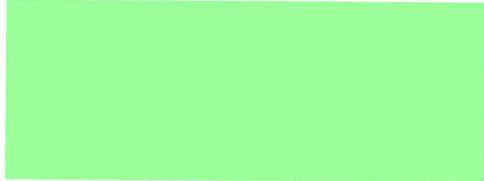
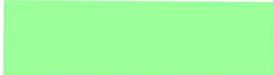


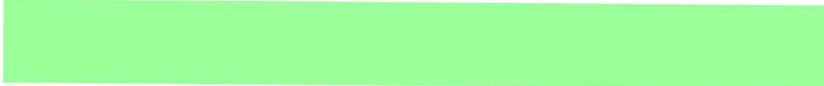
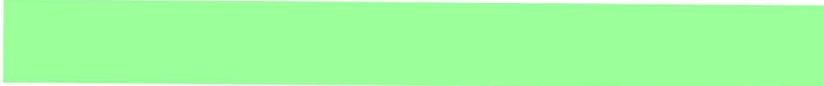


U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: **MAY 15 2014** Office: CALIFORNIA SERVICE CENTER File: 

IN RE: Petitioner:   
Beneficiary: 

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,



Ron Rosenberg  
Chief, Administrative Appeals Office

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

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the California Service Center on April 10, 2013. On the Form I-129 visa petition, the petitioner describes itself as an IT consulting business with 21 employees, established in 2006. In order to employ the beneficiary in a position to which it assigned the job title "Systems Analyst," the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition finding that the petitioner failed to establish (1) that it will have a valid employer-employee relationship with the beneficiary; and (2) that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. The petitioner, through counsel, submitted an appeal of the decision. On appeal, counsel for the petitioner contends that the director's basis for denial of the petition was erroneous. In support of this contention, counsel for the petitioner submits a brief and additional evidence.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's notice denying the petition; (5) the petitioner's Notice of Appeal or Motion (Form I-290B) and supporting documentation; (6) the AAO's decision; (7) the petitioner's second Form I-290B and supporting documentation; (8) the AAO's notice reopening the matter *sua sponte*; and (9) the petitioner's brief 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. Accordingly, the appeal will be dismissed, and the petition will be denied.

Beyond the decision of the director, the AAO will also address additional, independent grounds, not identified by the director's decision, that the AAO finds also precludes approval of this petition.<sup>1</sup> Specifically, the AAO finds that the evidence in the record of proceeding does not establish (1) the petitioner's eligibility at the time of filing for the benefit sought; and (2) 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. For these additional reasons, the petition may not be approved.

## I. FACTUAL AND PROCEDURAL HISTORY

In this matter, the petitioner indicated in the Form I-129 and supporting documentation that it

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

seeks the beneficiary's services in a position that it designates as a Systems Analyst to work on a full-time basis at a salary of \$85,000 per year. In addition, the petitioner indicated on the Form I-129 that the beneficiary will be employed at [REDACTED] San Jose, CA [REDACTED] Cypress, CA [REDACTED] and [REDACTED] Madison, WI [REDACTED]

The petitioner also submitted two Labor Condition Applications (LCAs) in support of the instant petition. The first LCA indicated that the beneficiary will work at [REDACTED] Walnut Creek, CA [REDACTED] and [REDACTED] Pleasanton, CA [REDACTED] and the second LCA indicated that the beneficiary will work at [REDACTED] Cypress, CA [REDACTED] Madison, WI [REDACTED] and [REDACTED] Pleasanton, CA [REDACTED]

Both LCA's also state the occupational category is designated as "Computer Systems Analysts," SOC (ONET/OES) Code 15-1121, at a Level II wage level, and that the period of intended employment is from September 6, 2013 to September 5, 2016.

Among the documents submitted with the Form I-129 is an April 1, 2013 letter of support, signed by the petitioner's CEO. The letter's "Major Responsibilities and Job Duties: Systems Analyst" section introduces the following explanation of the duties to be performed in the proffered position:

- Application Design, Development, Testing, Implementation of PeopleSoft Enterprise Human Capital Management (HCM) Applications. Handle functional and technical aspects of HCM modules like Human Resources, Payroll, Benefits Administration, Talent Management, Time and Labor, Absence Management, eCompensation, eBenefits, ePay, eProfile, Payroll Interface[.]
- Perform evaluation of business procedures and problems. Analyst begins an assignment by talking with managers or specialists to determine the precise nature of the problem and to break it down into its component parts. Interviews method of data collection and conducts written surveys and observe workers performing tasks. After sufficient information has been collected, the analyst prepares charts and diagrams that constitute a representation of the new system in terms which managers or non-data-processing personnel can understand. Analyst consults with management throughout this phase in order to confirm that the analyst and the management agree on the principles of the system and implementing the proposed new system.
- Once the system is accepted, Systems Analyst prepares specifications for programmers to follow. The specifications include detailed descriptions of the records, files, and documents used in processing, and data flow charts describing the interrelationship of the data elements to be considered by the programmers.
- A Systems Analyst works with clients to identify their IT requirements, business needs[,] the costs and benefits of implementing a computing solution.

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<sup>2</sup> The petitioner's CEO's signature on the second LCA does not correspond with the CEO's signature on the first LCA, on the petition and other documentation.

- He/she selects options for potential solutions, and assesses them for technical and business feasibility.
- Perform requirement analysis, project planning from functional requirements, including Technical Fit Gap Analysis, design, development, implementation based on system specifications. Produce detailed reports for fit-gap. Produce functional designs. Produce business requirement documents.
  - PeopleSoft Problem Solving – will prepare program flow charts & diagrams to assist in problem analysis and submits recommendations for solutions. He will prepare program specifications and develop coding logic and program flow and will encode, test, debug and install programs and procedures in conjunction with user documents.
  - Manage and finalize the Technical Requirements and Functional Requirements, including conceiving and creating a Prototype of each transaction to obtain client sign off.
  - Good understanding of PIA Architecture such as Web Server, Application Server, Process Scheduler Configuration Setups and creating new instances for Web, Application & Process Scheduler Servers.
  - Involved in various stages of life cycle development in multiple projects and gained extensive knowledge in quality management, project management, communication, presentation skills and also experience working with clients and end users.
  - Experience in managing teams both at Onsite/Offshore and worked as onsite coordinator.
  - Excellent analytical, programming skills and Good communication, interpersonal skills with a positive attitude.
  - Build Reports, Interfaces, Customizations and Enhancements for PeopleSoft for industries like Hi-Tech, Manufacturing, Banking/Financial, Pharmaceuticals, Health Care & Insurance Operations and Professional Services[.]
  - Develop and Maintain the Upgrade Plan, manage the upgrade activities, tasks and deliverables. Design the Functional and Technical documents based on the client business needs and fit-gaps out comes and requirements.
  - Conduct functional testing of business processes, setup and configuration. Develop test plans and test scripts. Lead System Integration Test and Assist clients in User Acceptance Test.
  - Evaluation and determination of the People Tools Objects and Batch (SQR's, Reports and Interfaces) of the client's customizations retrofits and its functionality.
  - Use Waterfall and Agile methodologies for development[.]
  - Be available to handle high severity calls, Functional & Technical and resolve production issues[.]
  - Support/Research the issues/coordinate resolution for data fix and configuration changes[.]
  - Monitor key interfaces, batch jobs, Extracts & resolve issues[.]

The petitioner also stated that the position of Systems Analyst is a "professional position requiring a Bachelor's degree or equivalent education that is normally the minimum requirements for entry into this position." The petitioner also stated that "[i]n order to successfully discharge the duties and to carry out the job duties to the maximum benefit, a Systems Analyst must have theoretical and practical application of a body of highly specialized knowledge in the field of Computers and/or Engineering, and requires a bachelor's degree or higher in the related field with the training in Computer Science or Information Science or its equivalent."

In addition, the petitioner submitted, among other things, the following documents in support of the petition:

- An employment offer letter from the petitioner's director, consulting services, dated January 21, 2013, which states that the petitioner is offering the beneficiary the position of Systems Analyst for an annual salary of \$85,000. The letter also stated that the beneficiary's reporting manager is [REDACTED] the start date is October 1, 2013, the office location is [REDACTED] Pleasanton, CA [REDACTED]" and that the position offered is an at will employment.
- A memorandum from the petitioner's CEO dated March 28, 2013 providing a company overview, clients and project profile and supporting information.
- A copy of the petitioner's employee handbook.
- A copy of the petitioner's organizational chart.
- A copy of a document entitled "Agreement for Temporary Staffing Services (Non-Medical)," entered into as of March 31, 2009, between the petitioner and [REDACTED] Inc. This agreement calls for the petitioner to provide [REDACTED] Inc. with personnel for temporary services.
- A copy of a document entitled, "Business Associate Agreement," entered into as of April 20, 2009, by and between the petitioner and [REDACTED] Inc.
- A copy of a document entitled, "Consulting Agreement," entered into on November 15, 2012, between the petitioner and [REDACTED]. This agreement calls for the petitioner to provide [REDACTED] with personnel for temporary services.
- A copy of the Statement of Work (SOW) entitled "Health Check Assessment," entered into on November 15, 2012, pursuant to the Consulting Agreement between the petitioner and [REDACTED]. The SOW lists the "Scope of Services" and states that "[t]he parties will agree on a start date for the services."

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<sup>3</sup> [REDACTED] name on the first page appears to contain a typo. [REDACTED] on page 9 of the Consulting Agreement is listed as [REDACTED]

- A copy of the petitioner's "Performance Bonus Plan Worksheet."

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on April 25, 2013. The petitioner was asked to submit probative evidence to establish that a valid employer-employee relationship will exist between the petitioner and the beneficiary. The director outlined some of the types of specific evidence that could be submitted.

In response to the director's RFE, the petitioner provided an unsigned support letter dated July 12, 2013 from the petitioner's CEO that contends that the beneficiary will at all times be under the control and authority of the petitioner during the requested validity period. The petitioner also provided an itinerary of services for the beneficiary.

The petitioner submitted, among other things, the following additional supporting evidence regarding the beneficiary's assignment:

- A copy of email correspondence from July 2013 between [REDACTED] and the petitioner stating that "[REDACTED] is the [REDACTED] spin-off for which [the petitioner is] providing support services," and that [REDACTED] "will still be using Siebel and PeopleSoft for a minimum of 8 to 12 months"; and a copy of payments made by [REDACTED] to the petitioner from March 2013 to May 2013.
- A copy of a document entitled, "[REDACTED] Inc. Master Services Agreement, Statement of Work – [REDACTED]" entered into on December 7, 2006, between [REDACTED] Inc. and the petitioner (hereinafter, the [REDACTED] SOW). The [REDACTED] SOW states that "[u]nder this SOW, Consultant [(the petitioner)] shall provide deliverables as directed by [REDACTED]" The [REDACTED] SOW also states that the proposed timeline for application support starts on December 4, 2012 and ends on March 1, 2013.
- A copy of a document entitled, "[REDACTED] Inc. Master Services Agreement, Amendment 5 to Statement of Work – PeopleSoft Consulting Services," signed on March 20, 2012, between [REDACTED] Inc. and the petitioner (hereinafter, the [REDACTED] SOW Amendment). The [REDACTED] SOW Amendment states that "[u]nder this SOW, Consultant [(the petitioner)] shall provide deliverables as directed by [REDACTED]" The [REDACTED] SOW Amendment also states that the proposed timeline for application support starts on December 4, 2012 and ends on December 3, 2013.
- A copy of the purchase order dated March 21, 2013 from [REDACTED], Inc.
- A copy of email correspondence dated July 1, 2013 between the petitioner and [REDACTED] Inc. whereby the IT Director of [REDACTED] states that he "would like to have an SOW in place by July 15 if possible."
- A copy of the petitioner's undated document entitled "Proposal for Implementation of PeopleSoft Applications" that states "Presented to [REDACTED]"

- A copy of the petitioner's undated document entitled "Consulting Services Proposal for PeopleSoft 9.2 Upgrade + Implementation Presented to [redacted]"
- A copy of a draft document entitled "Professional Services Agreement" by and between [redacted] and [blank] company.

The director reviewed the documentation and found it insufficient to establish eligibility for the benefit sought. The director denied the petition on July 25, 2013. Counsel for the petitioner submitted an appeal of the denial of the H-1B petition, and supporting documentation.

## II. LAW AND ANALYSIS

### A. Lack of an Employer-Employee Relationship Between the Petitioner and the Beneficiary

As a preliminary matter, on appeal, counsel for the petitioner indicates that the "preponderance of the evidence" standard is relevant to this matter, and that the petitioner clearly established through credible and uncontested evidence the existence of an employer-employee relationship between the petitioner and the beneficiary.

With respect to the preponderance of the evidence standard, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010), states in pertinent part the following:

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

\* \* \*

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case.

\* \* \*

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

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. *See INS v. Cardoza-Foncesca*,

480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Applying the preponderance of the evidence standard, the AAO concludes that the petitioner has not established that it meets the regulatory definition of a United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii). The AAO will now review the record of proceeding to determine whether the petitioner has established that it will have "an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." *Id.*

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

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

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

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

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

8 C.F.R. § 214.2(h)(4)(ii) (emphasis added); *see also* 56 Fed. Reg. 61111, 61121 (Dec. 2, 1991). In the instant case, 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 an LCA with the Secretary of Labor pursuant to section 212(n)(1) of the

Act, 8 U.S.C. § 1182(n)(1). 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). Further, the regulations indicate that "United States employers" must file a Petition for a Nonimmigrant Worker (Form I-129) in order to classify aliens as H-1B temporary "employees." 8 C.F.R. § 214.2(h)(1), (2)(i)(A). Finally, the definition of "United States employer" indicates in its second prong that the petitioner must have an "employer-employee relationship" with the "employees under this part," i.e., the H-1B beneficiary, and that this relationship be evidenced by the employer's ability to "hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer").

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

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

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

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

In this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions.

*See generally* 136 Cong. Rec. S17106 (daily ed. Oct. 26, 1990); 136 Cong. Rec. H12358 (daily ed. Oct. 27, 1990). On the contrary, in the context of the H-1B visa classification, the regulations define the term "United States employer" to be even more restrictive than the common law agency definition.<sup>4</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

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<sup>4</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).

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

"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>5</sup>

Accordingly, in the absence of an express congressional intent to impose broader definitions, both the "conventional master-servant relationship as understood by common-law agency doctrine" and the *Darden* construction test apply to the terms "employee" and "employer-employee relationship" as used in section 101(a)(15)(H)(i)(b) of the Act, section 212(n) of the Act, and 8 C.F.R. § 214.2(h).<sup>6</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

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<sup>5</sup> To the extent the regulations are ambiguous with regard to the terms "employee" or "employer-employee relationship," the agency's interpretation of these terms should be found to be controlling unless "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359, 109 S.Ct. 1835, 1850, 104 L.Ed.2d 351 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945))).

<sup>6</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).

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

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

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

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

The petitioner claims that it will have an employer-employee relationship with the beneficiary and that the beneficiary will work offsite at various locations. In the memorandum dated March 28, 2013, the petitioner explained that it "has several active client contracts that it services at any given time." The petitioner stated that it has an agreement with [REDACTED] a Statement of Work with [REDACTED] and a Master Services Agreement with [REDACTED]. In addition, the petitioner stated that there are "two proposals for [REDACTED] 2013 projects" and that the petitioner is trying to enter into a contract with [REDACTED].

The petitioner's first LCA indicates that the beneficiary will work at [REDACTED] Walnut Creek, CA [REDACTED] address) and [REDACTED] Pleasanton, CA [REDACTED] (the petitioner's address), and the petitioner's second LCA indicates that the beneficiary will work at [REDACTED] Cypress, CA [REDACTED] address); [REDACTED] Madison, WI [REDACTED] address); and [REDACTED] 220, Pleasanton, CA [REDACTED] (the petitioner's address).

In response to the RFE, the petitioner provided an unsigned letter dated July 12, 2013 that indicated a proposed itinerary of services for the beneficiary. The petitioner stated that the beneficiary will work for [REDACTED] at [REDACTED] San Jose, CA from October 2013 to December 2013 and then from December 2013 to December 2014 "based on client contract extensions expected to be awarded to [the petitioner]." The itinerary also stated that the

beneficiary will work for [REDACTED] at [REDACTED], Cypress, CA from December 2013 until September 2016. The itinerary also stated that the beneficiary will work for [REDACTED] at [REDACTED] Madison, WI [REDACTED] from December 2013 until September 2016.

As previously noted, on the Form I-129, the petitioner stated that the beneficiary will work offsite at [REDACTED] San Jose, CA [REDACTED] address); [REDACTED] Cypress, CA [REDACTED] address); and [REDACTED] Madison, WI [REDACTED] address). However, upon review of the two LCA's submitted by the petitioner, the address of [REDACTED] at [REDACTED], San Jose, CA is not listed. Although the itinerary provided by the petitioner indicated that the beneficiary will work at [REDACTED] from October 2013 until December 2013 and then from December 2013 until December 2014 upon approval of an extension of the contract, this end client site is not listed on the LCA. No explanation was provided by the petitioner for the discrepancy. 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).

Furthermore, at the time the instant petition was filed, the petitioner did not have an executed contract with [REDACTED] or [REDACTED]. In response to the RFE, the petitioner provided email correspondence indicating that [REDACTED] and [REDACTED] were interested in executing a service agreement; however, a contract was not signed until after the instant petition was filed.

Moreover, beyond the decision of the director, the evidence submitted fails to establish non-speculative employment for the beneficiary for the entire period requested. Although the petitioner requested, on the Form I-129, that the beneficiary be granted H-1B classification from October 1, 2013 to September 5, 2016, there is a lack of documentation regarding any specific work for the beneficiary for the duration of the requested employment period. As previously noted, the contracts indicating that the petitioner will provide services to [REDACTED] and [REDACTED] were not signed and executed until after the instant petition was filed. In addition, the work location of [REDACTED] was not listed on either LCA submitted with the petition. Therefore, the AAO also finds that 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 the petitioner established that it would be the beneficiary's United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii), which it has not, the petitioner has not demonstrated that it would maintain such an employer-employee relationship with the beneficiary for the duration of the period requested.<sup>7</sup> Moreover, according

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<sup>7</sup> 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:

to the itinerary provided by the petitioner, it appears that the beneficiary will work on projects that overlap in time but that are located in different parts of the country. As noted in the itinerary, the beneficiary will work for [REDACTED] at [REDACTED] San Jose, CA from October 2013 to December 2013 and then from December 2013 to December 2014 "based on client contract extensions expected to be awarded to [the petitioner]." The itinerary also stated that the beneficiary will work for [REDACTED] at [REDACTED] Cypress, CA from December 2013 until September 2016, and will work for [REDACTED] at [REDACTED] Madison, WI [REDACTED] from December 2013 until September 2016. The petitioner has not explained how the beneficiary can work for multiple clients at the same time when the clients are in different locations of the country, and the projects differ from each other.

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 AAO notes that the petitioner provided a document entitled "Agreement for Temporary Staffing Services (Non-Medical)," entered into as of March 31, 2009, between the petitioner and [REDACTED] Inc., that calls for the petitioner to provide [REDACTED] Inc. with personnel for temporary services. However, the petitioner did not indicate on the itinerary that the beneficiary would provide services to [REDACTED] Inc. Thus, the AAO will not further discuss this contract.

In the memorandum dated March 28, 2013, the petitioner contends that it can establish the right to control the beneficiary based on the employment offer letter; contracts with clients that are "long-term in nature and are drafted for [the petitioner] to provide PeopleSoft Consulting

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Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. See section 214(i) of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

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

Services to manage the entire lifecycle of these applications from implementation to support and upgrade"; and that the beneficiary's incentive compensation plan is controlled by the petitioner. The petitioner further stated that it "shall be directly responsible for projects that the beneficiary works on and we will manage all the tasks related to design, development, quality control and deployment on such projects." The petitioner also stated that it controls the beneficiary's pay, withholds taxes and reimburses expenses. In addition, the petitioner stated that it also is "responsible for providing laptop, cell phone, travel expenses, productivity tools (MS Office) and other necessary tools for the beneficiary to perform his/her job duties."

While social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are still relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary's employer. Without full disclosure of all of the relevant factors, the AAO is unable to find that the requisite employer-employee relationship will more likely than not exist between the petitioner and the beneficiary.

Furthermore, the petitioner did not submit any documentation from the end clients that indicate the job duties the beneficiary would perform for them as a Systems Analyst on the project. The petitioner also did not submit any statements of work specifically naming the beneficiary for any of the projects listed on the itinerary. 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. 190).

Based on the tests outlined above, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii). Moreover, the petition must also be denied due to the petitioner's failure to establish eligibility at the time of filing and to proffer non-speculative employment to the beneficiary.

#### **B. Failure to Establish that Proffered Position Qualifies as a Specialty Occupation**

The AAO will now address the petitioner's failure to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions.

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

*Specialty occupation* means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition

of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this 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 evidence in the record of proceeding establishes that performance of the particular proffered 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 a 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's job requirements is critical. *See Defensor v. Meissner*, 201 F.3d at 387-388. That is, it is necessary for the end-client to provide sufficient information regarding the proposed job duties to be performed at its location in order to properly ascertain the minimum educational requirements necessary to perform those duties. *Id.* 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.

In the instant case, the record of proceeding is devoid of sufficient information from the claimed end-clients, [REDACTED] and [REDACTED] regarding the specific job duties to be performed by the beneficiary for these clients.

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

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

The AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient documentation to demonstrate that the position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation.

As discussed in this decision, the petitioner did not submit sufficient evidence regarding the proffered position to determine that it is a specialty occupation and, therefore, the issue of whether it will require a baccalaureate or higher degree in a specific specialty, or its equivalent, also cannot be determined. Therefore, the AAO need not and will not address the beneficiary's qualifications.

### III. CONCLUSION

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

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

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

(b)(6)

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