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



U.S. Citizenship  
and Immigration  
Services

DATE: **MAY 06 2014** OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

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

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

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

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

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

Thank you,

A handwritten signature in black ink that reads "Elizabeth McCormack".

Ron Rosenberg  
Chief, Administrative Appeals Office

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

The petitioner is an engineering, manufacturing, and distribution business. It states that it seeks to employ the beneficiary as an industrial engineer and to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on the ground that the petitioner failed to establish that it was a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee" within the contemplation of the Act and applicable federal regulations.

The record of proceeding before the AAO contains: (1) the Form I-129 petition and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's decision; and (5) Form I-290B, an appeal brief, and supporting materials. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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).

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). Furthermore, 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.* H-1B beneficiaries) and that this relationship must 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.* For purposes of the H-1B visa classification, therefore, 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>

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>

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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).

<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))).

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 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

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<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).

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 the instant case, 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."

The H-1B petition, filed on April 13, 2013, was accompanied by a letter to USCIS from the petitioner's human resources manager, dated, March 29, 2013, stating that the petitioner sought to employ the beneficiary as an industrial engineer for three years, without further specifics. In a Request for Evidence (RFE) sent to the petitioner on May 13, 2013, the director noted that the petition was filed without an itinerary of employment, which is required under the regulations if services will be performed in more than one location. An itinerary was required in this case because the petition indicated that the beneficiary would work at the petitioner's address in Cincinnati, Ohio, as well as off-site (Form I-129, Parts 5.1 and 5.5), while the accompanying labor condition application (LCA), certified by the Department of Labor, identified three different work locations in (1) Cincinnati, Ohio, (2) DeSoto, Texas, and (3) New Orleans, Louisiana (ETA Form 9035 & 9035E, Parts G.a, G.b, and G.c). Accordingly, the petitioner was requested to submit an itinerary with dates and locations of the services to be provided by the beneficiary including documentation from the end-client employer with the following information:

- The name of the project the beneficiary is assigned to.
- The address where the beneficiary performs the work.
- The title and duties of the beneficiary's position.
- The contracted employment dates.
- Whether there is a vendor through whom the beneficiary's services are provided.
- The name of the vendor, if applicable.
- Contact information from the end-client which includes the name, address, email, and telephone number where the contact can be reached.
- The name, title, and contact information of the person who will supervise the beneficiary at the work site.

The petitioner was also requested to submit evidence that the beneficiary was in valid nonimmigrant status at the time the instant petition was filed. The director noted that the beneficiary previously had F-1 student status, but that this status ended on November 25, 2012, which was prior to the filing of the H-1B petition in April 2013.

The petitioner responded to the RFE on August 5, 2013, with a letter from counsel and additional documentation. Counsel stated that the beneficiary would perform his work primarily at the petitioner's headquarters location, with travel to other sites for temporary work on an as-needed basis. As evidence that the beneficiary was an employee of the petitioner, counsel cited the following documentation:

- Two offer letters from the petitioner, dated July 13, 2011 and July 26, 2013 (both of which, however, identified the beneficiary's place of employment as Greensboro, North Carolina).
- Payroll records for the year 2012.
- Three services contracts between [REDACTED], a company sharing the same address as the petitioner, and client companies located in Mason, Ohio, Orrville, Ohio, and Cincinnati, Ohio.
- An organizational chart of the petitioner showing the beneficiary's prospective place in the company.

A copied page from the beneficiary's passport was also submitted, showing that he returned to India on November 12, 2012, before his F-1 status expired.

On September 23, 2013 the director issued a decision denying the petition. The director held that the petitioner failed to establish that it had an employer-employee relationship with the beneficiary. The employment offer letter to the beneficiary of July 2013, the director pointed out, identified Greensboro, North Carolina, as the place of employment, which was not listed on the certified LCA. Also, the letter did not provide a detailed description of the duties to be performed by the beneficiary. The itinerary of services to be provided by the beneficiary, requested in the RFE, was not submitted. Instead of an itinerary, the director noted, the petitioner substituted counsel's statement that the beneficiary would work mostly at headquarters but also off-site as needed. The director found this "itinerary" insufficient to establish an employer-employee relationship because it (1) lacks sufficient detail to show that the petitioner will control when, where, and how the beneficiary performs the proposed work; (2) does not list the services to be performed; (3) does not cover the entire period of requested employment; (4) does not indicate the petitioner as the primary developer of the project; and (5) does not specify the dates of each service or engagement, or the names and addresses of the actual employers, establishments, venues, or locations where the services will be performed. The director noted the petitioner's claim that [REDACTED] is one of its "family companies" and that it appeared the beneficiary would be assigned to work for third party clients pursuant to their services contracts with [REDACTED]. No evidence was submitted by the petitioner, however, that it shares the same FEIN (Federal Employer Identification Number) as [REDACTED]. Thus, the record failed to show that the petitioner and [REDACTED] are the same business entity. The director determined, therefore, that the petitioner had failed to establish its right to control the beneficiary's employment at the third party end clients. In addition to the foregoing evidentiary deficiencies, the director pointed out that all three services contracts were either expired or unsigned (or both).

In summation, the director concluded that the evidence of record was insufficient to establish that the petitioner controlled the manner and means by which the work product is accomplished, including when, where, and how the beneficiary performs the duties of the proffered position.

Accordingly, the director held that the petitioner had not established that it was a “United States employer” having an “employer-employee relationship” with the beneficiary as an H-1B temporary “employee.”

On appeal, counsel contends that the director made errors of law and fact in his decision. In a supporting brief counsel reiterates his previous claim that the beneficiary will work primarily in the petitioner’s Cincinnati office, and that trips to other locations will be brief, lasting less than 10 consecutive days. Moreover, none of the business travel was expected to be to Greensboro, North Carolina. According to counsel, the designation of Greensboro as the work location in the July 2013 offer letter was erroneous. As evidence thereof counsel submits an affidavit dated October 24, 2013, from the offer letter’s author, [REDACTED] the petitioner’s human resources director, stating that the inclusion of Greensboro and the omission of Cincinnati was “an oversight and a scrivener’s error” in the offer letter of July 26, 2013. Ms. [REDACTED] states that the petitioner’s Cincinnati office will be the beneficiary’s primary work location, that there is no schedule at present for the beneficiary’s travel to other locations, and that any such travel in the future would be for less than 10 consecutive days. Counsel asserts that all tasks performed by the beneficiary, whether at the home location in Cincinnati or at other locations, would be at the direction of, for the benefit of, and thus under the control of the petitioner. Therefore, the petitioner will be the beneficiary’s employer.

The AAO is not persuaded. Counsel’s submission on appeal fails to overcome the myriad evidentiary deficiencies and inconsistencies in the record. While Ms. [REDACTED] claims that the designation of Greensboro rather than Cincinnati as the primary work location was a “scrivener’s error” in the July 26, 2013 offer letter to the beneficiary, the previous offer letter to the beneficiary on July 13, 2011, for optional practical training while he was still in F-1 status following the completion of his education, also designated Greensboro as the work location starting August 1, 2011. The payroll check history report issued to the beneficiary for 2012 includes a notation “Department No. [REDACTED] Greensboro” which appears to indicate that he was located in Greensboro before his return to India in November of that year. Even if Ms. [REDACTED] meant to designate Cincinnati as the primary work location in the 2013 offer letter, she acknowledged in her affidavit of October 24, 2013 that travel may be part of the job and that up to 10 consecutive days could be spent at other locations. The offer letter in July 2013 and the associated affidavit in October 2013 confirm that the beneficiary’s job will involve work at multiple locations. Furthermore, neither the offer letter in July 2013 nor the associated affidavit in October 2013 is consistent with the LCA because they do not even mention the secondary work locations identified in the LCA – DeSoto, Texas and New Orleans, Louisiana.

Thus, there is still no itinerary of the beneficiary’s intended H-1B employment for the three-year time period requested in the petition – October 1, 2013 to September 30, 2016. The regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) provides, in pertinent part, 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 Form I-129 shall be where the petitioner is located for purposes of this paragraph.

The itinerary language at 8 C.F.R. § 214.2(h)(2)(i)(B), with its use of the mandatory "must" and its inclusion in the regulatory subsection "Filing of petitions," establishes that the itinerary as there defined is a material and necessary document for an H-1B petition involving employment at multiple locations, and that such a petition may not be approved for any employment period for which there is not submitted at least the employment dates and locations.

The petitioner has submitted copies of three contracts for services between [REDACTED] and client companies. None of them provide any evidence of the beneficiary's prospective employment with the petitioner or with [REDACTED]. The petitioner refers to [REDACTED] as a member of the "[REDACTED] of companies"<sup>4</sup> and the website for [REDACTED] LLC confirms that it is a separately incorporated company. See [http://\[REDACTED\]](http://[REDACTED]). As such, it would not have the same FEIN as the petitioner. If the beneficiary were employed by [REDACTED] therefore, the petitioner could not be the beneficiary's "United States employer" as defined in the regulation at 8 C.F.R. § 214.2(h)(4)(ii)(3). The petitioner has not adequately explained or documented its relationship to [REDACTED] nor the beneficiary's relationship, if any, to [REDACTED]. In the petitioner's organizational chart, submitted in response to the RFE, the beneficiary's prospective position in the company does not appear to have any connection with [REDACTED].

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. See *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In any event, the record does not show that any of the services contracts was in force at the time the instant petition was filed in May 2013. The oldest of the [REDACTED] contracts was a five-year agreement with [REDACTED] Corporation in Mason, Ohio, dated February 29, 2008. Thus, it had expired by the time the petition was filed. The second contract identifies [REDACTED] in Orrville, Ohio, as the buying party at section 1.1 and, without explanation, The [REDACTED] as the buying party at section 10.10. In addition to this unexplained conflict, and the fact that the document is unsigned by the contracting parties, the contract period was specified as January 1, 2010 to December 31, 2012. The buyer had sole discretion to extend the contract by one year, but there is no evidence that such action was taken, whoever the other contracting party was. Thus, even if the second contract were valid, it would have expired by the time the petition was filed. The third contract, with [REDACTED] in Cincinnati, is incomplete as only the first two pages were submitted, neither of which was signed by the parties. Thus, it is impossible to determine if and when the contract entered into force and whether it is still operative. Furthermore, none of the three contract documents identifies the beneficiary as an individual who would perform services for the client.

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<sup>4</sup> See letters from the petitioner's accounting manager, [REDACTED] and its human resources manager, [REDACTED] both dated March 29, 2013.

For the reasons discussed above, the services contracts have little probative value in this proceeding. They do not show that [REDACTED] had any operative contracts at the time the instant petition was filed. Nor do the contracts indicate that the beneficiary would work for [REDACTED] or that he has any relationship to [REDACTED]. Even if they did, the petitioner has not explained how it could claim to be the beneficiary's "United States employer" under the regulation at 8 C.F.R. § 214.2(h)(4)(ii)(3) if the beneficiary would actually work for a separate company with its own FEIN. Thus, the petitioner has failed to establish that any of the three [REDACTED] contracts is relevant to the beneficiary's intended H-1B employment with the petitioner.

Since the [REDACTED] contracts do not constitute an itinerary of the beneficiary's intended employment with the petitioner, and the series of documents from the petitioner's human resources director provides minimal information about the beneficiary's prospective employment, the AAO determines that the record fails to establish an employer-employee relationship between the petitioner and the beneficiary. The evidence of record does not show that the petitioner will control when, where, and how the beneficiary performs his work; does not provide a detailed and comprehensive description of the duties to be performed by the beneficiary; does not specify when, for whom, and in what circumstances the beneficiary will work at the three job locations identified in the LCA – *i.e.* whether the beneficiary will be working directly for the petitioner, an affiliated company, or a client; and does not account for the entire three-year period of requested employment.

The AAO finds that the petitioner has failed to establish that the petition it filed on behalf of the beneficiary was for non-speculative work, for the entire three-year period requested, that existed as of the time of the petition's filing. 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 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 Corporation*, 17 I&N Dec. 248. Thus, even if it were found that the petitioner would be the beneficiary's United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii), the petitioner has not demonstrated that it would maintain such an employer-employee relationship for the duration of the period requested.<sup>5</sup>

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<sup>5</sup> The agency made clear long ago that speculative employment is not permitted in the H-1B program. For example, a 1998 proposed rule documented this position as follows:

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

While social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are relevant factors in determining who will control an alien beneficiary, other incidents of the relationship – e.g., 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 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 petitioner exercises control over the beneficiary, without evidence supporting the claim, does not establish eligibility in this case. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). 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 – in particular, an itinerary of employment supplemented by documentation from the end-client – the evidence submitted by the petitioner did not meet the director's request and has not been remedied on appeal. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

In accordance with the foregoing analysis, and consistent with the director's decision, the AAO concludes that 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).

Beyond the decision of the director, the AAO notes that the petitioner's failure to submit an itinerary in this case not only conflicts with the regulatory requirement at 8 C.F.R. § 214.2(h)(2)(i)(B), but also makes it unclear what the beneficiary will be doing on the job. Without a detailed itinerary the USCIS cannot determine whether the beneficiary will be performing H-1B caliber work for the petitioner. While an industrial engineer would ordinarily qualify as a specialty occupation, the evidence of record does not establish that the beneficiary will be working in this capacity for the petitioner. Accordingly, the record does not establish that

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either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998). While a petitioner is certainly permitted to change its intent with regard to non-speculative employment, e.g., a change in duties or job location, it must nonetheless document such a material change in intent through an amended or new petition in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E).

the beneficiary will be coming temporarily to the United States to perform services in a specialty occupation, as required under section 101(a)(15)(H)(i)(b) of the Act. For this reason as well, the petition cannot be approved.

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director's decision denying the petition.

**ORDER:** The appeal is dismissed.