



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF D-N-S-, INC.

DATE: DEC. 1, 2015

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, an IT consulting company, seeks to employ the Beneficiary as a “Callidus/PLSQL Developer” under the H-1B nonimmigrant classification. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The Director, California Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

I. ISSUES

The issues before us are whether (1) the Petitioner has established that it will have an employer-employee relationship with the Beneficiary; and (2) the proffered position qualifies as a specialty occupation.¹

II. EMPLOYER-EMPLOYEE RELATIONSHIP

A. Legal Framework

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

[S]ubject 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:

¹ We conduct appellate review on a *de novo* basis. *Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542 (AAO 2015); *see also* 5 U.S.C. § 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”); *Dor v. INS*, 891 F.2d 997, 1002 n.9 (2d Cir. 1989).

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* Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act, 56 Fed. Reg. 61,111, 61,121 (Dec. 2, 1991) (to be codified at 8 C.F.R. pt. 214).

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 individual 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). 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 Form I-129, Petition for a Nonimmigrant Worker, in order to classify individuals 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 Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992) (quoting *Cnty. 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.”

Id.; see also *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 445 (2003) (quoting *Darden*, 503 U.S. at 323). 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 Am.*, 390 U.S. 254, 258 (1968)).

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

Specifically, the regulatory definition of “United States employer” requires H-1B employers to have a tax identification number, to engage a person to work within the United States, and to have an “employer-employee relationship” with the H-1B “employee.” 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term “United States employer” not only requires H-1B employers and employees to have an

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

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 Res. Def. Council, Inc.*, 467 U.S. 837, 844-45 (1984).

“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 318-19.³

Accordingly, in the absence of an express congressional intent to impose broader definitions, both the “conventional master-servant relationship as understood by common-law agency doctrine” and the *Darden* construction test apply to the terms “employee” and “employer-employee relationship” as used in section 101(a)(15)(H)(i)(b) of the Act, section 212(n) of the Act, and 8 C.F.R. § 214.2(h).⁴

Therefore, in considering whether or not one will be an “employee” in an “employer-employee relationship” with a “United States employer” for purposes of H-1B nonimmigrant petitions, USCIS must focus on the common-law touchstone of “control.” *Clackamas*, 538 U.S. at 450; *see also* 8 C.F.R. § 214.2(h)(4)(ii) (defining a “United States employer” as one who “has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise *control* the work of any such employee . . .” (emphasis added)).

The factors indicating that a worker is or will be an “employee” of an “employer” are clearly delineated in both the *Darden* and *Clackamas* decisions. *Darden*, 503 U.S. at 323-24; *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* EEOC Compl. Man. at § 2-III(A)(1) (adopting a materially identical test and indicating that said test was based on the *Darden* decision); *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 petitioner, because the hospitals ultimately hire, pay, fire, supervise, or otherwise control the work of the beneficiaries).

³ To the extent the regulations are ambiguous with regard to the terms “employee” or “employer-employee relationship,” the agency’s interpretation of these terms should be found to be controlling unless “plainly erroneous or inconsistent with the regulation” *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

⁴ That said, there are instances in the Act where Congress may have intended a broader application of the term “employer” than what is encompassed in the conventional master-servant relationship. *See, e.g.*, section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F) (referring to “unaffiliated employers” supervising and controlling L-1B intracompany transferees having specialized knowledge); section 274A of the Act, 8 U.S.C. § 1324a (referring to the employment of unauthorized individuals).

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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 448-49; EEOC Compl. Man. 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 323-24. 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).

B. The Proffered Position

In the letter dated July 1, 2014, the Petitioner stated that it is requesting an extension of H-1B employment for the Beneficiary to continue to work as a Callidus/PLSQL Developer. In the Form I-129 and the Labor Condition Application (LCA), the Petitioner indicated that the Beneficiary would not work at its offices in Florida, but instead would work at [REDACTED] California. The Petitioner did not provide any job description or statement of minimum requirements, but merely stated that there was no change to the Beneficiary's job duties from the previously approved H-1B petition, a copy of which was not submitted.

The RFE requested additional evidence to demonstrate the existence of an employer-employee relationship, and stated that the Petitioner could submit a complete itinerary of the Beneficiary's services, copies of relevant portions of client contracts, and/or copies of signed statements of work and letters with end-clients. However, the Petitioner only submitted a copy of its employment contract with the Beneficiary and a copy of a letter written by [REDACTED], President at [REDACTED] located in [REDACTED] Mississippi, stating that the Beneficiary would work at [REDACTED] located at [REDACTED] CA to perform [duties] as Senior Database administrator for the [REDACTED] [REDACTED] stated the following with regard to the duties and minimum requirements of the position (note: errors in the original text have not been changed):

- Install configure and administer Oracle Berkeley DB embedded Sun Java Directory Server Enterprise Edition suite of applications

- Developed and implemented a DBA maintenance plan for Oracle backups.
- Oracle installation (10g, 11g), configuration, backup and recovery.
- Analyzing SQL Queries for excessive CPU usage, high disk reads / writes and execution plans by using EXPLAIN PLAN
- Wide range of experience in RMAN backup / recovery scenarios.
- Sound knowledge in configuring the Oracle Dataguard.
- Knowledge in configuring the Automatic Storage Management (ASM).
- Expert in configuring the Real Application Clusters (RAC) and installing the Cluster software.
- Good knowledge in backup and recovery using RMAN in RAC environment.
- Having knowledge in Load Balancing Operations ,Transparent Application Failover (TAF)
- Expertise in enabling nodes and adding nodes in cluster environment
- Configured and maintaining Data Guard (Physical Standby database) for the production database and tested for Switchover
- Monitoring Cold, Hot and RMAN backup scripts of the databases supporting different applications
- Performing patch administration, review, testing, deployment
- Installed and configured Hyperion on Aix.
- Performing database maintenance with minimal downtime
- Implementing and configuring database monitoring tools
- Developing and implementing security schemes
- Managing DS instances on all three major location and doing day activities.
- Design LDAP Directory Information Tree (DIT), Multi-Master Replication and Fractional Replication architecture artifacts
- Develop and implement LDAP SSO Unified Profile project across all three Verizon lines of business
- Customize LDAP schema and configuration to cater to specific B2C and B2B business requirements
- Load test and tune performance of Sun Java Directory Server using SLAMD and scripts
- Minimum 6 years hands-on development experience in the use of Oracle Berkeley DB and SSO products and technologies – Sun Directory Server, Access Manager
- Excellent experience in Unix Solaris shell/ awk/ perl scripting and automation tasks
- Minimum 4 years of hands-on experience in hierarchical database & DIT design and development – Sun ONE/Sun Java DS.
- Display a high degree of Inquisitiveness and eagerness to learn at a detailed and abstract level. Bachelor's degree and related industry experience.

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This letter further stated:

The above mentioned duties require at least a Bachelor's degree (or the equivalent) in a directly and closely related field. I interact with [the Beneficiary] regularly, and as such I have the first-hand knowledge of the above duties [the Beneficiary] performs on daily basis.

[The Beneficiary's] work at [redacted] has been arranged through contracts between [the Petitioner], [redacted] and [redacted] [The Beneficiary] reports to [redacted] CA.⁵

We expect that [the Beneficiary] will continue to perform the above duties at [redacted] CA until further notice. [The Beneficiary] has been working at [redacted] performing the above-mentioned duties since March 2011.

[redacted] does not have the ability to assign [the Beneficiary] to a different employer or client. [redacted] is the end-client receiving the services of [the Beneficiary].

No evidence was submitted to demonstrate that either [redacted] or [redacted] has a contract with the Petitioner. It is also not clear what role, if any, [redacted] plays in the Beneficiary's employment.

The employment contract between the Petitioner and the Beneficiary is dated September 14, 2010. This contract states in pertinent part that "[the Beneficiary's] services hereunder shall be 'at will' and provided only on an 'as needed' basis without any commitment as to minimum use by [the Petitioner]."

C. Analysis

The primary issue in the present matter 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). Specifically, the question is 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).

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

⁵ According to a preliminary search on the Internet, it appears that [redacted] is an employee of [redacted]

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Beneficiary as an H-1B temporary “employee.”

The Petitioner claims that it will have an employer-employee relationship with the Beneficiary. We have considered this assertion within the context of the record of proceeding. We examined each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010). However, as will be discussed, there is insufficient probative evidence in the record to support this assertion. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *In Re Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Applying the *Darden* and *Clackamas* tests to this matter, we find that the Petitioner has not established that it will be a “United States employer” having an “employer-employee relationship” with the Beneficiary as an H-1B temporary “employee.”

Further, we observe numerous inconsistencies and discrepancies in the petition and supporting documents, which undermine the Petitioner’s credibility with regard to several aspects of the Beneficiary’s claimed employment. 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). Doubt cast on any aspect of the Petitioner’s proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

1. The Beneficiary’s Work Location

The Petitioner stated that the Beneficiary would work at an address in California that it claims is the office of its end client, [REDACTED] for the duration of the petition. However, the Petitioner did not provide copies of any contracts or documentation from [REDACTED] confirming the expected length of the project. In addition, the Petitioner’s contract with the Beneficiary stated that the Beneficiary will only work as needed basis with no minimum commitment of work by the Petitioner. The evidence was therefore not sufficient to demonstrate that the Beneficiary would work at [REDACTED] California address for the duration of the petition. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *In Re Soffici*, 22 I&N Dec. at 165 (Reg'l Comm'r 1998).

2. Duration of Relationship Between Parties

Further, upon review of the record, we find that the Petitioner has not established the duration of the relationship between the parties. As discussed previously, the Petitioner did not submit copies of any of its contracts with its clients. Further, given that the employment agreement the Petitioner has with the Beneficiary states that the agreement is at will with no commitment for any work to be provided by the Petitioner, the agreement does not establish that H-1B caliber work exists for the

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Beneficiary for the duration of the requested period, and the Petitioner did not submit probative evidence establishing other projects or specific work for the Beneficiary.⁶

Although the Petitioner requested that the Beneficiary be granted H-1B classification from October 1, 2014 to September 30, 2017, there is a lack of substantive documentation regarding the work for the duration of the requested period since the Petitioner did not submit any of its client contracts even though its employment agreement does not guarantee work for the Beneficiary. The record does not contain a written agreement between the Petitioner and Implementation Technology Consultants, or any other organization, establishing that H-1B caliber work exists for the Beneficiary for the duration of the requested period.

We find that the Petitioner has not established that the petition was filed for non-speculative work for the Beneficiary, for the entire period requested, that existed as of the time of the petition's filing. 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, 249 (Reg'l Comm'r 1978). Thus, even if it were found that the Petitioner would be the Beneficiary's United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii), the Petitioner has not demonstrated that it would maintain such an employer-employee relationship for the duration of the period requested.⁷

⁶ An Internet search revealed that the Petitioner's address is a private residence in Florida. The Petitioner has not demonstrated, therefore, that the Petitioner has a work space available for the Beneficiary once the project with [REDACTED] is complete.

⁷ The agency made clear long ago that speculative employment is not permitted in the H-1B program. For example, a 1998 proposed rule documented this position as follows:

Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. See section 214(i) of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform 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).

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Nevertheless, based on what evidence was provided with regard to who will control the Beneficiary during the requested employment period, we note that the record indicates that the Beneficiary will be physically located at [REDACTED] offices in [REDACTED] California. The Petitioner is located in Florida, raising the additional issue of who would supervise, control and oversee the Beneficiary's work. No evidence was submitted to demonstrate that the Petitioner has any oversight with respect to the Beneficiary's employment.

3. Instrumentalities and Tools

As previously noted, when making a determination of whether the Petitioner has established that it has or will, have an employer-employee relationship with the Beneficiary, we look at a number of factors, including who will provide the instrumentalities and tools required to perform the duties of the proffered position. It appears from the documentation submitted that instrumentalities and tools will be provided by the end client, [REDACTED] and not by the Petitioner.

4. Supervision

In addition, a key element in this matter is who would have the ability to hire, fire, supervise, or otherwise control the work of the Beneficiary for the duration of the H-1B petition. As noted previously, it appears that the Beneficiary will report to a supervisor who is an employee of the end client, not the Petitioner. Furthermore, the Petitioner has not provided probative evidence with regard to the right to control the manner and means by which the product (or in this case, the service) is accomplished and the assignment of additional projects. Without full disclosure of all of the relevant factors, we are unable to find that the requisite employer-employee relationship will exist between the Petitioner and the Beneficiary.

5. Lack of Evidence

As previously noted, when making a determination of whether the Petitioner has established that it will have an employer-employee relationship with the Beneficiary, we look at a number of factors, including who will provide the instrumentalities and tools required to perform the duties and the provision of employee benefits. In the instant case, the Director specifically noted that the Petitioner had not documented the end-client, the end-client's vendor through whom the Beneficiary was assigned to work, or the contracted dates of service. However, the Petitioner elected not to address these issues or provide any information in response to this material request for evidence. Thus, while the Petitioner was given an opportunity to clarify its relationships with the end client and the vendors through which the Beneficiary would be assigned, it chose not to submit any probative evidence on these issues. "Failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the [petition]." 8 C.F.R. § 103.2(b)(14).

6. Conclusion

The Petitioner asserts that it is the employer of the Beneficiary because it pays the Beneficiary's salary. However, without evidence of a work product or on-going project supported by contracts,

the Petitioner has not established that the petition was filed for non-speculative work for the Beneficiary that existed as of the time of the petition's filing. There is insufficient documentary evidence in the record corroborating the availability of work for the Beneficiary for the requested period of employment and, consequently, what the Beneficiary would do, where the Beneficiary would work, as well as how this would impact the circumstances of his relationship with the Petitioner. The burden of proving eligibility for the benefit sought remains entirely with the Petitioner. Section 291 of the Act.

Upon complete review of the record of proceeding, we find that the evidence in this matter 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 that the Petitioner exercises control over the Beneficiary, without evidence supporting the claim, does not establish eligibility in this matter. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *In Re Soffici*, 22 I&N Dec. at 165. Based on the tests outlined above, the Petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the Beneficiary as an H-1B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii).

The Petitioner emphasizes that the proffered position is the same position in job title and duties as the two previously approved H-1B petitions filed by the Petitioner on behalf of the Beneficiary. The Petitioner also submitted an April 23, 2004, memorandum authored by William R. Yates (hereinafter Yates memo) as establishing that USCIS must give deference to those prior approvals or provide detailed explanations why deference is not warranted. Memorandum from William R. Yates, Associate Director for Operations, *The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity*, HQOPRD 72/11.3 (Apr. 23, 2004).

First, it must be noted that the Yates memo specifically states as follows:

... Adjudicators are not bound to approve subsequent petitions or applications seeking immigration benefits where eligibility has not been demonstrated, merely because of a prior approval which may have been erroneous. *Matter of Church Scientology International*, 19 I&N 593, 597 (Comm. 1988). Each matter must be decided according to the evidence of record on a case-by-case basis. See 8 C.F.R. § 103.8(d).

....

... Material error, changed circumstances, or new material information must be clearly articulated in the resulting request for evidence or decision denying the benefit sought, as appropriate.

Thus, the Yates memo does not advise adjudicators to approve an extension petition when the facts of the record do not demonstrate eligibility for the benefit sought. On the contrary, the

memorandum's language quoted immediately above acknowledges that a petition should not be approved where, as here, the Petitioner has not demonstrated that the petition should be granted.

Again, as indicated in the Yates memo, we are not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 597 (Comm'r 1988). If the two previous nonimmigrant petitions were approved based on the same description of duties and assertions that are contained in the current record, they would constitute material and gross error on the part of the Director. It would be "absurd to suggest that [USCIS] or any agency must treat acknowledged errors as binding precedent." *Sussex Eng'g, Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987). A prior approval does not compel the approval of a subsequent petition or relieve the Petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act, 55 Fed. Reg. 2,606, 2,612 (Jan. 26, 1990) (to be codified at 8 C.F.R. pt. 214). A prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of eligibility for the benefit sought. *See Tex. A&M Univ. v. Upchurch*, 99 F. App'x. 556 (5th Cir. 2004). Furthermore, our authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved nonimmigrant petitions on behalf of a beneficiary, we would not be bound to follow the contradictory decision of a service center. *See La. Philharmonic Orchestra v. INS*, 44 F. Supp. 2d 800, 803 (E.D. La. 1999).

Second, the memorandum clearly states that each matter must be decided according to the evidence of record. In the appeal, the Petitioner suggests that USCIS was required to look at the prior records of proceeding dealing with the separate adjudications of the approved H-1B petitions filed on behalf of the Beneficiary and provide a reason why deference is not warranted.

Copies of these petitions, however, were not included in the record and, therefore, this claim is without merit. If a petitioner wishes to have prior decisions considered by USCIS in its adjudication of a petition, the petitioner is permitted to submit copies of such evidence that it either obtained itself and/or received in response to a Freedom of Information Act request filed in accordance with the applicable regulations. Otherwise, "[t]he non-existence or other unavailability of required evidence creates a presumption of ineligibility." 8 C.F.R. § 103.2(b)(2)(i).

When "any person makes application for a visa or any other document required for entry, or makes application for admission, . . . the burden of proof shall be upon such person to establish that he is eligible" for such benefit. Section 291 of the Act, 8 U.S.C. § 1361; *see also Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190 (Reg'l Comm'r 1972). Each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof. Each petition must stand on its own individual merits. There is no requirement either in the regulations or in USCIS procedural

documentation requiring nonimmigrant petitions to be combined in a single record of proceeding.⁸ Accordingly, the Director was not required to request and obtain a copy of the prior H-1B petitions.

Again, the Petitioner in this case has not submitted copies of the prior H-1B petitions and their respective supporting documents and approval notices. As the record of proceeding does not contain any evidence of the petitions, there were no underlying facts to be analyzed and, therefore, no prior, substantive reasons could have been provided to explain why deference to the approvals of the prior two H-1B petitions was not warranted. The burden of proving eligibility for the benefit sought remains entirely with the Petitioner. Section 291 of the Act. For this additional reason, the Yates memo does not apply in this instance.

Finally, we note that the Petitioner stated that the proffered position is an entry level position for wage purposes on the LCA, comparable to a Level One "Software Developers, Applications," OES/SOC code: 15-1132.⁹ However, the letter from Implementation Technologies Consulting states that six years of development experience is required in addition to a Bachelor's degree. If the Petitioner contends that Implementation Technologies Consulting's statements regarding the minimum requirements are accurate, we would need to find that the LCA submitted does not correspond to the petition, given that the stated minimum requirements are much higher than an entry level position.¹⁰ It is incumbent upon the Petitioner to resolve any inconsistencies in the record

⁸ USCIS does not engage in the practice of reviewing previous nonimmigrant petitions when adjudicating extension petitions. Given the various and changing jurisdiction over various nonimmigrant petitions and applications, requiring previously adjudicated nonimmigrant petitions to be reviewed before any newly filed application or petition could be adjudicated would result in extreme delays in the processing of petitions and applications. Furthermore, such a suggestion, while being impractical and inefficient, would also be a shift in the evidentiary burden in this proceeding from the Petitioner to USCIS, which would be contrary to section 291 of the Act, 8 U.S.C. § 1361.

⁹ The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is described as follows:

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

U.S. Dept of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

¹⁰ The issue here is that the petitioner's designation of this position as a Level I, entry-level position undermines its claim that the position is particularly complex, specialized, or unique compared to other positions *within the same occupation*. Nevertheless, it is important to note that a Level I wage-designation does not preclude a proffered position from classification as a specialty occupation. In certain occupations (doctors or lawyers, for example), an entry-level position would still require a minimum of a bachelor's degree in a specific specialty, or its equivalent, for entry. Similarly, however, a Level IV wage-designation would not reflect that an occupation qualifies as a specialty occupation if that higher-level position does not have an entry requirement of at least a bachelor's degree in a specific

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. at 592.

III. SPECIALTY OCCUPATION

Since the identified basis for denial is dispositive of the Petitioner's appeal, we need not address another ground of ineligibility we observe in the record of proceeding. Nevertheless, we will briefly note and summarize it here with the hope and intention that, if the Petitioner seeks again to employ the Beneficiary or another individual as an H-1B employee in the proffered position, it will submit sufficient independent objective evidence to address and overcome this additional ground in any future filing.

Beyond the decision of the Director, we find that the Petitioner did not establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one 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 term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires [(1)] 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 requires [(2)] 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, the position must meet one of the following criteria:

specialty or its equivalent. That is, a position's wage level designation may be a consideration but is not a substitute for a determination of whether a proffered position meets the requirements of section 214(i)(1) of the Act.

- (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 foreign nationals 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.

(b)(6)

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To determine whether a particular job qualifies as a specialty occupation, USCIS does not rely simply upon a proffered position's title. The specific duties of the 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 beneficiary, and determine whether the position qualifies as a specialty occupation. See generally *Defensor v. Meissner*, 201 F. 3d at 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.

We find that the record of proceeding lacks documentation regarding the Petitioner's business activities and the actual work that the Beneficiary will perform to sufficiently substantiate the claim that the Petitioner has H-1B caliber work for the Beneficiary for the period of employment requested in the petition. In other words, the record does not include sufficient work product or other documentary evidence to confirm that the Petitioner has sufficient projects to which the Beneficiary will be assigned. As discussed, the Petitioner did not provide its own job description, nor did it provide any contracts with its clients. Further, the accuracy of the job description provided by vendor client [REDACTED] is in question because this job description requires six years of experience in addition to a general bachelor's degree, even though the certified LCA is for an entry level position. The Petitioner therefore has not submitted corroborating evidence to support its claim that the Beneficiary has been offered a position in a specialty occupation. In other words, the Petitioner's designation of the proffered position as a Level I, entry-level position appears to contradict the level of knowledge, judgement, and supervision required for the position.

The Petitioner has provided inconsistent information regarding the substantive nature of the work to be performed by the Beneficiary, which precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for 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's 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.

We therefore additionally find that the Petitioner has not established that the proposed position qualifies for classification as a specialty occupation.

IV. CONCLUSION AND ORDER

The Petitioner has not established eligibility for the benefit sought. The appeal will be dismissed.⁶ 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.

Cite as *Matter of D-N-S-, Inc.*, ID# 14714 (AAO Dec. 1, 2015)

⁶ Since the identified bases for denial are dispositive of the Petitioner's appeal, we need not address other ineligibilities we observe in the record of proceeding.