

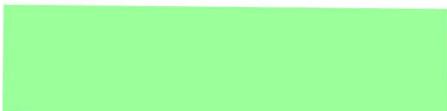


U.S. Citizenship  
and Immigration  
Services

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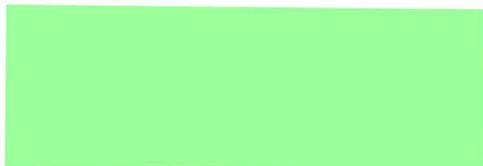


DATE: **MAY 01 2014** OFFICE: CALIFORNIA SERVICE CENTER FILE: 

IN RE: Petitioner:   
Beneficiary: 

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (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 (hereinafter "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.

## I. PROCEDURAL AND FACTUAL BACKGROUND

On the Form I-129 visa petition, the petitioner describes itself as a Software Design, Development, and Testing firm. In order to employ the beneficiary in what it designates as a Tibco Developer position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the evidence of record failed to establish (1) that the petitioner would employ the beneficiary in a specialty occupation position and (2) that the petitioner has standing to file the visa petition as the beneficiary's prospective employer. On appeal, counsel asserted that the bases for denial were erroneous and contended that the petitioner satisfied all evidentiary requirements.

As will be discussed below, the AAO has determined that the director did not err in her decision to deny the petition on each of the bases specified in her decision. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

The AAO bases its decision upon its review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's submissions on appeal.

## II. THE LAW

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).

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

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

The AAO notes that, as recognized by the court in *Defensor, supra*, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. See *Defensor v. Meissner*, 201 F.3d at 387-388. The court held that the former 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.

### III. EVIDENCE

The visa petition, which was filed on April 1, 2013, states that the beneficiary would work as a Tibco Developer at [REDACTED] in Chicago, Illinois. The Labor Condition Application (LCA) submitted to support the visa petition states that the proffered position is a Tibco Developer position, and that it corresponds to Standard Occupational Classification (SOC) code and title 15-1132, Software Developers, Applications from the Occupational Information Network (O\*NET). The LCA further states that the proffered position is a Level I, entry-level, position. That LCA is certified for employment at [REDACTED] in Chicago, Illinois.

With the visa petition, counsel submitted evidence that the beneficiary received a master's degree in electrical engineering from [REDACTED]. Counsel also submitted (1) a copy of a document headed Consulting Subcontracting Agreement, dated December 9, 2009, executed between the petitioner's president and the president of [REDACTED] Inc. [REDACTED]; (2) a document headed Service Supplement, also dated January 9, 2013, executed by the president of [REDACTED] and a Category Manager of [REDACTED]; (3) a letter, dated February 21, 2013, from the vice president of [REDACTED]; (4) a copy of an employment contract executed by the petitioner's president on February 23, 2013 and by the beneficiary on February 24, 2013; (5) a document headed, Itinerary of Services; and (6) a letter, dated March 22, 2013, from the petitioner's president.

The December 9, 2009 Consulting Subcontracting Agreement states terms pursuant to which the petitioner could provide personnel to provide services for [REDACTED] at the various locations of [REDACTED]'s clients as those services would be described in subsequent Statements of Work (SOWs).

The January 9, 2013 Service Supplement is apparently one of the SOWs referred to in the Consulting Subcontracting Agreement. In it, the petitioner and [REDACTED] agreed that the petitioner would provide the beneficiary to work in San Francisco on a project to be invoiced to [REDACTED]. It states that the "Service Duration" was from January 1, 2013 to March 31, 2013.

The February 21, 2013 letter from the vice president of [REDACTED] Inc. states that [REDACTED] has retained the beneficiary's services from the petitioner to work at the Chicago, Illinois location of [REDACTED]. It states:

[The beneficiary's] project duties include the design, development, testing, documentation and maintenance of enterprise software in the Tibco environment using EMS, ActiveMatrix, Business Works (BW), File Adapter, Active Database Adapter (ADB) and Tibco Administrator. Further, [REDACTED] required that [the petitioner] staff this position with a professional who holds at least a U.S., four-year bachelor's degree, or the educational/experience equivalent in a relevant specialty occupation field.

[REDACTED]'s president stated, "[REDACTED] is not responsible for the . . . project assignments [or] supervision of [the beneficiary]," and "[The beneficiary's] work is directly supervised by [the petitioner's president]." He also stated, "[REDACTED] project is ongoing and expected to be active for approximately two years."

The beneficiary's employment contract states, "[The beneficiary] will be working either at [the petitioner's] offices or a client location designated by the [petitioner]." It does not state that the beneficiary's assignments would be limited to the Chicago area, the only area for which the LCA is certified.

The itinerary provided states:

[The beneficiary] is currently working at our end client's location [REDACTED] Chicago, IL [REDACTED] and will continue to work on the same project, performing the same job duties, at the same location for the period of approximately 3 years as stated on form I-129 ending on 08/27/2016.

[The beneficiary] will report directly to [the petitioner's president] as his immediate supervisor.

That itinerary is signed by the petitioner's president. It does not indicate whether the petitioner's president will also work at the Chicago, Illinois site. Although that itinerary is undated, the AAO observes that it was provided with the visa petition, filed on April 1, 2013. The petitioner's president did not attempt to reconcile his assertion that the beneficiary would work at the [REDACTED] project for an additional three years with the assertion of [REDACTED]'s president that the project would continue for only until approximately February 2015.

The March 22, 2013 letter from the petitioner's president states the same duties that were included in the February 21, 2013 letter from the vice president of [REDACTED]. It also states the following:

As with any Tibco Developer, the usual minimum requirement for performance of the job duties is a Bachelor's degree in Computer Science, Engineering, Information Technology, or other closely related field.

On May 28, 2013, the service center issued an RFE in this matter. The service center requested, *inter alia*, evidence that the petitioner would employ the beneficiary in a specialty occupation. The director outlined the specific evidence to be submitted.

In response, counsel submitted, *inter alia*, (1) an undated document, headed "Job Description," signed by the petitioner's president; (2) six vacancy announcements; (3) a work order from [REDACTED] (4) an SOW executed by [REDACTED]'s vice president and by the petitioner's president on June 30, 2013 and July 1, 2013, respectively; (5) a letter, dated July 10, 2013, from [REDACTED]'s vice president; and (6) a letter, dated June 28, 2013, from [REDACTED]'s vice president.

The undated job description from the petitioner's president states the following as the duties of the proffered position:

- Meet business-analysts and business users to understand business requirements – 5%.
- Work with Architects to come up with a design for the software solutions using Tibco products like BusinessWorks (BW), Enterprise Messaging System (EMS), Active Matrix, Adapters, and give due consideration to functional as well as non-functional requirements. Provide design documentation – 40%;
- As part of development team, implement the design using of Tibco products like BusinessWorks (BW), Enterprise Messaging System (EMS), ActiveMatrix, Adapters, etc. Code must be properly documented – 20%
- Provide Production Support once the application goes live and is deployed in production – 15%

As to the educational requirement of the position, the petitioner's president again stated that it requires at least a bachelor's degree in "Computer Science, Engineering, Information Technology or other related field." As to the duration of the project at the [REDACTED] location in Chicago, the petitioner's vice president stated:

[The beneficiary] shall be . . . employed on the project . . . for the period ending on 8/27/2016. Employment beyond this date is to be continued on an extendable basis as determined by the employer.

The [REDACTED] work order indicates that [REDACTED] has acquired the beneficiary from [REDACTED] to work on a [REDACTED] project for an "Original Period" from July 1, 2013 to March 31, 2014. The "Create Date" and "Submit Date" of that work order are both June 28, 2013. It does not indicate where the work would be performed.

The SOW executed by [REDACTED]'s vice president and by the petitioner's president indicates that the petitioner has agreed to provide the beneficiary to [REDACTED] to work on the project at [REDACTED]'s location in "Chicago, IL and other locations as assigned" from July 1, 2013 to March 31, 2014. It

states, "The duties will include but are not limited to: Tibco development and other tasks as assigned."

The July 10, 2013 letter from [REDACTED]'s vice president states that [REDACTED] refused to provide a letter confirming that the beneficiary has been assigned to work at [REDACTED]'s Chicago location.

The June 28, 2013 letter from [REDACTED]'s vice president reiterated the duty description he previously provided in his February 21, 2013 letter. He reiterated that the petitioner is responsible for assigning the beneficiary's work and supervising his performance, that that he will be directly supervised by the petitioner's president. He did not indicate whether the petitioner's president will work at the Chicago site where the beneficiary will be located. He stated:

[REDACTED] required that [the petitioner] staff this position with a professional who holds at least a U.S., Four-year bachelor's degree, or the educational/experience equivalent in a relevant specialty occupation field.

[REDACTED]'s vice president did not identify the various subjects that a degree might be in to qualify one for the proffered position.

Counsel's own letter, dated July 11, 2013, states:

Please note that in the IT industry, services between parties are outlined by contract agreements, which are accompanied by SOWs "Statements of Work" or POs "Purchase Orders." It is the norm within the industry for these SOWs or POs to have a validity period usually ranging from 3 months to 12 months. This does not mean that the "project" in question ends when the SOW expires. It is an industry standard for SOWs to be extended a few weeks before the current SOW's expiration date.

Counsel provided no evidence in support of this assertion. 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).

Counsel asserted that the evidence submitted, "demonstrates that the Petitioner has specialty occupation employment available for the beneficiary to cover the **entire H-1B validity period requested.**" Counsel also cited the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* as evidence that the proffered position qualifies as a specialty occupation position.

The director denied the petition on August 29, 2013, finding, as was stated above, that the petitioner had not demonstrated that it would employ the beneficiary in a specialty occupation position and has not demonstrated that it has standing to file the visa petition as the beneficiary's prospective employer.

On appeal, counsel submitted an e-mail from [REDACTED] dated September 9, 2013, sent from the [REDACTED] e-mail domain to [REDACTED]'s vice president. In his email, Mr. [REDACTED] stated that "[o]ur corporate counsel has directed us to neither provide a supporting letter [nor] one that states that we do not."

In his appeal brief, counsel asserted that the evidence provided demonstrates that the petitioner will employ the beneficiary in a specialty occupation position and will have an employer-employee relationship with him.

#### IV. EMPLOYER-EMPLOYEE RELATIONSHIP ANALYSIS

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

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

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

"In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to

assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party."

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

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

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<sup>1</sup> While the *Darden* court considered only the definition of "employee" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(6), and did not address the definition of "employer," courts have generally refused to extend the common law agency definition to ERISA's use of employer because "the definition of 'employer' in ERISA, unlike the definition of 'employee,' clearly indicates legislative intent to extend the definition beyond the traditional common law definition." See, e.g., *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).

Finally, it is also noted that if the statute and the regulations were somehow read as extending the definition of employee in the H-1B context beyond the traditional common law definition, this interpretation would likely thwart congressional design and lead to an absurd result when considering the \$750 or \$1,500 fee imposed on H-1B employers under section 214(c)(9) of the Act, 8 U.S.C. § 1184(c)(9). As 20 C.F.R. § 655.731(c)(10)(ii) mandates that no part of the fee imposed under section 214(c)(9) of the Act shall be paid, "directly or indirectly, voluntarily or involuntarily," by the beneficiary, it would not appear possible to

Specifically, the regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to engage a person to work within the United States, and to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee" or "employer-employee relationship" combined with the agency's otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition" or, more importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. *Cf. Darden*, 503 U.S. at 318-319.<sup>2</sup>

Accordingly, in the absence of an express congressional intent to impose broader definitions, both the "conventional master-servant relationship as understood by common-law agency doctrine" and the *Darden* construction test apply to the terms "employee" and "employer-employee relationship" as used in section 101(a)(15)(H)(i)(b) of the Act, section 212(n) of the Act, and 8 C.F.R. § 214.2(h).<sup>3</sup>

Therefore, in considering whether or not one will be an "employee" in an "employer-employee relationship" with a "United States employer" for purposes of H-1B nonimmigrant petitions, USCIS 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

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comply with this provision in a situation in which the beneficiary is his or her own employer, especially where the requisite "control" over the beneficiary has not been established by the petitioner.

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

<sup>3</sup> That said, there are instances in the Act where Congress may have intended a broader application of the term "employer" than what is encompassed in the conventional master-servant relationship. *See, e.g.*, section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F) (referring to "unaffiliated employers" supervising and controlling L-1B intracompany transferees having specialized knowledge); section 274A of the Act, 8 U.S.C. § 1324a (referring to the employment of unauthorized aliens).

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

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

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

In the instant case, representatives of the petitioner and [REDACTED] have repeatedly asserted that the petitioner's president will assign the beneficiary's tasks and supervise his employment. However, they did not indicate that the petitioner's president would work at the [REDACTED] site in Chicago, rather than, for instance, at the petitioner's location in Austin, Texas. Absent even an assertion, it seems unlikely that the president of a Texas company will work on a project at a location in Chicago. If the petitioner's president works in Texas, however, then it is unlikely that the petitioner's president will manage the project in Chicago. It is difficult to imagine how the petitioner's president, if

working in Texas, could feasibly assign project tasks to the beneficiary and supervise his performance of them on a project being completed by [REDACTED] for [REDACTED] at [REDACTED]'s site in Chicago. Notwithstanding the assurances of the petitioner and [REDACTED] the AAO finds that the evidence of record does not demonstrate that the petitioner will assign the beneficiary's duties and supervise his performance.

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. Without full disclosure of all of the relevant factors, the AAO is unable to find that the requisite employer-employee relationship will exist between the petitioner and the beneficiary.

The evidence, 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 petitioner exercises complete control over the beneficiary, without evidence supporting the claim, does not establish eligibility in this matter. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. The evidence of record prior to adjudication did not establish that the petitioner would act as the beneficiary's employer in that it will hire, pay, fire, or otherwise control the work of the beneficiary. Despite the director's specific request for evidence such as a letter from the end client, the petitioner failed to submit such evidence. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

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

#### V. SPECIALTY OCCUPATION ANALYSIS

The remaining basis for the decision of denial is the director's finding that the petitioner has not demonstrated that, if the visa petition were approved, it would employ the beneficiary in a specialty occupation position.

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.<sup>4</sup> 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.

Also, at a more basic level, as reflected in this decision's discussion of the evidentiary deficiencies, the record lacks credible evidence that when the petitioner filed the petition, the petitioner had secured work of any type for the beneficiary to perform during the entire requested period of employment.

The period of requested employment is from October 1, 2013 to August 27, 2016.

The [REDACTED] work order indicates that it has acquired the beneficiary to work for a portion of the period of requested employment, from July 1, 2013 to March 31, 2014. However, that work order was created on June 28, 2013, after the instant visa petition was filed. It is not evidence that, *when the petitioner filed the visa petition*, it had work for the beneficiary to perform during the period of requested employment.

USCIS regulations 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 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). The evidence of work the petitioner acquired after it filed the instant visa petition may not be considered.

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<sup>4</sup> Neither the time sheets nor the "Service Supplement" describe the duties to be performed by the beneficiary for [REDACTED] in any meaningful detail.

A SOW executed by [REDACTED] and the petitioner indicates that the beneficiary will work for [REDACTED] from July 1, 2013 to March 31, 2014, the same period indicated by the [REDACTED] work order. The AAO observes, first, that if found to be credible evidence of work the petitioner had available to assign to the beneficiary when it filed the instant visa petition, that SOW would cover only a portion of the period of requested employment. Further, however, that SOW is dated January 9, 2013, a date prior to [REDACTED] issuing the work order described above. It is not credible that [REDACTED] would have issued that SOW for the beneficiary's services from July 1, 2013 to March 31, 2014 on the [REDACTED] project months before [REDACTED] requested to utilize him on that project for those same dates.

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. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). It is incumbent upon the petitioner to resolve any inconsistencies in the record with independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.* At 591-592. Absent an explanation of that apparent anachronism, the SOW from Evolution is not credible evidence of any work the petitioner had, when it filed the instant visa petition, to which it could have assigned the beneficiary.

The January 9, 2013 SOW is also for work to be performed from January 1, 2013 to March 31, 2013. It contains no indication of work available during any portion of the period of requested employment.

The February 21, 2013 letter from [REDACTED]'s vice president stated that the [REDACTED] project was then expected to last two years. That suggests that it would end in approximately February of 2015, considerably short of the end of the period of requested employment.

The itinerary from the petitioner's president states that the beneficiary would continue to work on the [REDACTED] project throughout the period of requested employment. In the undated job description, the petitioner's president reiterated that assertion. However, he provided no basis for this projection, which appears to be contradicted by other evidence, including the statement by [REDACTED]'s vice president that the project was expected to end in approximately February of 2015.

The AAO observes that, even if the petitioner had demonstrated that it had specialty occupation employment to which to assign the beneficiary during some portion of the period of requested employment, the visa petition could not be approved for any other portion of the period of requested employment. That is, even if the petitioner had demonstrated, for instance, that when it filed the visa petition it had specialty occupation employment to assign to the beneficiary from July 1, 2013 to March 31, 2014, the visa petition could only be approved for that portion of the period of requested employment.

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

VI. CONCLUSION

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. As discussed above, the evidence of record does not overcome any of the grounds upon which the petition was denied.<sup>5</sup> Consequently, the appeal will be dismissed and the petition will be denied 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.

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<sup>5</sup> As each of the grounds upon which the director denied the petition independently preclude approval of this petition, the AAO will not address any of the additional deficiencies it has identified on appeal.