



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

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

MATTER OF O-ITS-, INC.

DATE: DEC. 2, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a software development, database administration and consulting services firm, seeks to employ the Beneficiary as a “Database Administrator” 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, Vermont Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

**I. ISSUE**

The Director denied the petition, finding that the evidence of record did not establish a valid employer-employee relationship between the Petitioner and the Beneficiary and the Petitioner did not meet the definition of a United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii). Beyond the decision of the Director, we will also address whether the proffered position qualifies as a specialty occupation.<sup>1</sup>

**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

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<sup>1</sup> 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).

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* 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).

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.<sup>2</sup>

Specifically, the regulatory definition of “United States employer” requires H-1B employers to have a

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

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).

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 318-19.<sup>3</sup>

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

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

The factors indicating that a worker is or will be an “employee” of an “employer” are clearly delineated in both the *Darden* and *Clackamas* decisions. *Darden*, 503 U.S. at 323-24; *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,

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

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

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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 448-49; 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. Analysis

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." Although the Petitioner has repeatedly stated that the Beneficiary would work exclusively at the Petitioner's location, the evidence submitted is insufficient to support the assertion that the Petitioner has work for the Beneficiary to perform there.

The December 27, 2010, Subcontractor Agreement with [REDACTED] sets out general terms pursuant to which [REDACTED] may subsequently commission work by submitting a Statement of Work (SOW) or Task/Purchase Orders to the Petitioner, delineating the work to be performed. The record contains insufficient evidence that any such work was subsequently commissioned. If [REDACTED] ever commissioned any such work, or will ever commission any such work pursuant to that agreement, whether it includes or would include database administration and whether the Beneficiary would perform that work are also unclear.

Further still, that document refers to, *inter alia*, "Exhibit B, (General Terms and Conditions)." Exhibit B was not provided, which indicates that some of the terms and conditions of any work performed pursuant to that agreement have been withheld. That document does not state where the Beneficiary would perform work, if any, commissioned pursuant to its terms. However, that it refers

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to travel expenses suggests that it contemplates that at least some of that work may be performed at a location other than the Petitioner's offices. Further, that document states: [REDACTED] shall furnish all facilities, services, tools, travel and material necessary to accomplish the requirements and data set forth in the [SOWs] determined by individual Task/Purchase orders." That statement does not appear to be consistent with work being performed at the Petitioner's location. Rather, it suggests that any work to be performed under that agreement would be at [REDACTED] location, which is in [REDACTED] Pennsylvania.

Yet further, the agreement with [REDACTED] shows that its term ran from January 1, 2011, to August 10, 2011. The instant visa petition was filed on April 1, 2014, and the period of employment requested in this case is from October 1, 2014, to August 31, 2017. As such, that agreement had expired when the instant visa petition was submitted, and any work performed during the term of that agreement is of no direct relevance to whether the Petitioner had work for the Beneficiary to perform during the period of employment requested in this case.

The March 4, 2014, Professional Services Agreement (PSA) with [REDACTED] [REDACTED] similarly, does not state where services provided pursuant to it would be performed and also contains provisions pertinent to travel expenses incurred in the performance of those duties, suggesting that the parties contemplated that at least some of the work performed pursuant to that agreement might be performed at some location other than the Petitioner's offices. It also states, as to those expenses, "Travel does not include normal travel to [REDACTED] place of work (as detailed in the work order Section 5)," which suggests that at least some of the work would be performed at [REDACTED] place of work. Further, it indicates that [REDACTED] may supervise the work it commissions to the extent it deems that supervision necessary to guarantee successful and timely completion. The [REDACTED] PSA also states [REDACTED] would execute a Work Order for any services to be provided pursuant to that PSA.

The [REDACTED] Work Order is dated March 7, 2014, and indicates that the Petitioner and [REDACTED] ratified it on March 10, 2014, and that it is for "remote database administration Service from March 15, 2014, to March 15, 2017." Although the PSA indicated that a contemporaneously executed Work Order would contain a Section 5 with details pertinent to travel to [REDACTED] place of work, that Work Order provided contains no Section 5 and no reference to travel to [REDACTED] place of work. "[I]t is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence." *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* at 591-92. Further still, the Work Order contains no indication that the Beneficiary would perform any of the work commissioned pursuant to its terms.

Some terms appear to be missing from the [REDACTED] Work Order. Although it states that the Petitioner would receive \$9,500 for services to be rendered, it does not state how many workers the Petitioner will provide or how many hours they will work per month. This appears to conflict with the PSA, which states:

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Payment for services rendered will be as specified and agreed to in the relevant Work Order. The [Petitioner] will maintain records of the hours that services have been performed. These records must be reviewed and signed by the designated Company supervisor before the associated invoice may [sic] be submitted for payment.

Although the PSA states that the Petitioner must maintain records of hours worked in order to be paid for those hours, the Work Order and the PSA do not state an hourly fee for services to be provided. They do not state how service requests are to be made, what response time is required, where invoices should be sent, how soon properly submitted invoices would be paid, whether the work assigned may be subcontracted, who will serve as points-of-contact for the two companies, or which company would furnish the facilities, tools, and materials necessary to accomplish the work. In short, they lack the usual indices of a PSA and work order.

The June 13, 2011, [redacted] PSA also does not state where work pursuant to its terms would be performed, but stipulates that [redacted] would pay for travel expenses, which suggests that the work would entail travel, and further stipulates that such compensated travel does not include travel to [redacted] location, which suggests that at least some of the work would be performed there. It states that [redacted] may supervise the Petitioner's workers as it deems necessary to guarantee successful and timely completion of work. It also indicates that work to be performed would be commissioned on work orders. No such work orders were provided to show that [redacted] ordered any such work.

The SOW from [redacted] is for work to be "delivered via a remote connection to [redacted] database environment." It was signed by a representative of the Petitioner on April 20, 2014, and ratified by [redacted] on April 26, 2014. As such, it was not in effect when the instant visa petition was submitted. 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* 8 C.F.R. § 103.2(b)(1); *see also Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See In re Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). Further, it is for work to be performed pursuant to specific requests to be subsequently issued to the Petitioner. The record contains no indication that any such requests were subsequently issued.

An SOW dated June 12, 2014, was signed by the Petitioner and [redacted] during May of 2014.<sup>5</sup> The SOW states that it is "attached to and incorporated therein by reference to the Service Agreement" between the Petitioner and [redacted] however, the Service Agreement detailing the terms of the Petitioner's contract with [redacted] was not submitted. In any event, that the agreement was both dated and signed after the instant visa petition was submitted makes plain that the SOW was not in

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<sup>5</sup> How that chronology is possible is unclear.

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effect when the instant visa petition was submitted. It is not evidence that, when the Petitioner filed the instant visa petition, it had work available to which it could assign the Beneficiary.

The January 16, 2012, PSA with [REDACTED] does not state where services provided pursuant to it would be performed but contains provisions pertinent to travel expenses that, as explained above, suggest that the parties contemplated that performance of at least some of the work performed pursuant to it would involve travel. Like the agreement with [REDACTED], it states, "Travel does not include normal travel to [REDACTED] place of work (as detailed in the work order Section 5)," which, again, suggests that at least some of the work would be performed at [REDACTED] place of work. Further, it indicates that [REDACTED] may supervise the work it commissions to the extent it deems that supervision necessary to guarantee successful and timely completion. As is explained above, supervision of services provided is one index of which company would have a true employer-employee relationship with the individual(s) providing the work pursuant to that agreement. That PSA also states [REDACTED] would execute a Work Order for any services to be provided pursuant to that PSA. No work orders executed by Key were provided with that [REDACTED]. As such, the record contains insufficient evidence that any work was ever commissioned pursuant to that agreement.

The "Statement of Work #31" (SOW31)<sup>6</sup> executed by the Petitioner and [REDACTED] states that it was executed "in accordance with Section 1 of the Master Services Agreement (MSA) effective May 25, 2007, between [REDACTED] and [the Petitioner]." It further states that it pertains to remote database administration support "as set forth in greater detail in Contractor's proposal dated May 22, 2009." However, an MSA in the record between [REDACTED] does not appear to have any bearing on any work to be performed during the period of intended employment, which began on October 1, 2014, after the term of that MSA had expired. Further, that SOW does not indicate that the Beneficiary would perform any work to be commissioned pursuant to that SOW.

In its December 4, 2014, declaration, the Petitioner asserted that the Beneficiary would not necessarily work on all of the projects for which evidence was submitted, but did not state precisely which contracts are for work that the Beneficiary would perform. However, the Petitioner did state:

[Sabre] is a prime contractor for US census bureau and we are their sub-contractors. Census Bureau, being a federal department require [*sic*] resources to be US citizens or permanent residents and must work onsite. The Beneficiary is not eligible to work on this project. We never stated that the Beneficiary will work on this project and neither we meant it so any way. The inclusion of this contract with the petition was meant to demonstrate that we have these clients and as a company we do a serious business.

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<sup>6</sup> SOW31 purports to renew a previous SOW, SOW 12, which was to conclude on May 23, 2012.

<sup>7</sup> The Petitioner states in a letter dated March 26, 2014, that it was formed as [REDACTED] in 2000 and changed its name in 2007.

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We observe, however, that in his March 26, 2014, letter, submitted with the visa petition, the Petitioner stated: “[The Beneficiary] will be working on an in-house database management project. A contract with the end client explaining the duties etc. is enclosed herewith.” The only contract provided with that visa petition was the contract between the Petitioner and [REDACTED]. Although the Petitioner now disclaims it, the Petitioner did, in the March 26, 2014 letter, state that the Beneficiary would work on the project for [REDACTED].

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. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). It is incumbent upon the petitioner to resolve any inconsistencies in the record with independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.* At 591-592. The Petitioner’s shift from claiming that the Beneficiary would work pursuant to the contract with Sabre to stating that he would not is just such an inconsistency.

In any event, none of the evidence supplied shows that, when the visa petition was submitted, the Petitioner had sufficient specialty occupation database administration work to perform at its own office to which it could assign the Beneficiary throughout the period of employment, or during any part of it.

That is, some of the agreements in evidence expired before the period of requested employment. They are not evidence, therefore, of any evidence to which the Petitioner could have assigned the Beneficiary during the requested period of employment.

Some of the agreements were ratified after the visa petition was submitted. As such, they are not evidence that, when the Petitioner submitted the instant visa petition, it had work to which it was able to assign the Beneficiary. Again, the Petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after a petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm’r 1978).

Some of the agreements provided state that work to be performed pursuant to their terms, if any, would be evidenced by SOWs, Work Orders, or similar documents, but were not accompanied by those documents to show that such work was ever commissioned. They are insufficient, absent such additional evidence, to show that such work was ever actually commissioned.

Some of the agreements refer to other documents for a description of the work to be performed and the terms pursuant to which it would be performed, and some do not make clear that the services to be provided would include database administration.

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<sup>8</sup> The Petitioner made this claim notwithstanding that, as was noted above, the agreement with [REDACTED] had, pursuant to its own terms, expired before the visa petition was submitted.

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The only evidence that purports to show work that had actually been ordered prior to the submission of the visa petition and that is for work to be performed during the period of requested employment is the March 7, 2014, work order from [REDACTED]. However, as was explained above, the agreement between the Petitioner and [REDACTED] is missing key details such as exactly what work and how much work will be performed for the monthly fee and whether the work can be subcontracted. Further, as was also previously explained, if it was for work to be performed pursuant to the previously submitted PSA, then the terms of that PSA suggest that some of the work would be performed at [REDACTED] location and that [REDACTED] might supervise the provision of services by the Petitioner's workers. The Petitioner has not demonstrated that, even if the Beneficiary were to work pursuant to that work order, the Petitioner would have an employer-employee relationship with the Beneficiary.

Further still, as was noted above, the work order does not identify the Beneficiary as an individual who would perform the services commissioned, and the Petitioner has never asserted that the Beneficiary would perform services pursuant to that work order. In fact, the only document the Petitioner has ever specifically identified as showing work that the Beneficiary would perform is the Subcontract Agreement with Sabre, which claim the Petitioner has since retracted and disclaimed.

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 a 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. The Petitioner has steadfastly asserted that the Beneficiary would work at its offices, but has provided evidence that conflicts with that claim and has not sufficiently identified the specific work that the Beneficiary would perform. 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.

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 Petitioner exercises complete control over the Beneficiary, without evidence supporting the claim, does not establish eligibility in this matter. “[G]oing 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)). The evidence of record does not establish that, if the visa petition were approved, the Petitioner would act as the Beneficiary's employer in that it will hire, pay, fire, or otherwise supervise and 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).

### III. SPECIALTY OCCUPATION

Beyond the decision of the Director, the petition cannot be approved because the Petitioner has not demonstrated that, if the visa petition were approved, the Beneficiary would work in a specialty occupation position.

#### A. Legal Framework

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 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. Fed. 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), U.S. Citizenship and Immigration Services (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 individuals 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 individual, 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 or 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 note that, as recognized by the court in *Defensor*, 201 F.3d at 387-88, where the work is to be performed for entities other than the petitioner, evidence of the client companies’ job requirements is critical. *See Defensor v. Meissner*, 201 F.3d at 387-88. The court held that the former Immigration

and Naturalization Service 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.

#### B. Analysis

Although the Petitioner provided a description of the duties the Beneficiary would ostensibly provide at the Petitioner's location, the evidence submitted is insufficient to demonstrate that the Petitioner had such work available to which it could have assigned the Beneficiary when it submitted the visa petition. As such, it has not established the substantive nature of the work the Beneficiary would actually perform if the visa petition were approved. That the Petitioner did not establish the substantive nature of the work to be performed by the Beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4. Thus, the appeal will be dismissed and the petition will be denied for this additional reason.

Also, at a more basic level, as reflected in this decision's discussion of the evidentiary deficiencies, the record lacks credible evidence that when the Petitioner filed the petition, the Petitioner had secured work of any type for the Beneficiary to perform during the requested period of employment. USCIS regulations require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). For this reason also, the appeal will be dismissed and the petition denied.

#### IV. CONCLUSION

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.

We may deny an application or petition that does not comply with the technical requirements of the law even if the Director does not identify all of the grounds for denial in the initial decision. *See Spencer Enters., Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001); *see also Matter*

*Matter of O-ITS-, Inc.*

*of Simeio Solutions, LLC*, 26 I&N Dec. 542 (AAO 2015) (noting that we conduct appellate review on a *de novo* basis).

Moreover, when we deny a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that we abused our discretion with respect to all of the enumerated grounds. *See Spencer Enters., Inc. v. United States*, 229 F. Supp. 2d at 1037; *see also BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1183 (D.C. Cir. 2003) (“When an agency offers multiple grounds for a decision, we will affirm the agency so long as any one of the grounds is valid, unless it is demonstrated that the agency would not have acted on that basis if the alternative grounds were unavailable.”).

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) (citing *Matter of Brantigan*, 11 I&N Dec. 493, 495 (BIA 1966)). Here, that burden has not been met.

**ORDER:** The appeal is dismissed.

Cite as *Matter of O-ITS-, Inc.*, ID# 14593 (AAO Dec. 2, 2015)