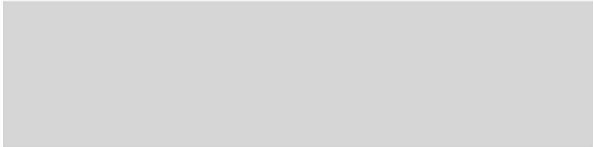




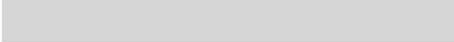
U.S. Citizenship
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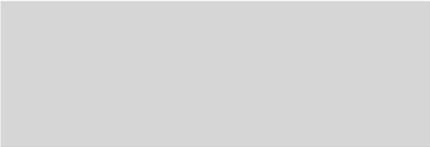
DATE: JUL 08 2015

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, California 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 advanced computer software development and consulting firm with 49 employees, established in [REDACTED]. In order to employ the beneficiary in what it designates as a programmer analyst/filenet position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The Director denied the petition, concluding that the petitioner did not establish that it meets the regulatory definition of a United States employer and that the evidence of record did not establish that the proffered position qualifies as a specialty occupation.¹ 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 requests for additional evidence (RFE); (3) the petitioner's responses to the RFEs; (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.²

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

¹ The director also found that the beneficiary failed to maintain nonimmigrant status in the United States. On appeal, the petitioner asserts that the director erred in finding that the beneficiary had not maintained his nonimmigrant status. However, we have no jurisdiction over this matter, as issues surrounding the beneficiary's maintenance of nonimmigrant status are within the sole discretion of the director.

² We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." *Id.*

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

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

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

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

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

(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.³

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

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

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).⁵

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.

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).

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

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

§ 214.2(h)(4)(ii) (defining a "United States employer" as one who "has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise *control* the work of any such employee" (emphasis added)).

The factors indicating that a worker is or will be an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. *Darden*, 503 U.S. at 323-324; *Clackamas*, 538 U.S. at 445; *see also Restatement (Second) of Agency* § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. *See Clackamas*, 538 U.S. at 445; *see also New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1) (adopting a materially identical test and indicating that said test was based on the *Darden* decision); *see also Defensor v. Meissner*, 201 F.3d 384, 388 (5th Cir. 2000) (determining that hospitals, as the recipients of beneficiaries' services, are the "true employers" of H-1B nurses under 8 C.F.R. § 214.2(h), even though a medical contract service agency is the actual petitioner, because the hospitals ultimately hire, pay, fire, supervise, or otherwise control the work of the beneficiaries).

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

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

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

B. Analysis

In the Form I-129 and its supporting documents, the petitioner indicated that the beneficiary will be working off-site at [REDACTED]⁶. The documents in the record of proceeding indicate that the petitioner assigned the beneficiary to the end-client, [REDACTED] through a middle-vendor, [REDACTED].

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).

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 offer letter signed by the petitioner and the beneficiary on August 11, 2014. The letter states that the beneficiary will be working as "Programmer Analyst/FileNet" and the beneficiary "is scheduled to start on August 25, 2014."⁷ The letter further states that "[t]his will be a Full-time position with the IT division of [the petitioner] based out of the office located in [REDACTED] MN." It also indicates that the "overall function of the occupation is to develop and maintain software projects in-house at [the petitioner's] or with various related business partners of [the petitioner]."

Moreover, the record contains an employment agreement dated August 11, 2014. It states, in section

⁶ In the letter from [REDACTED] dated August 11, 2014, [REDACTED] indicated that the beneficiary would be "contracted to work at [REDACTED]." The petitioner also noted [REDACTED], as the work location in the accompanying Labor Condition Application.

In response to the Director's first RFE, the petitioner provided a statement from [REDACTED] stating that their initial letter contained a typographical error and that the beneficiary was always intended to be placed at [REDACTED]. In response to the second RFE, the petitioner provided an updated letter from [REDACTED] describing the beneficiary's placement at [REDACTED] and a letter from [REDACTED] confirming the beneficiary's employment.

A search of public records reveals that [REDACTED] is the address of [REDACTED] and no other businesses. Given that this is the work location provided by the petitioner on the Form I-129, LCA, and original itinerary, we find it credible that the mention of [REDACTED] by [REDACTED] was a scrivener's error. Therefore, we will proceed with the analysis of the employer-employee relationship, as it concerns the beneficiary's proposed placement, with [REDACTED] as the end-client.

⁷ USCIS records show that the beneficiary was employed by a different company, pursuant to a previously approved H-1B petition, from November 25, 2013 to December 21, 2014. The instant petition was filed on August 27, 2015.

7 "Employee Obligation," that "[the beneficiary is] obligated to submit a [sic] Itinerary of service at the beginning of [his] contract explaining [his] tasks, duties and responsibilities for the period of the contract." It further states that the employee is "responsible to provide [the petitioner] with the approved timesheets by the last day of every month. These timesheets must be approved by the client . . ." Therefore, while the beneficiary is required to submit a time sheet to the petitioner on a monthly basis, it appears that it is the client that assigns tasks, duties and responsibilities and approves the hours worked. 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.

The record also contains a sub-vendor agreement with [REDACTED] dated August 14, 2017. This agreement provides that placement of any contract worker is subject to the approval of [REDACTED] and their customer. The agreement states "[the petitioner] acknowledges that Contract Workers supplied by [the petitioner] shall be subject to the continuing approval of Customer. Either [REDACTED] or Customer[]May request the removal of Contract Worker at any time for any lawful reason." This agreement also states:

WHEREAS, [REDACTED] and its customer(s) ("Customer(s)") are parties to a Service Agreement (the "Customer Agreement") pursuant to which [REDACTED] has agreed to provide temporary staffing services to Customer.

WHEREAS, in connection with the performance of [REDACTED] obligations to its Customer under the Customer Agreement, [REDACTED] desires to retain [the petitioner] to supply in certain instances, and [the petitioner] desires to supply in certain instances, Contract Workers to the Customer, based on the terms and conditions of this Agreement.

The petitioner did not submit a copy of the above referenced "Customer Agreement," which would, provide the terms and conditions that would govern the beneficiary's placement at any customer site. Additionally, while the work order attached to the sub-vendor agreement names the beneficiary, it does not provide information such as the name of the end-client, the duration of the project, the location of the project, or a description of the project. Without full disclosure of the facts, we are unable to find that the requisite employer-employee relationship will exist between the petitioner and the beneficiary.

The petitioner also submitted letters from [REDACTED]. In a letter dated August 11, 2014, the petitioner indicates that the beneficiary will be contracted to work at [REDACTED]. The letter further states that the beneficiary's contract is "scheduled to commence on August 25, 2014 and is expected to be a long term project exceeding three years." This appears to contradict the petitioner's offer letter which states that the beneficiary will be based out of its office in [REDACTED] MN. Further, in another letter dated October 8, 2014, [REDACTED] indicate that "the duration of this project is ongoing and is expected to exceed two years." The petitioner did not explain the discrepancies.

Furthermore, the letter from the middle-vendor, [REDACTED], and the letter from the end-client, [REDACTED] both state that "[a]lthough the on-site manager assigns general direction, [the petitioner] will be responsible for [the beneficiary's] supervision off-site through timesheet approvals, status reports and calls." These letters do not clarify that the on-site manager is employed by the beneficiary, and appear to indicate that the end-client, not the petitioner will supervise the beneficiary in the course of his daily duties. The petitioner also submitted a copy of its organizational chart. While the organizational chart shows the beneficiary reporting to a "Project Manager/Department Head," the petitioner has not offered further information on where this individual is located and how he/she will provide day-to-day control and supervision of the beneficiary. The record also contains a document titled "Performance Management Overview." However, this appears to be a general template and guidance about performance assessment and lacks sufficient information regarding how work and performance standards were established, the methods for assessing and evaluating the beneficiary's performance, the criteria for determining bonuses and salary adjustments, et cetera. Importantly, there is a lack of information as to how the day-to-day work of the beneficiary has been and will be supervised and overseen.

In response to the RFE, the petitioner submitted additional documentation, including quarterly wage reports and federal income tax returns. 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. Given the documentation discussed above, 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. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 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 prior to adjudication did not establish that the petitioner would act as the beneficiary's employer in that it will hire, pay, fire, or otherwise control the work of the beneficiary.

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 programmer analyst/ FileNet from August 25, 2014 to August 17, 2017.

As discussed above, the record of proceeding contains a letter from the end-client [REDACTED] dated September 29, 2014. In this letter, the end-client writes that the duration of the project to which the beneficiary has been assigned, is ongoing and is expected to exceed two years. As mentioned, the letters from [REDACTED] provide inconsistent information regarding the length of the projects. The petitioner has not provided evidence that it has available work in a specialty occupation for the remaining year of the requested H-1B validity period. Accordingly, the evidence in the record does not establish that the petitioner has work in a specialty occupation for the beneficiary for the duration of the requested H-1B 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 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. 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.⁸

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).

⁸ 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).

III. SPECIALTY OCCUPATION

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

In this matter, the record contains material inconsistencies concerning the description of the proffered position. 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).

Specifically, the employment offer letter describes the proffered position as:

[D]esigning, implementing and ensuring the design, development and implementation of Software for computer systems at [the petitioner] and many of our clients. The overall function of the occupation is to develop and maintain software projects in-house at [the petitioner] or with various related business partners of [the petitioner]."

However, the letter from [redacted] dated August 11, 2014 identifies the proposed position as a "Programmer Analyst/FileNet," with the following responsibilities:

- Analyze, design, develop, prototype, implement and enhance software in order to meet current and future customer business requirements.
- Develop IBM FileNet Content/Business Process Management products and Java/J2EE Technologies[.]
- Develop and write applications IBM FileNet Content/Business Process Management products, Java/J2EE Technologies and other object-based technologies.
- Develop workflow Management solutions design, development and intuitive architecture. Content Engine (CE), Application Engine (AE), Process Engine (PE), Business Process Framework (BPF), FileNet Application Programming Interface, FileNet 3.5/4.x/5.x (CE, PE, and BPF API's), IBM FileNet Workplace/Workplace XT, [sic] Records Manager, IBM FileNet Content Manager Java API Programming, eForms (eForms Designer).
- Proficient in developing Multi-Tier Enterprise applications using JAVA, J2EE Standards, JSP, Servlets, MVC Struts, Hibernate, JDBC, Core JAVA, XML, HTML, AJAX, JavaScript.
- Involved in entire Project Life Cycle for various projects, which includes analyzing the Customer Requirements, System Design, Database Design, End User Training and Implementation.

- Programming using PL/SQL, (SQL Queries, Stored Procedures) DB2, Oracle, SQL Server, Database environments.
- Developing and deploying FileNet based enterprise and content management solutions.
- Administration for BPM and CM Suites.

In response to the first RFE from the Director, the petitioner provided another letter from [REDACTED] and letter from the end-client, [REDACTED], which both describe the proffered position as an "IBM FileNet P8 Developer and Administrator," with the following responsibilities:

- Identifies requirements by establishing personal rapport with potential and actual clients and with other persons in a position to understand service requirements with a thorough technical knowledge.
- Arranges project requirements in programming sequence by analyzing requirements; preparing a work flow chart and diagram using knowledge of computer capabilities, subject matter, programming language, and logic.
- Solutioning with FileNet suite including experience with one or all of the following tools: Content Navigator, Process Engine, IBM Info sphere, Enterprise Records, Document Management, Bar Code Capture OCR, [REDACTED] with email and Sharepoint.
- Production support within FileNet or external application development environment including installing or upgrading P8 components, patches, and bug fixes. Configuring existing FileNet P8 tools.
- Lead the effort to provide technical support to system owners as well as other information technology groups to help ensure effectiveness of information technology systems in enabling our client's customers to conduct day-to-day businesses. The support includes, but is not limited to, answering customer questions, interpreting system functionalities, completing data requests, making emergency fixes and performing other critical support functions.
- Maintains professional and technical knowledge by attending educational workshops; reviewing professional publications.

As stated by the director, the discrepancies between the various position descriptions prevent us from fully evaluating the proffered position and preclude us from determining that the proffered position is a specialty occupation.⁹

⁹ In the LCA filed with the initial petition, the petitioner classified the proposed programmer analyst position as a "Software Developer-Applications" - SOC 15-1132.00. However, on appeal, the petitioner submitted a printout from the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook (Handbook)* for Computer Systems Analyst as evidence that the proffered position should be considered a specialty occupation.

However, we note that even if we were able to conclude that the proffered position would be that of a computer systems analyst, the *Handbook* does not support the assertion that the normal minimum entry

On appeal, the petitioner asserts that the "job title and position description along with supporting documents are in a relatively standard format used by many petitioner in the industry where a more general description may be used to describe the Beneficiary's work before a more specific set of duties is determined for the project." However, 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); *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. 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 *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

Because the petitioner has not resolved the inconsistencies with objective evidence or satisfactorily explained the noted discrepancies, 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). We note that it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

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

requirement to become a computer systems analyst is the obtainment of a baccalaureate degree in a specific specialty, or its equivalent. Specifically, the *Handbook* states that while a bachelor's degree in a computer or information science field is common, it is not a requirement, and some companies hire analysts with business or liberal arts degrees who have skills in information technology or computer programming. Therefore it would not be considered a specialty occupation, absent additional evidence from the petitioner that it met one of the criteria stated at 8 C.F.R. § 214.2(h)(4)(iii)(A). We recognize the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses. The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.bls.gov/oco/>. All of our references to the *Handbook* are to the 2014 – 2015 edition available online.

IV. CONCLUSION AND ORDER

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.¹⁰

ORDER: The appeal is dismissed.

¹⁰ Since the identified basis for denial is dispositive of the petitioner's appeal, we will not address additional grounds of ineligibility we observe in the record of proceeding.