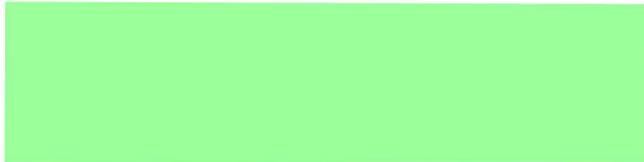


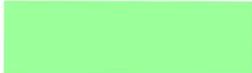
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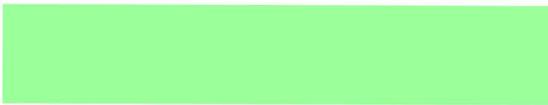


U.S. Citizenship
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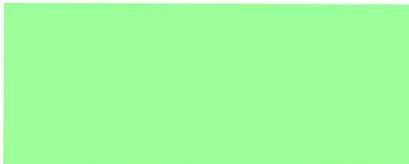
DATE: **MAY 15 2014**

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,

A handwritten signature in black ink, appearing to read "N. Rosenberg".

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 a software development business with approximately 162 employees, established in 1996. In order to employ the beneficiary in a position to which it assigned the job title "Systems Analyst," the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on June 26, 2013, finding that the petitioner failed to establish that it will have a valid employer-employee relationship with the beneficiary. The petitioner, through counsel, submitted a timely 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 request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's notice denying the petition; and (5) the petitioner's Notice of Appeal or Motion (Form I-290B) and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

Upon review of the entire record of proceeding, the AAO finds that the petitioner has failed to overcome the director's grounds for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

Later in this decision, the AAO will also address an additional, independent ground, not identified by the director's decision, that the AAO finds also precludes approval of this petition. Specifically, beyond the decision of the director, the AAO finds that the evidence in the record of proceeding does not establish the proffered position as a specialty occupation in accordance with the applicable statutory and regulatory provisions.¹ For this additional reason, 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 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 \$60,000 per year. In addition, the petitioner indicates that the beneficiary will be employed at Dayton, Ohio and [REDACTED] Maryland Heights, MO [REDACTED]. The petitioner stated that the dates of intended employment are from October 1, 2013 to August 27, 2016.

¹ The AAO conducts appellate review on a *de novo* basis (*See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)), and it was in the course of this review that the AAO identified this additional ground for denial.

Among the documents submitted with the Form I-129 is a March 8, 2013 letter of support, signed by the petitioner's vice president. The letter's "Responsibilities and Requirements for Systems Analyst" section introduces the following explanation of the duties to be performed in the proffered position:

Specifically, as a Systems Analyst, the beneficiary will analyze computer problems of existing and proposed systems and initiate and enable specific technologies that will maximize our company's ability to deliver more efficient and effective technological and computer-related solutions to our business clients. The beneficiary will gather information from users to define the exact nature of system problems and then design a system of computer programs and procedures to resolve these problems. As a System Analyst, the beneficiary will plan and develop new computer systems and devise ways to apply the IT industry's already-existing technological resources to additional operations that will streamline our clients' business processes. This process of developing new computer systems will include the design or addition of hardware or software applications that will better harness the power and usefulness of our clients' computer systems. In this position, the beneficiary will employ a combination of techniques, including: structured analysis, data modeling, information engineering, mathematical model building, sampling, and cost accounting to plan systems and procedures to resolve computer problems. As part of the duties of a Systems Analyst, the beneficiary will also analyze subject matter operations to be automated, specify the number and type of records, files, and documents to be used, and format the output to meet user's needs. As a System Analyst, the beneficiary is also required to develop complete specifications and structure charts that will enable computer users to prepare required programs. Most importantly, once the systems have been instituted, the beneficiary will coordinate tests of the systems, participate in trial runs of new and revised systems, and recommend computer equipment changes to obtain more effective operations.

In the letter of support, the petitioner also stated that "[a]s with any Systems Analyst position, the usual minimum requirement for performance of the job duties is a bachelor's degree, or equivalent, in computers, engineering, or a related field." The petitioner provided a copy of the beneficiary's academic transcript to establish that the beneficiary received a Master of Science degree in Computer Science from the [REDACTED] in Kansas City, Kansas.

Moreover, the petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification of "Computer Systems Analysts" – SOC (ONET/OES) Code 15-1121. The petitioner designated the proffered position as a Level I (entry level) position. In the LCA, the petitioner indicated that the beneficiary would work at the petitioner's location at [REDACTED] Dayton, OH [REDACTED] and at [REDACTED] Maryland Heights, MO [REDACTED]. The LCA indicates that the dates of intended employment are from August 28, 2013 to August 27, 2016.

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

- A two-page document entitled "Itinerary of Services for Mr. [the beneficiary]."² The document listed the actual employer as the petitioner and the vendor company as [REDACTED] Inc. and the "establishment where services will be performed" as [REDACTED], Maryland Heights, MO [REDACTED]. The document states that the "succession of contracts" is "[the petitioner] – [REDACTED] Inc. – [REDACTED]. The document also states that the date of service is from October 1, 2013 until August 27, 2016 and that the beneficiary will be working as a Systems Analyst. The document lists the beneficiary's name in the title of the document but lists another individual's name in the "work schedule" and "pay schedule" sections.
- A copy of a document entitled "Professional Services Agreement," entered into as of January 23, 2013, between the petitioner and its vendor, [REDACTED] Inc. (d/b/a [REDACTED]). This Professional Services Agreement calls for the petitioner to provide [REDACTED] Inc. with personnel to fill assignments for the benefit of a third-party client. The Professional Services Agreement references an "Exhibit A" that was not submitted into the record.
- A copy of a letter, dated March 26, 2013, from the Account Manager of [REDACTED] stating that the beneficiary is an employee of the petitioner and "is needed at [REDACTED] located at [REDACTED] Maryland Heights, MO [REDACTED]' to perform duties as a Systems Analyst in the "Technology Pipeline Solutions (CQA) Team."
- A copy of a letter, dated March 22, 2013, from the Legal Assistant, Immigration, of [REDACTED]. The letter states that it "is submitted in support of [the beneficiary's] placement at [REDACTED] as a Contractor by her employer, [the petitioner]." The letter also states that the beneficiary "will perform the following duties at [REDACTED] facility located in St. Louis, Missouri":
 - Develop web Application on both [the] client side and the server side using java, J2EE technologies by following Agile Process methodology
 - Develop web services using Rest and SOAP web services, hibernate, spring Integration
 - Build and deploy the applications
 - Attending to the application issue meetings, resolve the issues, Involving [sic] in code reviews.
- An employment offer letter from the petitioner's vice president to the beneficiary, dated March 14, 2013, which states that the position offered is "Systems Analyst starting on October 1st, 2013."
- A copy of the petitioner's Employee Handbook.

² The AAO notes that the beneficiary is a female.

- A copy of the petitioner's sample Performance Appraisal Form.
- A copy of the petitioner's sample Weekly Time Sheet.
- A copy of the petitioner's organization chart which indicates that Systems Analysts fall within the Software Development and Consulting Group.
- A copy of five paystubs issued to the beneficiary from the petitioner.
- A printout of pages from the petitioner's website.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on April 18, 2013. The RFE requested, in part, that the petitioner submit additional documentation to demonstrate that a valid employer-employee relationship will exist with the beneficiary for the duration of the requested H-1B validity period and to establish that the petitioner has the right to control the beneficiary for the duration of the requested H-1B validity period. The director provided a list of some of the types of specific evidence that could be submitted.

In the letter in response to the director's RFE, dated June 19, 2013, the petitioner stated that it "has directly hired the Beneficiary, and as such the Beneficiary will at all times be under the control and authority of the Petitioner during the requested validity period." The petitioner further explained that the beneficiary has been assigned to a project with [REDACTED] and that [REDACTED] Inc. is the vendor company.

The petitioner also contended that "[t]he Beneficiary's assignment at [REDACTED] is expected to last the entire requested validity period." The petitioner stated that "[d]ue to its policies, staffing companies are often unable to issue work orders in increments greater than a certain number of months; however, the work orders are routinely extended for as long as the project is ongoing."

In response to the RFE, the petitioner submitted, among other things, the following additional supporting evidence regarding the beneficiary's assignment:

- A copy of the cover page and pages 2, 4, 5, 7, 13, 16, and 19 of a document entitled, "Master Agreement for Services between [REDACTED] and [REDACTED] Inc. (d/b/a [REDACTED]). This agreement begins on January 1, 2012 and has "an effective date of termination not earlier than three (3) years from the commencement of the Agreement."
- A copy of a document entitled, "Employment Agreement," between the petitioner and the beneficiary, entered into on March 14, 2013.
- A copy of 16 weekly time sheets for the beneficiary on the petitioner's letterhead for work performed for [REDACTED]. The time sheets are signed by the supervisor, [REDACTED].

The director reviewed the documentation and found it insufficient to establish eligibility for the benefit sought. The director denied the petition on June 26, 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 Standing to File the Petition as a United States Employer

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

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

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

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

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

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

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

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

Although "United States employer" is defined in the regulations at 8 C.F.R. § 214.2(h)(4)(ii), it is

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

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

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

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

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

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

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

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

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

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

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

Thus, 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 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 at the end-client, [REDACTED]. The petitioner submitted documentation indicating that there is a contractual relationship between the petitioner and [REDACTED] Inc. (the vendor company), and [REDACTED] Inc. (the vendor company) and [REDACTED] (the end-client). However, the petitioner did not submit sufficient documentation which outlined in detail the nature and scope of the beneficiary's employment with the end-client.

In the letter from the account manager of [REDACTED] Inc. (the vendor company), dated March 26, 2013, the account manager stated that "[a]t the [REDACTED] office, [the beneficiary] interacts results and updates project progress with Manager [REDACTED]. Thus, it appears that the beneficiary's day-to-day duties will be supervised by a manager that is employed by the end-client, [REDACTED], rather than an employee of the petitioner. Although the petitioner claims that [REDACTED] an employee of the petitioner, will supervise the beneficiary, the documentation from the vendor clearly states that an in-house manager will supervise the work of the beneficiary at [REDACTED] (the end-client). 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 petitioner contends in its response to the RFE, that "[t]he Petitioner has directly hired the Beneficiary, and as such the Beneficiary will at all times be under the control and authority of the Petitioner during the requested validity period." The petitioner submitted a copy of the "Employment Agreement" between the petitioner and the beneficiary, entered into on March 14, 2013. Under section F, "Communication with Employer," it states the following:

If Employee is directed to render services away from Employer's business premises, Employee shall report back to Employer 4 times(s) per month for an evaluation of progress, performance, and goals. Employee will also be required to maintain timesheets of worked performed at other premises and will provide the timesheets to Employer. Employer contract for such reporting is: [blank.]

Although the employment agreement states that the beneficiary is directed to have contact with the petitioner four times a month when the beneficiary is working off site, it is not clear who will supervise the beneficiary on her day-to-day duties. As noted in the letter from the account manager at the vendor company, [REDACTED] Inc., the account manager stated that the beneficiary will have a supervisor at the end-client worksite. Thus, it is not clear who will be supervising and controlling the beneficiary on a day-to-day basis when the beneficiary is working with the end-client. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

In addition, the petitioner submitted a document entitled, "Master Agreement for Services between [REDACTED] and [REDACTED] Inc. (d/b/a [REDACTED]). Upon review of the document, the agreement is missing several pages. In addition, a paragraph on the first page is completely blacked out. The petitioner does not explain why the document is missing several pages or why a portion is blacked out. Without the full document, it is difficult to understand the true nature of the relationship between the end-client and the vendor company. 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).

The petitioner also submitted a document entitled, "Professional Services Agreement," between [REDACTED] Inc. (d/b/a [REDACTED]) and the petitioner, entered into on January 23, 2013. In this document, under Section 1, letter f., it states that the definition of "Services" means the "provision of staffing services contemplated by this Agreement, as described on Exhibit A attached hereto." Upon review of the documentation, the petitioner did not submit Exhibit A as mentioned in this agreement. Without all of the information, it is difficult to determine the services the petitioner provides and to determine whether an employer-employee relationship exists. 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).

The AAO also finds that the entire tenor of the agreement between [REDACTED] Inc. (the vendor company) and the petitioner, and the agreement between [REDACTED] Inc., (the vendor company) and [REDACTED] (the end-client) is indicative of a contractual scenario wherein the beneficiary would be assigned to [REDACTED] Inc.'s clients solely to augment [REDACTED] Inc.'s clients' staff – a role which, in the absence of countervailing evidence – is indicative of day-to-day control by the end-client, whose staff is normally subject to the end-client's direction.

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 likely exist between the petitioner and the beneficiary.

The AAO also notes that the petitioner has not established the duration of the relationship between the parties and the location(s) where the beneficiary will work for the duration of the requested H-1B employment period. More specifically, on the Form I-129, the petitioner requested that the beneficiary be granted H-1B classification from October 1, 2013 to August 27, 2016. The LCA indicates that the beneficiary will work in the following two locations: (1) [REDACTED] Dayton, Ohio [REDACTED] and (2) [REDACTED] Maryland Heights, Missouri [REDACTED]

The petitioner provided a document entitled, "Itinerary of Services for [the beneficiary]" that states that the dates of service are from October 1, 2013 until August 27, 2016, and the services will be performed for [redacted] located at [redacted], Maryland Heights, MO [redacted]. The director noted in the denial decision, that the itinerary mentions the beneficiary in the title but states a different person in the "work schedule" section and the "pay schedule" section. On appeal, counsel for the petitioner states that the error contained in the itinerary is "only a clerical oversight on behalf of the Petitioner's counsel." On appeal, counsel submits an affidavit that states that the "error contained in the Itinerary of Services document submitted with [the petitioner's] I-129 petitioner on behalf of [the beneficiary] are [sic] due solely to clerical oversight by [redacted]."

On appeal, counsel for the petitioner states that the RFE did not request for a new itinerary and the "petitioner, therefore, was not afforded an opportunity to correct any error in the Itinerary of Services." As to the perceived error in the service center's failure to issue an RFE that requested a new itinerary, the AAO notes that there is no requirement for USCIS to issue an RFE or to issue an RFE pertinent to a ground later identified in the decision denying the visa petition. The regulation at 8 C.F.R. § 103.2(b)(8) clearly permits the director to deny a petition for failure to establish eligibility without having to request evidence regarding the ground or grounds of ineligibility identified by the director. Second, even if the director had erred as a procedural matter in not issuing an RFE or Notice of Intent to Deny relative to the petitioner's failure to provide an accurate itinerary, it is not clear what remedy would be appropriate beyond the appeal process itself. The petitioner has in fact supplemented the record on appeal, and therefore it would serve no useful purpose to remand the case simply to afford the petitioner yet another additional opportunity to supplement the record with new evidence. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

As noted above, the itinerary states that the beneficiary's dates of services are from October 1, 2013 until August 27, 2016. The Form I-129 states the same dates of service. Upon review of the letter by the Account Manager of [redacted] Inc. (the vendor company), dated March 26, 2013, he stated that "[w]e expect that [the beneficiary] will continue to perform the above duties at [redacted] Maryland Heights, MO [redacted] until further notice." The letter also stated that "[o]ur company repeatedly renewed service contracts with [redacted] and [the petitioner] and [the beneficiary] has been working at [redacted] performing the above-mentioned duties."

The petitioner submitted a document entitled, "Master Agreement for Services between [redacted] and [redacted] Inc. (d/b/a [redacted]). In the "Term and Termination" section, it states that "[t]he term of this Agreement shall commence as of the date set forth at its beginning and shall continue until terminated by either party giving the other at least sixty (60) days prior written notice of termination with an effective date of termination not earlier than three (3) years from the commencement of the Agreement." The agreement commenced on January 1, 2012, thus according to the section discussed above, it appears that the contract should last until at least January 1, 2015, unless terminated by the parties at an earlier date. However, the date of employment requested on the Form I-129 is until August 27, 2016, which is past the termination date of the Master Agreement between [redacted] and [redacted] Inc. 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 petitioner also submitted a letter from the end-client, [REDACTED], dated March 22, 2013. The letter stated that "[t]o meet our strategic global objectives, [REDACTED] has contracted with [REDACTED] who has contracted with [the petitioner] to provide services in the area of Web Application Development" and it stated that the "current contract is valid and is subject to renewal based on agreement of the parties." The letter from the end-client does not state specific dates to indicate that it will continue to use the beneficiary's services up to August 27, 2016.

In response to the RFE, the petitioner submitted a letter dated June 19, 2013, and stated that "[d]ue to its policies, staffing companies are often unable to issue work orders in increments greater than a certain number of months; however, the work orders are routinely extended for as long as the project is ongoing." However, the petitioner did not submit any evidence to corroborate this claim such as evidence that the industry (relating to staffing companies) typically offers work orders for only a few months and not the length of the entire project and/or evidence that the end-client, [REDACTED] has an ongoing project that will last until August 27, 2016. Furthermore, the petitioner never provided any work order relating specifically to the beneficiary that detailed the length of services for the end-client. 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).

Furthermore, the employment agreement between the petitioner and the beneficiary states under Section D, "Place and Hours of Employment," that "upon the completion of duties away from Employer's premises, Employee shall report immediately back to Employer's office for his subsequent assignment." As noted in the LCA, the beneficiary may work at the end-client's location or at the petitioner's location. However, the petitioner did not provide any evidence of the project and job duties the beneficiary would perform if she returned to work onsite with the petitioner. Therefore, it is not clear if the beneficiary will work in a specialty occupation position for the entire period of employment requested on the Form I-129. 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).

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 for the duration of the period requested.⁶

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

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

Beyond the decision of the director, the AAO will now address whether the petitioner's proffered position qualifies as a specialty occupation.

⁶ The agency made clear long ago that speculative employment is not permitted in the H-1B program. A 1998 proposed rule documented this position as follows:

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

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

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 387. To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

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

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

To ascertain the intent of a petitioner, USCIS must look to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

In the instant case, the petitioner states that "[a]s with any Systems Analyst position, the usual minimum requirement for performance of the job duties is a bachelor's degree or equivalent in computers, engineering, or a related field." Such an assertion, i.e., that the duties of the proffered position can be performed by a person with a degree in any one of those disciplines, (i.e., computers, engineering or a related field) suggests that the proffered position is not, in fact, a specialty occupation. More specifically, the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but such a degree in a *specific specialty* that is directly related to the position. See section 214(i)(1)(b) of the Act, 8 U.S.C. § 1184(i)(1)(b), and 8 C.F.R. § 214.2(h)(4)(ii).

As noted above, the petitioner claims that a degree in one of the disciplines (i.e., computers, engineering, or related field) is sufficient for the proffered position. Provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added).

In other words, while the statutory "the" and the regulatory "a" both denote a singular "specialty," the AAO does not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. See section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). This also includes even seemingly disparate specialties provided again, that the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

Again, the petitioner states that its minimum educational requirement for the proffered position is a bachelor's degree in "computers, engineering, or [a] related field." Absent evidence to the contrary, the fields of computers and engineering are not closely related specialties, and the petitioner fails to establish how these fields are directly related to the duties and responsibilities of the proffered position. Accordingly, as such evidence fails to establish a minimum requirement of at least a bachelor's degree *in a specific specialty* or its equivalent for entry into the occupation, it does not support the proffered position as being a specialty occupation.

Furthermore, the petitioner claims that a degree in engineering is acceptable for the proffered position. The issue here is that the field of engineering is a broad category that covers numerous and various specialties, some of which are only related through the basic principles of science and mathematics, e.g., nuclear engineering and aerospace engineering. Therefore, it is not readily apparent (1) that a general degree in engineering or one of its other sub-specialties, such

as chemical engineering or nuclear engineering, is closely related to computer science (i.e., that engineering and computer science are closely related fields); or (2) that any and all engineering specialties are directly related to the duties and responsibilities of the particular position proffered in this matter. Absent this evidence, it cannot be found that the particular position proffered in this matter has a normal minimum entry requirement of a bachelor's or higher degree in a specific specialty or its equivalent under the petitioner's own standards. Accordingly, as the evidence of record fails to establish a standard, minimum requirement of at least a bachelor's degree *in a specific specialty* or its equivalent for entry into the particular position, it does not support the proffered position as being a specialty occupation and, in fact, supports the opposite conclusion.

Moreover, 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 company'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.* at 387-388. The court held that the former INS had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. *Id.* at 384. Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work. In other words, as the nurses in *Defensor v. Meissner* would provide services to the end-client hospitals and not to the petitioning staffing company, the petitioner-provided job duties and alleged requirements to perform those duties were irrelevant to a specialty occupation determination. *See id.* at 387-388.

Here, the record of proceeding in this case is similarly devoid of sufficient information from the end-client, [REDACTED] regarding not only the specific job duties to be performed by the beneficiary for that company, but also information regarding whatever the end-client may or may not have specified with regard to the educational credentials of persons to be assigned to its projects. The end-client provided a very brief job description of the duties to be performed by the beneficiary.

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

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

The AAO does not need to examine the issue of the beneficiary's qualifications because the petitioner has not provided sufficient evidence to demonstrate that the proffered 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.

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 145 (noting that the AAO conducts appellate review on a *de novo* basis).

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

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

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