proffered position and the estimated percentages of worktime that their performance would require:

Analysis of the user needs 25%:

This involves the review and analysis of the existing programs, applications, and systems. The beneficiary needs to confer with the existing user of the systems and to understand the users' needs and applications. The beneficiary will be involved in analyzing user requirements, procedures and problems to automate processing and improve existing computer systems and applications.

This will require the beneficiary to study and analyze the existing programs and system on which the development work will be carried out. This will require the beneficiary to interact with the users of the programs and systems – understand the functionality of the programs and systems, the specifications and the requirements of the users.

Responsible for planning, coordinating, design and development of the initial/modification/enhancements of applications to meet the client needs 45%.

Based on the feedback received from the users and the on [sic] the understanding of their needs the beneficiary is responsible for design of the new programs, systems and modifications needed to be implemented. The beneficiary will design and develop the applications, programs and any modifications and enhancement to meet the business needs. The beneficiary will formulate/define systems scope objectives and write a detailed description of the user needs, program functions and steps required to develop or tailor computer programs. The beneficiary will utilize his knowledge and experience in the field for designing, enhancing, integrating, creating and implementing new applications and systems as well as customizing.

Testing and implementation of the proposed applications, programs, modifications, enhancements and providing support if necessary 20%.

Once the design and development is in place the beneficiary will work on the implementation of applications, programs, modifications, enhancements, test the same and work with the users to provide them the necessary support. The beneficiary will

configure and customize various modules based on user requirements and will be involved in the systems integration, systems configuration, program specifications, coding, testing and unit integration. The beneficiary will extensively interact with user groups with regard to various functionalities and provided application support during the advanced stages of implementation.

Miscellaneous 10%

The balance of the beneficiary's time is spent on miscellaneous activities documentation etc including coordinating with other professionals involved in the project.

The descriptions generally tally with a position held by a robustly involved Software Developer that would be acting in that capacity from the inception of the project until its completion. There is absolutely no indication here that the beneficiary would be involved in any subordinate role or that he would be relegated to any particular functional area. Rather, the language and tenor of counsel's descriptions depict the beneficiary as continuously playing a major – if not the major – software development role in the project at [REDACTED]. The following segment from above is fairly representative of the level of responsibility and authority and the commanding software development role that counsel claims for the proffered position:

Responsible for planning, coordinating, design and development of the initial/modification/enhancements of applications to meet the client needs 45%.

Based on the feedback received from the users and the on [sic] the understanding of their needs the beneficiary is responsible for design of the new programs, systems and modifications needed to be implemented. The beneficiary will design and develop the applications, programs and any modifications and enhancement to meet the business needs. The beneficiary will formulate/define systems scope objectives and write a detailed description of the user needs, program functions and steps required to develop or tailor computer programs. The beneficiary will utilize his knowledge and experience in the field for designing, enhancing, integrating, creating and implementing new applications and systems as well as customizing.

Accordingly, as the evidence of record does not establish that [REDACTED] accepts the accuracy of any of the duty descriptions provided by the petitioner, counsel, or [REDACTED] in its statement of work dated February 18, 2013, the AAO will focus upon whatever evidence [REDACTED] has provided with regard to the duties that the beneficiary would perform if this petition were approved.

From [REDACTED]

In clear contrast to counsel's assertions quoted above, [REDACTED] significantly narrows the scope and responsibilities of the proffered position – and to such an extent that the position described by counsel is so materially diminished from counsel's deposition as to not amount to the same position at all. In the previously-mentioned letter dated March 28, 2013, [REDACTED] stated that the beneficiary will

be working "in [REDACTED] Enterprise Systems Reengineering project," and would perform the following duties:

- Creating Test Cases, Test Strategy, and Test Plan based on the nonfunctional business requirements to meet the expected performance of various applications.
- Work as a QA Analyst in a complex and dynamic testing and Quality Assurance environment.
- Executing Load test, Stress test, Benchmark Profile test, Fail-Over test, Fail-Back test against supported configurations by uploading the Jmeter scripts in to Apache Jmeter.
- Involve in all stages of SDLC during projects, analyze design and test the new requirement for performance, efficiency and maintainability using Jmeter and other in house tools.
- Monitoring the CPU, memory, and network utilizations of Web, Application and database servers using Wily Introscope, Site Scope and other monitoring tools.
- Collaborate with architecture and development teams to analyze the application's core functionalities and its various dependencies for effectively identifying potential bottlenecks.¹³

Additionally we note that [REDACTED] provides no explanation or clarification of the differences between its description above and the following description, which we quote from the [REDACTED] "Statement of Work" submitted as Exhibit E of the RFE:

1. Scope of Work: LoadRunner Web, Web Services, Winsock, Citrix, Oracle, Click and Script Protocols.
2. Skill Required: LoadRunner Web, Web Services, Winsock, Citrix, Oracle, Click and Script Protocols.

The March 27 2013 letter from [REDACTED] is substantially identical in content and wording to the [REDACTED] letter. There are only some minor changes in wording, capitalization, and sentence structure and order. In fact, the AAO finds that the content of the [REDACTED] letters are so similar as to suggest that the two letters were drafted by or copied from a common source.

We also note that while the [REDACTED] letters refer to the proposed job as that of "QA Analyst" neither describes the proffered position as a Software Developer or Software Developer, Applications position.

¹³ It is noted that [REDACTED] letter dated March 28, 2013 describes the proposed duties of the beneficiary in terms similar to those used in the petitioner's letter of support, dated March 28, 2013, and counsel's response to the RFE, dated July 9, 2013. However, there is no adoption or endorsement of the breakdown of the percentage of time the beneficiary would devote to his claimed duties as set forth in counsel's response to the RFE by any IT company involved in the claimed contractual relationship.

Further, however, we note that the [redacted]/petitioner "Statement of Work" submitted as Exhibit G to the RFE provides *yet another version* of the work to be performed by the beneficiary. This document states, in part:

Scope of Work: Provide Performance Testing services in coordination with the client [(not identified)] in coordination with the client offshore team.

From the asserted end-client, [redacted]

There is only the letter from [redacted] Legal and Compliance Department – and approximately four-lines have been redacted by what appears to be black marker. We find that because [redacted] is a critical party in determining the nature of the project that would be provided for it – and in which the beneficiary would assertedly serve, and because the totality of the record indicates that [redacted] would naturally determine for whom it would pay to be assigned and in what capacity and at what cost and according to what terms and conditions, we find that both the paucity of information therein provided and also the fact that the integrity of the letter has been destroyed and its content and internal context destroyed by the redaction critically undermines the reliability of the assertions about the proffered position and its duties.

The body of that letter now just reads as follows (with redaction noted):

This will confirm that [redacted] has engaged the services of [redacted] [redacted] to provide IT consulting services. As a part of this agreement, [redacted] professionals at our worksite.

While an IT professional performs work at [redacted] Premises, the professional is not employed by us. [Lines redacted by black marker.]

Additionally, we emphasize that there are no submissions from [redacted] – the entity upon whose project the beneficiary is said to be working – that corroborates whatever duties may be claimed with regard to the claimed [redacted] project upon which the beneficiary will be working. Other than the April 12, 2012 letter submitted for the first time on appeal, which states simply that it has engaged [redacted] to provide IT consulting services in the past, the record contains no documentary evidence from [redacted] stating or corroborating the nature of the claimed project upon which the beneficiary will work, the associated duties, or the duration of the assignment.

We conclude that the inconsistencies in the job and duty descriptions reviewed above are nowhere explained or reconciled within this record of proceeding. Thus, the record fails to establish exactly what the beneficiary would actually do if he were assigned to the unexplained project work claimed to exist for him at [redacted]

We find that the evidence of record does not establish whatever substantive work would be involved, and what associated level of training, work experience, or educational level of specialized knowledge in a computer-related specialty would be required to perform such work. In this regard,

the AAO observes that neither this [REDACTED] letter nor any other portion of the record provides substantive details about the Enterprise Systems Reengineering Project for J [REDACTED]. Further, there is no persuasive evidence in the record of proceeding that establishes that taken at face value the duties as described in this T [REDACTED] letter would comport with those of the Software Developers occupational classification for which the petition was filed.

Finally, based upon our review of the totality of this record's varied and inconsistent representations presented about the proffered position, we find no reasonable evidentiary basis for determining that the proffered position would even fall within the Software Development occupational category asserted by petitioner as central to its specialty occupation claim.

The AAO recognizes the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations it addresses.¹⁴ In relevant part, the *Handbook* states the following with regard to the duties of software developers:

Software developers are the creative minds behind computer programs. Some develop the applications that allow people to do specific tasks on a computer or other device. Others develop the underlying systems that run the devices or control networks.

Duties

Software developers typically do the following:

- Analyze users' needs, then design, test, and develop software to meet those needs
- Recommend software upgrades for customers' existing programs and systems
- Design each piece of the application or system and plan how the pieces will work together
- Create a variety of models and diagrams (such as flowcharts) that instruct programmers how to write the software code
- Ensure that the software continues to function normally through software maintenance and testing
- Document every aspect of the application or system as a reference for future maintenance and upgrades
- Collaborate with other computer specialists to create optimum software

Software developers are in charge of the entire development process for a software program. They begin by asking how the customer plans to use the software. They design the program and then give instructions to programmers, who write computer code and test it. If the program does not work as expected or people find it too difficult to use, software developers go back to the design process to fix the problems

¹⁴ The *Handbook*, which is available in printed form, may also be accessed online at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are from the 2014-15 edition available online.

or improve the program. After the program is released to the customer, a developer may perform upgrades and maintenance.

Developers usually work closely with computer programmers. However, in some companies, developers write code themselves instead of giving instructions to computer programmers.

Developers who supervise a software project from the planning stages through implementation sometimes are called information technology (IT) project managers. These workers monitor the project's progress to ensure that it meets deadlines, standards, and cost targets. IT project managers who plan and direct an organization's IT department or IT policies are included in the profile on computer and information systems managers.

The following are types of software developers:

Applications software developers design computer applications, such as word processors and games, for consumers. They may create custom software for a specific customer or commercial software to be sold to the general public. Some applications software developers create complex databases for organizations. They also create programs that people use over the Internet and within a company's intranet.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Software Developers," <http://www.bls.gov/ooh/computer-and-information-technology/software-developers.htm#tab-2> (last visited March 6, 2014).

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

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

Although not a decisive factor in the AAO's decision here, we also note that the petitioner's submission of an LCA certified for use with a Level I wage-rate job – which is only appropriate for

use when the associated job duties are of relatively low complexity – is materially inconsistent with the earlier quoted statements by counsel regarding the proffered position.

In this regard, we observe that the *Prevailing Wage Determination Policy Guidance* issued by the U.S. Department of Labor (DOL) states the following with regard to Level I wage rates:

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered [emphasis in original].

The pertinent guidance from the Department of Labor, at page 7 of its *Prevailing Wage Determination Policy Guidance* describes the next higher wage-level as follows:

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.

The above descriptive summary indicates that even this higher-than-designated wage level is appropriate for only “moderately complex tasks that require limited judgment.” The fact that this higher-than-here-assigned, Level II wage-rate itself indicates performance of only “moderately complex tasks that require limited judgment,” is very telling with regard to the relatively low level of complexity imputed to the proffered position by virtue of its Level I wage-rate designation.

Further, the AAO notes the relatively low level of complexity that even this Level II wage-level reflects when compared with the two still-higher LCA wage levels, neither of which was designated on the LCA submitted to support this petition.

The aforementioned *Prevailing Wage Determination Policy Guidance* describes the Level III wage designation as follows:

Level III (experienced) wage rates are assigned to job offers for experienced employees who have a sound understanding of the occupation and have attained, either through education or experience, special skills or knowledge. They perform tasks that require exercising judgment and may coordinate the activities of other staff. They may have supervisory authority over those staff. A requirement for years

of experience or educational degrees that are at the higher ranges indicated in the O*NET Job Zones would be indicators that a Level III wage should be considered.

Frequently, key words in the job title can be used as indicators that an employer's job offer is for an experienced worker. . . .

The *Prevailing Wage Determination Policy Guidance* describes the Level IV wage designation as follows:

Level IV (fully competent) wage rates are assigned to job offers for competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. These employees receive only technical guidance and their work is reviewed only for application of sound judgment and effectiveness in meeting the establishment's procedures and expectations. They generally have management and/or supervisory responsibilities.

By virtue of this submission the petitioner effectively attested that the proffered position is a low-level, entry position relative to others within the occupation, and that, as clear by comparison with DOL's instructive comments about the next higher level (Level II), the proffered position did not even involve "moderately complex tasks that require limited judgment" (the level of complexity noted for the next higher wage-level, Level II).

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

ORDER: The appeal is dismissed.