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

U.S. Citizenship and Immigration Services

(b)(6)

DATE: JUL 08 2015

PETITION RECEIPT #:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO**.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

I. PROCEDURAL BACKGROUND

In the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as an education business, with 134 employees, established in In order to employ the beneficiary in what it designates as a teacher position, the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The Director denied the petition, concluding that the petitioner did not establish that it meets the regulatory definition of a United States employer. On appeal, the petitioner asserts that the Director's basis for denial was erroneous and contends that it satisfied all evidentiary requirements.

The record of proceeding contains: (1) the Form I-129 and supporting documentation; (2) the Director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the Director's letter denying the petition; and (5) the Notice of Appeal or Motion (Form I-290B) and supporting documentation. We reviewed the record in its entirety before issuing our decision.[1]

For reasons that will be discussed below, we agree with the Director that the petitioner has not established eligibility for the benefit sought. Accordingly, the Director's decision will not be disturbed. The appeal will be dismissed.

II. EMPLOYER-EMPLOYEE RELATIONSHIP

A. Legal Framework

For an H-1B petition to be granted, the petitioner must establish that it meets the regulatory definition of a United States employer. 8 C.F.R. § 214.2(h)(4)(ii). Specifically, the petitioner must establish that it will have "an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." *Id.*

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

> subject to section 212(j)(2), who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 214(i)(1) . . ., who meets the requirements for the occupation specified in section 214(i)(2) . . ., and with respect to whom the Secretary of Labor determines and certifies to the

[1] We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

> [Secretary of Homeland Security] that the intending employer has filed with the Secretary [of Labor] an application under section 212(n)(1) . . . .

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

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

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

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

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

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

Violence v. Reid, 490 U.S. 730 (1989)). The Supreme Court stated:

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

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

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

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[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), *aff'd*, 27 F.3d 800 (2nd Cir.), *cert. denied*, 513 U.S. 1000 (1994).

However, in this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. Instead, in the context of the H-1B visa classification, the term "United States employer" was defined in the regulations to be even more restrictive than the common law agency definition. A federal agency's interpretation of a statute whose administration is entrusted to it is to be accepted unless Congress has spoken directly on the issue. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-845 (1984).

Specifically, the regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to engage a person to work within the United States, and to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee" or "employer-employee relationship" combined with the agency's otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition" or, more importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. *Cf. Darden*, 503 U.S. at 318-319.[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 323-324; *Clackamas*, 538 U.S. at 445; *see also Restatement (Second) of Agency* § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. *See Clackamas*, 538 U.S. at 445;

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[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, 109 S.Ct. 1835, 1850, 104 L.Ed.2d 351 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945)).

[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 aliens).

see also New Compliance Manual, Equal Employment Opportunity Commission, § 2-III(A)(1) (adopting a materially identical test and indicating that said test was based on the *Darden* decision); *see also Defensor v. Meissner*, 201 F.3d 384, 388 (5th Cir. 2000) (determining that hospitals, as the recipients of beneficiaries' services, are the "true employers" of H-1B nurses under 8 C.F.R. § 214.2(h), even though a medical contract service agency is the actual petitioner, because the hospitals ultimately hire, pay, fire, supervise, or otherwise control the work of the beneficiaries).

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

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

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

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." We examined each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, and find that the petitioner did not establish the requisite employer-employee relationship with the beneficiary. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

In the Form I-129 and its supporting documents, the petitioner indicated that the beneficiary will be working as a teacher at three locations during the requested H-1B validity period of October 1, 2014 to September 10, 2017: , ; and .[5]

[5] We note that while not specified in the documents submitted, according to an internet search, these locations

In the Form I-129 Addendum, the petitioner states that the beneficiary will be trained by the petitioner for the first three months. The beneficiary would then be placed with schools for the first academic year, and then in schools for the second academic year. However, in response to the RFE, the petitioner asserts that it plans to assign the beneficiary to for the 2014-2015 and 2015-2016 school years, and to for the 2016-2017 school year. While the petitioner submitted an itinerary, it does not specify the dates and location of the services.[6] 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). Upon review, we find that the petitioner did not substantiate its claims regarding the location and length of the beneficiary's employment.

For H-1B classification, the petitioner is required to submit written contracts between the petitioner and the beneficiary, or if there is no written agreement, a summary of the terms of the oral agreement under which the beneficiary will be employed. *See* 8 C.F.R. § 214.2(h)(4)(iv)(A) and (B). The record contains an employment agreement signed by the petitioner and the beneficiary, effective February 20, 2014. The agreement states that the "[beneficiary] shall perform the assigned duties, or other specialized technical work as he/she is directed to perform by [the petitioner] for [its] Clients." However, the employment agreement does not provide any level of specificity as to the beneficiary's position, duties and requirements for the position or the duration of assignment at the client sites. While an employment agreement may provide some insights into the relationship of a petitioner and a beneficiary, it must be noted again that 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.

In response to the RFE, the petitioner asserts that, pursuant to the terms of the employment agreement:

> We further assert that [the beneficiary] though will be assigned to work at client locations,

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are the petitioner's office, the , and Administrative Offices of , respectively. It therefore appears that these locations are school district's administrative offices and are not locations of schools where the beneficiary would teach.

[6] The regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) provides as follows:

> *Service or training in more than one location.* A petition that requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with USCIS as provided in the form instructions. The address that the petitioner specifies as its location on the I-129 shall be where the petitioner is located for purposes of this paragraph.

> she is an employee of [the petitioner], as we will run her pay roll, responsible for her insurance, social security, medicare, etc.. Only [the petitioner] has complete control of [beneficiary's] employment in the U.S. [The petitioner] has the full rights over recruitment, transfer, promotion and termination of [the beneficiary]. [The petitioner] reviews the performance of our employees through periodical site visits, personal interaction and organizes orientations and workshop for their skill improvements. The Teachers report their duties to [the petitioner] and send their lesson plans and teaching modules for [the petitioner]'s review and [the petitioner] has complete control over work schedule outside the School hours.

However, the assertions made by the petitioner are not supported by the documents in the record. Specifically, the record contains an International Teaching Services Agreement between the petitioner and the . The agreement was effective for one year from August 1, 2011 and had the option to renew for up to two additional one year terms.[7] The agreement states that "shall have the right, but not the obligation, to have [the petitioner] provide . . . up to 22 teachers for the 2011-2012 school year, if needed." The agreement further defines control over the beneficiary's daily work and work schedule, stating:

> Teachers will provide instructional services and will fulfil other duties as reasonably assigned by the Principal of the school where Teacher is placed. Except for provisions relating to compensation, insurance, retirement, tenure, and social security provisions, Teacher(s) will be subject to and required to abide by all regular personnel policies of Teachers shall work on a full time basis consistent with the normal work schedule of teaching staff.

The agreement goes on to state, "[a]ll Teachers who did not teach in the previous year must participate in monthly professional learning opportunities provided after school hours by at no cost to [the petitioner]." Additionally, the agreement indicates that has the right to reject the services of any Teacher and that any teacher may be removed by in its sole discretion.

On appeal, the petitioner submitted a new Teacher Services Agreement with dated June 1, 2014, along with copies of Vendor Spend Reports showing payments made to the petitioner by as evidence of its continuing contractual relationship. The term of the new agreement is from the first teacher workday of the 2014-15 school year through the last teacher workday of the 2014-15 school year. The agreement does not include a renewal period.[8] The agreement states:

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[7] The agreement would therefore expire on August 1, 2014. As the instant petition is requesting H-1B status from October 1, 2014 until September 10, 2017, this agreement does not establish a relationship between the petitioner and during the relevant timeframe.

[8] We note that according to the signature dates on this agreement, it appears that the agreement did not exist at the time of filing. 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 the petitioner or beneficiary

> [The petitioner] shall supply with Teachers on an "as-needed" basis. . . The Parties agree that this Agreement does not obligate] to accept any Teachers and that shall have the right, in its sole discretion, to determine which Teacher or Teachers to accept from [the petitioner].

Like the previously submitted agreement, this agreement provides that may in its sole discretion remove or terminate any teacher. This agreement also stipulates that any contract between a teacher and the petitioner to include the following terms; any teacher placed by the petitioner in a school must comply with and the state's curriculum policies, rules and regulations; maintain records in the manner required by for all students served by the teacher; follow the same work schedule as required of employees; and abide by all Board of Education policies, except those relating to compensation, insurance, retirement, tenure and social security.

Based on a review of the foregoing, it is evident that the beneficiary, if actually placed with would be subject to the policies and procedure of and that not the petitioner, would determine the type and length of assignment of teachers, day-to-day activities and supervision, and schedules of teachers assigned to its schools. It is also apparent that the agreement between and the petitioner would govern the terms of any contract or agreement made between the beneficiary and the petitioner regarding the beneficiary's employment. As such, these documents do not establish that the petitioner would be the beneficiary's United States employer, as expressed in the pertinent regulations.

Similarly, the petitioner submitted a Teaching Services Agreement with the . The agreement states that the initial term of the agreement would "commence at the beginning of August 2005, and shall terminate on the last teacher workday of the SCHOOL SYSTEM for the year 2005 – 2006 school year. The agreement also states that the agreement will automatically renew for one additional school year unless either party gives notice of its intent not to renew. In the RFE, the Director noted that it would appear that this agreement was no longer valid as the initial term and one year renewal term had lapsed. In response, the petitioner explains that "although the contract is dated it is automatically renewed every year under Clause 1 of the agreement with the same terms as such it is renewed every year." To support the assertion that the agreement is still in force at the time of filing, the petitioner submitted "Schedule A" work orders for the 2014 -2015 school year showing placement of teachers in however, the work orders do not reference an underlying agreement or contract between the petitioner and .

The agreement details the relationship between the petitioner and stating:

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becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

> During the initial and any renewal term of this Agreement, [the petitioner] shall supply the SCHOOL SYSTEM with teachers on an "as-needed" basis. [The petitioner] understands and agrees that this Agreement does not obligate the SCHOOL SYSTEM to accept any [of the its] teachers and the SCHOOL SYSTEM shall have the right, in its sole discretion, to determine whether it needs any [of] [the petitioner's] teachers.

The agreement further states that the petitioner must have a contract with each teacher and to include the following provisions for the teachers:

i. Comply with the SCHOOL SYSTEM and the State's applicable curriculum policies, rules and regulations, including but not limited to those relating to in-field certification;
ii. Maintain adequate and current records in the manner required by the SCHOOL SYSTEM for all students served by the teacher;
iii. Follow the same work schedule as required by the School System's teachers;
iv. Abide by all personnel policies of the SCHOOL SYSTEM except those relating to compensation, insurance, retirement, tenure and social security provisions.
v. Provide notice of absences in the manner required of the SCHOOL SYSTEM'S teachers.

Given that this agreement states that the teachers are placed and retained at the discretion of that governs the terms of the contract between the teacher and the petitioner, and that the teachers must follow policies regarding curriculum, hours, training, record keeping, attendance etc., this document does not establish that the petitioner would be the beneficiary's United States employer, as expressed in the pertinent regulations.

In addition to the documents discussed above, the petitioner also submitted copies of site visit reports/performance reviews conducted for similarly placed teachers, a chart showing the beneficiary's supervisory chain with the petitioner, and its quarterly tax returns showing the tax treatment of similarly placed teachers. Rather, these reports appear to be based on a single visit to and the petitioner does not indicate how often the teachers are evaluated. On appeal, the petitioner asserts that the teachers are required to send in their lesson plans for its review and approval; however, there is no documentary evidence to substantiate its claims. Therefore, we cannot conclude that the petitioner is overseeing or providing day-to-day supervision on a continuous and consistent basis.

Furthermore, while the petitioner contends that it would pay the beneficiary's wages and would be responsible for the requisite taxes and insurance; this alone does not establish that the requisite employer-employee relationship will exist between the petitioner and the beneficiary. We acknowledge that the method of payment of wages can be a pertinent factor to determining the petitioner's relationship with the beneficiary. While social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are still relevant factors in determining who will control an alien

beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary's employer.

Additionally, a review of the documents in the record reveals that the petitioner did not submit any document which outlines in detail the nature and scope of the beneficiary's employment from the end client school districts Specifically, while the petitioner asserts that the beneficiary will be placed at the end client sites pursuant to the service agreements discussed earlier, these service agreements do not contain information about the types of positions that will be filled (subject matter, grade level etc.), when the positions will be filled or where the positions will be located. Furthermore, the petitioner did not submit any work orders or schedules to indicate that the end clients, and intend to place the beneficiary in a position pursuant to the agreements submitted.

On appeal, the petitioner asserts that it cannot provide information specific to the beneficiary because the end clients in question require fingerprinting, background checks and licensing prior to confirming placement and that these processes can only take place once the beneficiary is in the United States. Despite the director's specific request for evidence such as a letter from the end clients, the petitioner did not submit such evidence. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petitioner has not provided evidence that either of the purported end-clients intends to place the beneficiary in a specialty occupation position for any period of time. 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 in the record, therefore, is insufficient to establish that the petitioner qualifies as a United States employer, as defined by 8 C.F.R. § 214.2(h)(4)(ii). Merely claiming in its letters that the petitioner exercises complete control over the beneficiary, without evidence supporting the claim, does not establish eligibility in this matter. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). The evidence of record did not establish that the petitioner would act as the beneficiary's employer in that it will hire, pay, fire, or otherwise control the work of the beneficiary.

Based on the tests outlined above, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii).

Further, we find the record does not establish that the petitioner has available non-speculative work for the beneficiary in a specialty occupation. The Form I-129 states that the petitioner intends to employ the beneficiary as a teacher from October 1, 2014 to September 10, 2017. As noted above, the agreement with is valid through August 2015 and the agreement with is valid

through the end of the 2014-2015 school year (assuming we accept the assertion that the original agreement was renewable and is currently valid based on the submitted work orders). Therefore, at most, the petitioner has submitted evidence to establish that there may be work available with these end clients through August 2015. While the petitioner maintains that the submitted agreements can be renewed on a yearly basis, the petitioner did not submit evidence that any of the agreements had been renewed for the entire validity period, at the time of filing the instant petition.[9] The petitioner has not submitted any other agreements, contracts or work orders that cover the remainder of the requested validity period.

Therefore, 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 at the time of filing this petition. 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. 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.[10]

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[9] Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 ((citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190)).

[10] 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).

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

Additionally, we find that the record does not establish that the beneficiary would be employed in a specialty occupation, as defined by applicable statues and regulations, for the duration of the requested H-1B validity period.

The Form I-129 describes the proffered position as a teacher and does not mention the subject matter or grade level of the position. To ascertain additional information on the proffered position we look to the documents submitted with the Form I-129 including the LCA, petitioner's letter, itinerary of services, and the petitioner's response to the RFE.

In the LCA, the petitioner states that the proffered position corresponds to the Standard Occupational Classification (SOC) code and occupation title "25-2031 Secondary School Teachers, Except Special and Career/Technical Education" from the Occupational Information Network (O*NET). In the petitioner's letter submitted in support of the initial petition and in the document called "Itinerary of services of [the petitioner's] Science Teacher," the petitioners describes the beneficiary's proffered position as a science teacher, but does not discuss the grade level of instruction. In contrast, the petitioner's response to the RFE references the proffered position as a math teacher and also submits vacancy announcements for math teachers.

Based on a review of the submitted materials, it is evident that the documents in the record are inconsistent and incomplete in their description of the proffered position, such that we cannot determine whether or not the proffered position is in a specialty occupation, as defined by applicable statues and regulations. 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).

Moreover, throughout the record of proceeding, the petitioner describes the proposed duties as a teacher in overly broad and general terms. For example, in the itinerary, the petitioner indicates that the beneficiary is required to "maintain records for such things as student attendance, evaluations, and discipline" and "use computers to record grades and perform other administrative duties." The petitioner's description is generalized and generic in that the petitioner does not convey either the substantive nature of the work that the beneficiary would actually perform, any particular body of highly specialized knowledge that would have to be theoretically and practically applied to perform it, or the educational level of any such knowledge that may be necessary. The responsibilities for the proffered position contain generalized functions without providing sufficient information regarding the particular work, and associated educational requirements, into which the duties would manifest themselves in their day-to-day performance. The abstract, speculative level of information regarding the proffered position and the duties comprising it is exemplified by the phrases "develop and

maintain long range and daily instructional plans for students" and "use a variety of assignment strategies."

Furthermore, as recognized in *Defensor v. Meissner*, it is necessary for the end client to provide sufficient information regarding the proposed job duties to be performed at its location(s) in order to properly ascertain the minimum educational requirements necessary to perform those duties. *See Defensor v. Meissner*, 201 F.3d at 387-388. In other words, as the nurses in that case would provide services to the end-client hospitals and not to the petitioning staffing company, the petitioner-provided job duties and alleged requirements to perform those duties were irrelevant to a specialty occupation determination. *See id.*

In this matter, the petitioner did not submit documentation from the end clients, and that outline the nature and scope of the beneficiary's proposed employment. Specifically, the agreements with the end clients do not provide substantive information on the type, duties, or requirements for the proffered position. Therefore, the petitioner has not established the substantive nature of the work to be performed by the beneficiary, which therefore precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4. Because the record does not contain information from the end client regarding the work to be performed, we cannot conclude that the beneficiary will be employed in a specialty occupation.

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

IV. BENEFICIARY QUALIFICATIONS

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

As discussed in this decision, the petitioner did not submit sufficient evidence regarding the proffered position to determine whether it will require a baccalaureate or higher degree in a specific specialty or its equivalent. Absent this determination that a baccalaureate or higher degree in a specific specialty or its equivalent is required to perform the duties of the proffered position, it also cannot be determined whether the beneficiary possesses that degree or its equivalent.

V. CONCLUSION AND ORDER

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

We will dismiss the appeal for the above stated reasons. 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, the petitioner has not met that burden.

ORDER: The appeal is dismissed.