

(b)(6)



U.S. Citizenship
and Immigration
Services

DATE: **MAY 01 2014** OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

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

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

ON BEHALF OF PETITIONER:

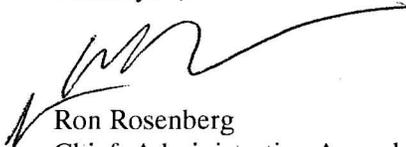
SELF-REPRESENTED

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

(b)(6)

DISCUSSION: The service center director ("the 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.

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a "Search engine optimization" company established in 2010, with 15 employees. In order to extend the employment of the beneficiary in what it designates as a "Senior Software Engineer" position, the petitioner seeks to classify her 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: (1) the petitioner failed to establish an employer-employee relationship; and (2) the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation.

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.

Upon review of the entire record of proceeding, the AAO finds that the petitioner has failed to overcome the director's grounds for denying this petition.¹ Accordingly, the director's decision will not be disturbed. The appeal will be dismissed and the petition will remain denied.

As a preliminary matter, the AAO will also address an additional, independent ground, not identified by the director's decision, that the AAO finds also precludes approval of this petition. Specifically, the AAO finds that, beyond the decision of the director, the evidence in the record of proceeding does not 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.

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 senior software engineer to work on a full-time basis at a salary of \$85,000 per year. In addition, the petitioner indicated that the beneficiary would be employed at [REDACTED] CA [REDACTED]. The petitioner stated that the dates of intended employment are from July 15, 2013 to July 14, 2015.

The petitioner appended the requisite Labor Condition Application (LCA) to the petition, which indicates that the occupational classification for the position is "Computer Occupations, All Other" SOC (ONET/OES) Code 15-1199, at a Level II (qualified) wage.

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

In a letter of support, submitted with the initial petition, the petitioner stated as a Senior Software Engineer, the beneficiary will:

...continue to focus on Content Management Space and in particular [REDACTED] family of products requiring billable technical consulting, and advancement of the [REDACTED] brand via our web presence.

The petitioner further stated that the beneficiary will be assigned to a contract with [REDACTED] and the beneficiary will be responsible for the following:

'...to assist [REDACTED] with implementation of a new web presence to allow visitors with a consistent experience whether they are a distributor researching a drive for inclusion in a personal computer, a customer looking for a [sic] help with a problem drive, or a consumer interested in buying a new product on line'

The petitioner further stated that upon termination of the contract with [REDACTED] "through the passage of time, the Beneficiary will perform ongoing professional services at Petitioner's headquarters."

The petitioner asserted: "[a] degree in Computer Engineering is the minimum requirement necessary to do the job."

The petitioner submitted the following documentation with [REDACTED]

- An Independent Contractor Agreement with [REDACTED] LLC [REDACTED] effective August 15, 2010 for services to be performed by the beneficiary according to Statements of Work. The agreement was signed October 4, 2011 by both parties.
- A copy of Amendment No. 1 between the petitioner and [REDACTED] effective May 28, 2013 and Statement of Work ("SOW") No. 13 between the petitioner and [REDACTED] effective from June 11, 2013 to June 10, 2014.
- A copy of Statement of Work No. 4 effective from October 1, 2011 to July 1, 2012.
- A copy of Statement of Work No. 12 expiring July 15, 2013.

The Statement of Work No. 13 between the petitioner and [REDACTED] is the only documentation submitted for the time period requested. The SOW states that the petitioner shall provide two resources, one fulltime and the other one day per week after a "ramp-down period." Furthermore, the SOW states that the "actual hours will fluctuate as demands change." The SOW describes the scope of work as follows:

- (a) Support the needs of the [REDACTED] business team as directed by [REDACTED] project manager(s).
- (b) Act as lead developer on the Online Marketing Group team.
- (c) Coordinate and support content production and related operations.
- (d) Represent the Online Marketing Group to [REDACTED] corporate web services team, as needed.
- (e) Interact with [REDACTED] Offshore team, and other [REDACTED] contractors, and coordinate activities.
- (f) Support [REDACTED] and other [REDACTED] contractors, when they encounter technical problems.
- (g) Troubleshoot problems with content, pages, workflows and other aspects of the [REDACTED] platform.
- (h) Promote best practices for [REDACTED]'s correct usage of the [REDACTED] solution.
- (i) Business process design and advocacy.
- (j) Support of ongoing [REDACTED] operations (testing of new site functionality, participating in requirements definition, weighing in on priorities, etc.)

The petitioner provided a document entitled "Unique Skill set Possessed by [REDACTED] The document stated that the beneficiary was hired for the "Content Management" space. The petitioner stated: "All our projects on the Content Management practice uses one or many of the following products": (1) [REDACTED] (2) [REDACTED] Portal; and (3) [REDACTED]

In addition to the aforementioned, the documents filed with the Form I-129 included, *inter alia*, the following:

- An organizational chart showing the beneficiary as a Senior Software Engineer reporting directly to the "Principal"
- A copy of the beneficiary's IRS Form W-2 Wage and Tax statement for 2012; a payroll summary for the beneficiary from January 1, 2013 to February 22, 2013; copies of the beneficiary's paystubs through February 22, 2013; a list of the beneficiary's time activities showing the beneficiary at [REDACTED] through February 28, 2013; life and medical insurance details for the beneficiary; and the beneficiary's IRS Form W-4, Employee's Withholding Allowance Certificate for 2012.
- A copy of an excerpt from the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* for Computer Programmers.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on August 8, 2013. The petitioner was asked to submit, among other things: (1) an itinerary of employment and worksite information, and (2) evidence that a valid employer-employee will exist with the beneficiary for the duration of the requested H-1B employment period, and that

the petitioner will have the right to control the beneficiary's work.

In response to the director's RFE, the petitioner submitted a letter dated August 22, 2013. The petitioner explained that services the beneficiary is providing are performed in "one location"; [REDACTED]'s branch office in [REDACTED] CA. The petitioner provides again in response to the RFE a copy of Amendment No. 1 to the Independent Contractor Agreement and SOW No. 13 extending the contract through June 10, 2014. The petitioner also provided the same time activities report as submitted with the initial listing and a time card listing through July 27, 2013.

As evidence of the petitioner's right to control and maintain the employer-employee relationship, the petitioner submitted the following:

- The beneficiary's offer of employment letter dated December 2, 2011 and accepted by the beneficiary on December 5, 2011;
- Copies of documents submitted in response to a prior RFE including medical, retirement, and vision benefits information; payroll records through February 22, 2012; paystubs through February 22, 2013; IRS Form W-4, Employee's Withholding Allowance Certificate for 2012;
- Payroll detail sheet through December 31, 2013; IRS Form W-2 Wage and Tax Statement for 2012; State of California EDD Quarterly Contribution Returns and Report of Wages (DE9) for 2013 listing the beneficiary as employed;
- Employee evaluation for the period from February 6, 2012 to February 5, 2013; and
- Copies of work product produced by the beneficiary.

Based on the record, the director denied the petition for the reasons referenced above.

On appeal, the petitioner asserts that the evidence clearly establishes an employer-employee relationship and that the position qualifies as a specialty occupation. The petitioner submits the following evidence on appeal as evidence of the employer-employee relationship:

- Beneficiary Designation Form evidencing the Petitioner as the Beneficiary's employer;
- Authorization for direct deposit of the beneficiary's salary;
- Beneficiary's Health insurance enrollment/change form referencing the petitioner as the beneficiary's employer;
- Various paystubs through September 6, 2013;
- IRS Form W-4, Employee's Withholding Allowance Certificate for 2013; and
- Medical benefits information.

The petitioner further asserts that the contracts with [REDACTED] adequately describe the nature of the work to be performed by the petitioner. The petitioner generally states that the work performed by the beneficiary is subject to the petitioner's control, supervision, and direction. The

petitioner also attached a copy of the beneficiary most recent employee evaluation from June 10, 2013 to September 10, 2013, signed by the beneficiary's supervisor on September 10, 2013.

Regarding whether the position qualifies as a specialty occupation, the petitioner avers that it provided a comprehensive description of the duties required for the position. The petitioner attached a letter from the President describing the nature of the petitioner's activities generally. The position description for the beneficiary as provided on appeal is as follows:

1. Gathered requirements from business owners
2. Designed and Created Presentation Templates by using Vignette Dynamic Portal Module (DPM)
3. Developed and modified existing Java classes and created new to implement new functionalities
4. Developed override JSPs to display content and for the customization presentation
5. Developed VCM Custom widget grid button BAT (Bulk Action Tool) and BAT menu
6. Added multiple new actions that can be performed on the CI (Content Instance) from BAT menu
7. Configured and deployed BAT (Bulk Action Tool) tool using config utility
8. Prepared and updated BAT custom code for VCM upgrade from version 8.0 to 8.1
9. Updated the custom code for publish/unpublish workflow invoked from BAT menu
10. Integrated [REDACTED] external users and [REDACTED] System using web services
11. Developed [REDACTED] LMS Portlet which invokes webservices call using [REDACTED]
12. Developed custom web-service Java classes using Axis tool to integrate third party data on SPP site
13. Developed override Java Service Pages (JSPs) for display views
14. Created multiple Design Documents and Technical Specifications
15. Coordinate with on-shore and off-shore Malaysia [REDACTED] team
16. Attended team meeting occurring every Tuesday 5:00 PM to 6:00 PM (PST)
17. Worked on creating an updated content using multiple Content Type Definitions (CTDs) like Channel Info Master, Channel Info Child, Link Master and Link Child
18. Used Sub-version control (SVN) to check-in and check-out new and updated Java class files
19. Updated, Created and modified the bugs using bug tracker HPQC
20. Conducted Knowledge transfer and training session for BAT menu and SPP LMS portlet
21. Work on Agile methodology/Sprints

Furthermore, the petitioner contends that the *Handbook* specifies that most employers' prefer to hire persons who have at least a bachelor's degree. The petitioner does not identify the occupational category relating to the *Handbook* determination. The petitioner asserts: "[t]he duties are specific, specialized and complex requiring as a prerequisite special knowledge of the principals of computer engineering and the related areas of learning acquired in a specialized field." The petitioner claims that the duties for the offered position are complex "requiring the special knowledge attained in a Master's program."

II. LAW AND ANALYSIS

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

The AAO will first discuss whether the petitioner has established that it meets the regulatory definition of a "United States employer" and whether the petitioner has established that it will have "an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee" as set out at 8 C.F.R. § 214.2(h)(4)(ii).

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.²

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.

² 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).

Darden, 503 U.S. at 318-319.³

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).⁴

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 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

³ 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))).

⁴ 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).

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, while the petitioner claimed that the beneficiary will work for [REDACTED] LLC, the beneficiary has provided no confirmation from the [REDACTED] that the beneficiary has been, or will be, working as a Senior Software Engineer for the end client. Additionally, neither the contract, nor Statement of Work, between the petitioner and [REDACTED] specifies that the beneficiary is assigned to work at [REDACTED] pursuant to the contract.

Furthermore, the record does not contain evidence such as contracts, work orders, and statements of work which outline in sufficient detail the nature and scope of the beneficiary's intended employment with the end-client. The SOW No. 13 states that the petitioner shall provide two "resources" and that one of those resources will be full-time and the other will be approximately one day per week. The SOW does not provide the names of the resources, thus, the record does not support a finding that the beneficiary will continue to be employed full-time at [REDACTED] for the period requested.

Additionally, the SOW provided does not cover the entire period of employment requested by the beneficiary. The SOW ends June 10, 2014 and the beneficiary has requested an approval through July 14, 2015. The petitioner stated in a letter submitted in support of the initial petition that upon termination of the contract with [REDACTED] "through the passage of time, the Beneficiary will perform ongoing professional services at Petitioner's headquarters." The petitioner, however, has failed to provide any evidence or further description of what work the beneficiary would perform at the petitioner's headquarters.

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

There is insufficient documentary evidence in the record corroborating what the beneficiary would do, where the beneficiary would work, and the availability of work for the beneficiary for the 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190).

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 relating to the end-client, including evidence corroborating the beneficiary's actual work assignment, the AAO is unable to find that the requisite employer-employee relationship will exist between the petitioner and the beneficiary.

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 she performs. The petitioner's reliance on evidence showing that it pays the beneficiary's salary, makes contributions to worker's compensation, and withholds federal and state income tax as well as providing the beneficiary with certain health benefits, establishes in this matter only that the petitioner is providing an administrative function. The petitioner has not provided the necessary documentary evidence establishing that it provides the beneficiary's actual daily work and supervises her and her work. Without evidence supporting the petitioner's claims, the petitioner has not established eligibility in this matter. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190).

B. 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 July 15, 2013 to July 14, 2015, there is a lack of substantive documentation regarding work for the beneficiary for the duration of the requested period. As stated above, the current SOW with [REDACTED] does not cover

the entire period of employment requested by the beneficiary. The SOW ends June 10, 2014 and the beneficiary has requested an approval through July 14, 2015. Furthermore, it is unclear whether the beneficiary would continue to work fulltime or would work one day a week as indicated on the SOW.

The petitioner stated in a letter submitted in support of the initial petition that upon termination of the contract with [REDACTED] "through the passage of time, the Beneficiary will perform ongoing professional services at Petitioner's headquarters." The petitioner, however, has failed to provide any evidence or further description of what work the beneficiary would perform at the petitioner's headquarters.

The AAO finds that the petitioner has not provided documentary evidence to establish the existence of work, and specifically specialty occupation work, available to the beneficiary as a senior software engineer, for the requested H-1B validity period. The petitioner also did not submit documentary evidence regarding any additional work for the beneficiary. Thus, the petitioner has failed to establish that the petition was filed for non-speculative work for the beneficiary that existed *as of the time of the petition's filing*, for the entire period requested. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). Thus, even if it were found that the petitioner would be the beneficiary's United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii), the petitioner has not demonstrated that it would maintain such an employer-employee relationship with the beneficiary for the duration of the period requested.⁵

⁵ 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

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.

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

The AAO will now address 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;

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).

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

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

into the occupation, as required by the Act.

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

As previously noted, the petitioner indicated on the Form I-129 and in supporting documentation that it seeks the beneficiary's services in a position titled "Senior Software Engineer," to work on a full-time basis at a salary of \$85,000 per year.

One consideration that is necessarily preliminary to, and logically even more foundational and fundamental than the issue of whether a proffered position qualifies as a specialty occupation, is whether the petitioner has provided substantive information and supportive documentation sufficient to establish that, in fact, the beneficiary would be performing services for the type of position for which the petition was filed (here, a senior software engineer). Another such fundamental preliminary consideration is whether the petitioner has established that, at the time of the petition's filing, it had secured non-speculative work for the beneficiary that corresponds with the petitioner's claims about the nature of the work that the beneficiary would perform in the proffered position.

The AAO finds that the petitioner has failed in each of these regards. First, as discussed above, the record does not establish that the petitioner had work orders, statements of work, or contracts to fulfill when the petition was filed for the entire duration of the time period requested. The petitioner provided a statement of work through June 10, 2014 but the petitioner requested an approval through July 14, 2015. Furthermore, the SOW submitted does not identify the beneficiary as one of the "resources" who would perform the duties listed. Not only does the SOW fail to identify the beneficiary, the SOW requests both a full-time resources and a resource that will work one day a week. Accordingly, it is not clear, even if the beneficiary were identified that the beneficiary would work pursuant to this SOW fulltime or would only work one day a week.

Second, although the petitioner claims that the beneficiary will work in-house upon completion of the claimed work with [REDACTED] the record is devoid of any documentation indicating and/or corroborating that the beneficiary would be assigned to work on any specific software development or other IT project for the petitioner.

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

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

For the reasons related in the preceding discussion, the AAO finds that the petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. Accordingly, the petition cannot be approved.

D. Inconsistencies in the LCA

Also beyond the decision of the director, the petition must be denied due to the petitioner's failure to provide a certified LCA that corresponds to the petition.

The LCA serves as the critical mechanism for enforcing section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). *See* 65 Fed. Reg. 80110, 80110-80111 (indicating that the wage protections in the Act seek "to protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring temporary foreign workers" and that this "process of protecting U.S. workers begins with [the filing of an LCA] with [DOL]."). According to section 212(n)(1) of the Act, an employer must attest that it will pay a holder of an H-1B visa the higher of the prevailing wage in the "area of employment" or the amount paid to other employees with similar experience and qualifications who are performing the same services. *See Patel v. Boghra*, 369 Fed.Appx. 722, 723 (7th Cir. 2010).

The regulations require that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner must obtain a certified LCA from DOL in the occupational specialty in which the H-1B worker will be employed. *See* 8 C.F.R. § 214.2(h)(4)(i)(B). The instructions that accompany the Form I-129 also specify that an H-1B petitioner must submit evidence that an LCA has been certified by DOL when submitting the Form I-129.

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) provides as follows:

Service or training in more than one location. A petition that requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with USCIS as provided in the form instructions. The address that the petitioner

specifies as its location on the I-129 shall be where the petitioner is located for purposes of this paragraph.

As noted above, the petitioner indicated on the Form I-129 that the beneficiary would be working only at the work location of its client, [REDACTED] for the duration of the time period requested. The certified LCA submitted *with* the Form I-129 also indicates that the beneficiary will work only at the [REDACTED]'s location in California. However, in a letter submitted in support of the petition, the petitioner stated that upon termination of the contract with [REDACTED] "through the passage of time, the Beneficiary will perform ongoing professional services at Petitioner's headquarters." Furthermore, the petitioner's statement of work with [REDACTED] terminates approximately one year prior to the time period requested on the H-1B.

In response to the RFE and on appeal the petitioner claims that the beneficiary will only be assigned to work at the client's location in California. The wage level on the LCA, however, further calls into question whether the beneficiary will be assigned to one work location for the duration of the time period requested. Specifically, the prevailing wage listed on the LCA for the position of 15-1199, Computer Occupations, All Other, corresponds to the Seattle-Bellevue-Everett, WA Metropolitan Division and not the [REDACTED] worksite location in Santa-Cruz-Watsonville, CA.

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).

The regulation at 8 C.F.R. § 214.2(h)(2)(E) states:

Amended or new petition. The petitioner shall file an amended or new petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition. An amended or new H-1C, H-1B, H-2A, or H-2B petition must be accompanied by a current or new Department of Labor determination. In the case of an H-1B petition, this requirement includes a new labor condition application.

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part:

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL-certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion

model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

[emphasis added]. As 20 C.F.R. § 655.705(b) requires that USCIS ensure that an H-1B petition is filed with a "DOL-certified LCA attached" that actually supports and corresponds with the petition on the petition's filing, this regulation inherently necessitates the filing of an amended H-1B petition to permit USCIS to perform its regulatory duty to ensure that a certified LCA actually supports and corresponds with an H-1B petition as of the date of that petition's filing. In addition, as 8 C.F.R. § 103.2(b)(1) requires eligibility to be established at the time of filing, it is factually impossible for an LCA certified by DOL after the filing of an initial H-1B petition to establish eligibility at the time the initial petition was filed. Therefore, in order for a petitioner to comply with 8 C.F.R. § 103.2(b)(1) and USCIS to perform its regulatory duties under 20 C.F.R. § 655.705(b), a petitioner must file an amended or new petition, with fee, whenever a beneficiary's job location changes such that a new LCA is required to be filed with DOL.

In light of the above, the AAO finds that a necessary condition for approval of an H-1B visa petition is an LCA, certified *on or before* the filing date of the petition, with information, accurate as of the date of the petition's filing, as to where the beneficiary would actually be employed. Furthermore, the petition must list the locations where the beneficiary would be employed and be accompanied by an itinerary with the dates the beneficiary will provide services at each location. Both conditions were not satisfied in this proceeding. Again, a petitioner must establish eligibility at the time of filing a 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).

In view of the foregoing, the petitioner has failed to meet the itinerary requirement at 8 C.F.R. § 214.2(h)(2)(i)(B). For these reasons, the petition may not be approved. Accordingly, the AAO shall not disturb the director's denial of the petition on this ground and shall deny the petition on the additional ground that the requisite itinerary was not filed with the 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.

(b)(6)

NON-PRECEDENT DECISION

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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.