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



U.S. Citizenship
and Immigration
Services

DATE: **MAR 13 2014**

OFFICE: CALIFORNIA SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner:

Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,

N. Rosenberg
for

Ron Rosenberg
Chief, Administrative Appeals Office

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

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the California Service Center on April 8, 2013. On the Form I-129 visa petition, the petitioner describes itself as a Software Design Development and Consulting company established in 2011, with 335 employees. In order to employ the beneficiary in what it designates as a "Data Analyst" position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on the grounds that the petitioner failed to establish that the proffered position qualifies for classification as a specialty occupation in accordance with the applicable statutory and regulatory provisions. The petitioner filed a timely appeal of the decision. On appeal, the petitioner's counsel asserts that the director erroneously denied the petition. In support of this assertion, counsel submits a brief and additional evidence.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's notice of decision; and, (5) the petitioner's Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

For the reasons that will be discussed below, the AAO agrees with the director's decision that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

As a preliminary matter, the AAO will also address additional, independent grounds, not identified by the director's decision, that the AAO finds also precludes approval of this petition.¹ Specifically, the AAO finds that, beyond the decision of the director, the evidence in the record of proceeding does not establish (1) that the petitioner will be a United States employer having an "employer-employee relationship" with the beneficiary as an H-1B temporary employee, (2) the petitioner's eligibility at the time of filing for the benefit sought, and (3) 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.

I. PROCEDURAL AND FACTUAL BACKGROUND

In this matter, the petitioner indicated in the Form I-129 and supporting documentation that it seeks the beneficiary's services in a position that it designates as a data analyst to work on a full-time

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

basis at a salary of \$75,000 per year. In addition, the petitioner indicated that the beneficiary would be employed at [REDACTED]. The petitioner stated that the dates of intended employment are from October 1, 2013 to September 16, 2016.

In a letter of support, dated March 21, 2013, the petitioner stated that the beneficiary will be responsible for the following duties:

- Gathering the requirements from the Business user and making sure the requirements are met accordingly in the Visual Science/Unica Netinsight Application[;]
- Maintain and develop the Campaign Tracking Tool[;]
- Extracting Queries using SQL[;]
- Making sure the ETL is going through[;]
- Day-to-Day interaction with offshore team in India[;]
- Maintaining the system and Monitoring the disk Storage Space[;]
- Good project management, communication skills and facing the client on a day-to-day basis[;]
- Production Support of Applications in Marketing-IT of Cisco Systems, Inc.[.][;]
- Supporting Visual Science, Unica Netinsight applications. These Analysis Applications are the next generation platform for the reporting and analysis of web metrics, statistics, and overall site usage of [REDACTED] strategic web sites, and is used to help measure and thereby improve the user experience of our customers on the web[;] and
- Running Daily Reports using Visual Science, Unica Netinsight, Adobe Site Catalyst and Microsoft Office.

In addition to the aforementioned letter of support, the documents filed with the Form I-129 included, among other things, the following:

- A copy of a letter from [REDACTED] Finance Analyst at [REDACTED] dated March 28, 2013;
- A copy of the "Services Agreement" between [REDACTED] (hereinafter, [REDACTED] and [REDACTED] (hereinafter, [REDACTED] made and entered into as of January 1, 2008;
- A copy of the State of Delaware Certificate of Merger of Domestic Corporations regarding the merger of [REDACTED] and [REDACTED] with and into [REDACTED] under the name of [REDACTED] dated August 31, 2011;
- A copy of the "Asset Contribution Agreement," dated August 31, 2011, between the petitioner and [REDACTED]. The "Asset Contribution Agreement" indicates that the

petitioner assumed, among other things, “all Contracts and rights thereunder” from [REDACTED] and is the successor in interest to [REDACTED]

- A copy of the employment offer letter, dated March 22, 2013, from the petitioner to the beneficiary, and Annexure 1, Terms of Employment;
- An itinerary document, signed by the petitioner’s representative, listing the location of the employment at the end client [REDACTED] the description of the project, the beneficiary’s duties at the end-client, and dates of service;² and
- Copies of the beneficiary’s educational qualifications and credential evaluation.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on April 29, 2013. The petitioner was asked to submit evidence to establish, among other things, (1) that the proffered position qualifies as a specialty occupation, and (2) that the beneficiary was maintaining a valid F-1 nonimmigrant status at the time the petition was filed. Specifically, the petitioner was asked to submit, among other things, “copies of signed contractual agreements, statements of work, work orders, service agreements, and letters between the petitioner and the authorized officials of the ultimate end-client companies that provides a detailed description of the duties the beneficiary will perform, details of the project, the qualifications that are required to perform the job duties . . . and any other related evidence.”

In response to the director's RFE, counsel submitted a letter dated July 19, 2013. Also, the petitioner provided a letter dated July 10, 2013, addressed to “To whom it may concern,” stating that “[the beneficiary] has performed the following tasks during his employment, along with the percentage of time that he has spent on each task:”

- Systems Development and Support (35%)
 - Support of NetInsight, Site catalyst and Insight application for Enterprise web analytics. Coding of Adhoc user queries, data extract for analytics using SQL, extract transformation and load utilities. Web Tagging development and support for analytics[;]
 - Archiving of data for historical reporting[;]
 - Purging of data to speed up reporting[;]
 - Partitioning for storage and performance management[;]
 - User access management[;]
 - Maintain[ing] and development of campaign [m]anagement tool[;]
 - Report portal development and support[;]
 - Offshore team management for support[;]
 - Gathering and documenting business user requirements[;]

² The petitioner refers to this document as the “beneficiary’s it[i]nerary” on the exhibit divider page.

- Support of daily, weekly and monthly application data processing[;]
 - Application upgrades and patch fixes[.]
- Functional Support (15%)
- Assisting business users analyze web data queries using NetInsight, Site catalyst, Insight and [O]racle database objects[;]
 - Assist with data variance and spikes[;]
 - Characterize data using database queries for in-depth data analysis[;]
 - Data Quality validation using scripts[;]
 - Addition of area definition for data grouping[.]
- Technical Business Support (10%)
- User training and ramp up assistance using webex and on hand training[;]
 - NetInsight tool user training[;]
 - Site catalyst tool user training[;]
 - Insight tool user training[;]
 - Web Analytics functionality[;]
 - Creating user specific reports[.]
- Performance (10%)
- Performance analysis of the tools and infrastructure due to the high volumes of data using Windows, Linux and [O]racle tools[;]
 - File system [s]torage performs (Local storage, network [s]torage)[;]
 - Database performance[;]
 - Application performance[.]
- Source and Target Data Analysis (Exception Management) (30%)
- Debugging and supporting source and target data issues in Windows and Linux operating system using command line and various utilities[;]
 - Web logs, tag server logs source data issues[;]
 - Weblogs formatting exception management[;]
 - Netinsight, Insight exception management[;]
 - Marketing operational data store integration[;]
 - Downstream application integration support[;]
 - Oreo exports[.]

Also, in response to the RFE, the petitioner provided some previously submitted documents and additional supporting evidence, including, among other things, the following:

- Copies of three job vacancy advertisements;
- A copy of a letter dated July 17, 2013 by [REDACTED], Ph.D., Professor of Management and Information Systems at [REDACTED];
- Copies of various job vacancy announcements by the petitioner; and
- Copies of pay stubs issued to the beneficiary by the petitioner between February 16, 2013 and May 15, 2013.

On July 30, 2013, the director denied the petition finding that the petitioner failed to demonstrate that the proffered position qualifies for classification as a specialty occupation in accordance with the applicable statutory and regulatory provisions. The petitioner, through counsel, filed a timely appeal on August 27, 2013.

On appeal, the petitioner and counsel submit, among other things, copies of four statements of work (SOW) for work to be performed starting from October 28, 2012 until October 27, 2013, three purchase orders, and a copy of an electronic mail communication (e-mail) from [REDACTED] Team Lead, Web Metrics at [REDACTED] to the petitioner, dated August 5, 2013, outlining the job duties for the proffered position.

II. LAW AND ANALYSIS

A. Inconsistencies in the Petition

Upon review of the entire record of proceeding and the totality of the evidence presented, the AAO notes, as a preliminary matter, that there are inconsistencies in the record of proceeding with regard to the beneficiary's dates of intended employment. When a petition includes numerous errors and discrepancies, those inconsistencies raise serious concerns about the veracity of the petitioner's assertions. Accordingly, the AAO will discuss some of these issues first before addressing the grounds of ineligibility.

For instance, in the Labor Condition Application (LCA), the petitioner indicates that the dates of intended employment for the proffered position are September 17, 2013 to September 16, 2016. The Form I-129 indicates that the dates of intended employment are October 1, 2013 to September 16, 2016. However, the employment offer letter, dated March 22, 2013, states that the beneficiary's employment would start on October 1, 2013 and indicates no end date for this employment. Furthermore, a document which the petitioner refers to as the "itinerary" indicates that the beneficiary would be working at [REDACTED] the end-client, from April 29, 2013 to September 30, 2016. Also, a letter from the petitioner, dated July 10, 2013, addressed to "To whom it may concern" states that "[the beneficiary] started his employment on April 13th, 2011." The record contains no explanation with respect to these inconsistencies.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* In this case, the discrepancies and errors catalogued above undermine the credibility of the petition.

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

As a preliminary matter and beyond the decision of the director, the AAO will next discuss 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." 8 C.F.R. § 214.2(h)(4)(ii).

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

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

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

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

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

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

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

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

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

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

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

Darden, 503 U.S. at 323-324 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. at 751-

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

In this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. See generally 136 Cong. Rec. S17106 (daily ed. Oct. 26, 1990); 136 Cong. Rec. H12358 (daily ed. Oct. 27, 1990). On the contrary, in the context of the H-1B visa classification, the regulations define the term "United States employer" to be even more restrictive than the common law agency definition.³

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

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

Specifically, the regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to engage a person to work within the United States, and to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee" or "employer-employee relationship" combined with the agency's otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition" or, more importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. *Cf. Darden*, 503 U.S. at 318-319.⁴

Accordingly, in the absence of an express congressional intent to impose broader definitions, both the "conventional master-servant relationship as understood by common-law agency doctrine" and the *Darden* construction test apply to the terms "employee" and "employer-employee relationship" as used in section 101(a)(15)(H)(i)(b) of the Act, section 212(n) of the Act, and 8 C.F.R. § 214.2(h).⁵

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

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).

⁴ To the extent the regulations are ambiguous with regard to the terms "employee" or "employer-employee relationship," the agency's interpretation of these terms should be found to be controlling unless "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359, 109 S.Ct. 1835, 1850, 104 L.Ed.2d 351 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945))).

⁵ That said, there are instances in the Act where Congress may have intended a broader application of the term "employer" than what is encompassed in the conventional master-servant relationship. *See, e.g.*, section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F) (referring to "unaffiliated employers" supervising and controlling L-1B intracompany transferees having specialized knowledge); section 274A of the Act, 8 U.S.C. § 1324a (referring to the employment of unauthorized aliens).

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

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

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

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

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

Specifically, the petitioner claimed that the beneficiary will work for [REDACTED] and in support of this assertion provided a copy of two identical letters from [REDACTED] stating that [REDACTED] intends to utilize the beneficiary's services pursuant to the Service Agreement, and a copy of the Service Agreement. As

⁶ The two letters from [REDACTED] Finance Analyst at [REDACTED] are identical save that one is dated March 28, 2013 and was submitted with the petition and the other is dated August 20, 2013 and was submitted on appeal.

previously discussed, on appeal, the petitioner and counsel submitted copies of four SOWs for work to be performed starting from October 28, 2012 until October 27, 2013, three purchase orders, and a copy of an e-mail from [REDACTED] Team Lead, Web Metrics at [REDACTED] to the petitioner dated August 5, 2013, outlining the job duties for the proffered position. However, the RFE put the petitioner on notice of required evidence and the petitioner was given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it for the first time on appeal. Thus, the AAO will not consider this evidence for any purpose. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

Therefore, the record does not contain evidence such as contracts, work orders, and statements of work between [REDACTED] and the petitioner, which outline in sufficient detail the nature and scope of the beneficiary's intended employment with the end-client. Thus, there is insufficient documentary evidence in the record corroborating what the beneficiary would do, where the beneficiary would work, and the availability of work for the beneficiary for the entire requested period of employment. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

While social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are still relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary's employer. Here, the record contains insufficient evidence to demonstrate that the petitioner will be overseeing and directing the work of the beneficiary.

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

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

Moreover, beyond the decision of the director, the evidence submitted fails to establish non-speculative employment for the beneficiary for the entire period requested. Although the petitioner requested, on the Form I-129, that the beneficiary be granted H-1B classification from October 1,

2013 to September 16 2016, there is a lack of substantive documentation regarding work for the beneficiary for the duration of the requested period. Rather, as stated above, the employment offer letter from the petitioner to the beneficiary indicates that the employment start date is October 1, 2013 and does not list an end date. Moreover, the employment offer letter states that the beneficiary's employment with the petitioner "is for no specified period." Likewise, the two letters from [REDACTED] Finance Analyst at [REDACTED] state that the petitioner assured [REDACTED] that the beneficiary would be employed through September 17, 2016; however, [REDACTED] does not indicate the dates of the project on which the beneficiary would be working.

The AAO finds that the petitioner has not provided documentary evidence to demonstrate that it would employ the beneficiary for the entire H-1B period and has failed to establish the existence of work available to the beneficiary as a data analyst for the requested H-1B validity period. The petitioner also did not submit documentary evidence regarding any additional work for the beneficiary. Thus, the petitioner has failed to establish that the petition was filed for non-speculative work for the beneficiary that existed *as of the time of the petition's filing*, for the 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, the petitioner has not demonstrated that it would maintain an employer-employee relationship with the beneficiary for the duration of the period requested.⁷

⁷ 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).

Based on the above, the petitioner has not established, by a preponderance of the evidence, that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the appeal will be dismissed and the petition will be denied.

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

The AAO will now address the director's decision, namely 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 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

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

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

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

Again, the issue before the AAO is whether the petitioner has provided sufficient evidence to establish that it would employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, the AAO finds that the evidence of record fails to establish, by a preponderance of the evidence, that the position as described constitutes a specialty occupation.

As a preliminary matter and as recognized in *Defensor v. Meissner*, it is necessary for the end-client to provide sufficient information regarding the proposed job duties to be performed at its location(s) in order to properly ascertain the minimum educational requirements necessary to perform those duties. *See Defensor v. Meissner*, 201 F.3d at 387-388. In other words, as the nurses in that case would provide services to the end-client hospitals and not to the petitioning staffing company, the petitioner-provided job duties and alleged requirements to perform those duties were irrelevant to a specialty occupation determination. *See id.*

Here, the record of proceeding in this case is similarly devoid of sufficient information from the end-client, [REDACTED] regarding the specific job duties to be performed by the beneficiary for that company. As previously mentioned, on appeal the petitioner submits an e-mail from [REDACTED] Team Lead, Web Metrics at [REDACTED] to the petitioner dated August 5, 2013. The RFE put the petitioner on notice that evidence from the end-client company providing a detailed description of the duties the beneficiary will perform, the details of the project, and other related evidence would be helpful and the petitioner was given a reasonable opportunity to provide such evidence for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal.

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. at 764; *see also Matter of Obaigbena*, 19 I&N Dec. at 533. If the petitioner had wanted the submitted evidence to be considered, it should have submitted it with the initial petition or in response to the director's RFE. *Id.* The petitioner has not provided a valid reason for not previously submitting the evidence. Under the circumstances, the AAO need not consider the sufficiency of such evidence requested by the director in the RFE but submitted for the first time on appeal. Nevertheless, the AAO reviewed the documentation. However, as discussed in this decision, the petitioner has not established eligibility for the benefit sought.

Moreover, the e-mail from [REDACTED] was prepared after the director's decision denying the petition and it was not available at the time the petition was filed. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). Thus, the petitioner did not establish the substantive nature of the work that the beneficiary would perform at [REDACTED] location.

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 denied.

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

III. CONCLUSION

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

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

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, it

is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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