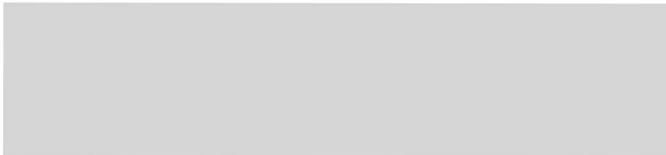




U.S. Citizenship
and Immigration
Services

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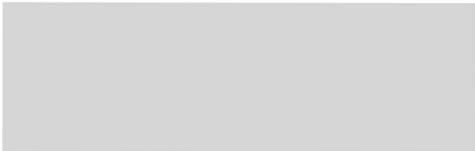
DATE: **JUN 03 2015**

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, and the matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed. The petition will be denied.

I. PROCEDURAL AND FACTUAL BACKGROUND

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a "650+"-employee "Specialized Technology Consulting and Development Services" firm established in [REDACTED]. In order to employ the beneficiary in what it designates as a "Software Development[,] Applications" 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 evidence of record does not demonstrate that the petitioner qualifies as a U.S. employer having an employer-employee relationship with the beneficiary.

The record of proceeding before us contains: (1) the Form I-129 and supporting documentation; (2) the Director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) the Form I-290B and supporting materials. We reviewed the record in its entirety before issuing our decision.¹

The Labor Condition Application (LCA) submitted with the visa petition states that the beneficiary would work at [REDACTED] Ohio. The petitioner also submitted, *inter alia*: (1) a Master Agreement for Professional Services, dated June 15, 2005, between [REDACTED] a company with principal offices in New York²; (2) a letter, dated March 31, 2014, from the petitioner; and (3) an employment agreement, dated October 1, 2014, between the petitioner and the beneficiary.

The June 15, 2005 Master Agreement sets out general terms pursuant to which [REDACTED] might provide workers to [REDACTED]. That document refers to "agreement(s) for professional type services between the parties" to be entered into by the parties at a later date and governed by the general terms of that Master Agreement.

In the March 31, 2014 letter, the petitioner stated that the beneficiary's work would be supervised by [REDACTED] an employee of the petitioner, and also stated:

In direct relation to the Master Services Agreement ("MSA") that we have in place

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

² The Contract ID No. listed on the agreement is [REDACTED]

³ The petitioner subsequently submitted evidence that [REDACTED] is a name used by the petitioner.

with our Client [REDACTED] we intend to assign [the beneficiary] to work at the [REDACTED] project location in [REDACTED] OH.⁴

Please note that [the beneficiary] will be supervised, directed and controlled by [the petitioner] at all times, including at the client facility as they have assigned space specifically to our team working on these projects. Specifically, Mr. [REDACTED] who is a Director and a [REDACTED] employee, will oversee [the beneficiary].

On June 4, 2014, the service center issued an RFE in this matter. The service center requested, *inter alia*, evidence pertinent to who would assign and supervise the beneficiary's work and otherwise exercise control over the beneficiary's work. The Director outlined the specific evidence to be submitted.

In response, the petitioner submitted, *inter alia*: (1) additional documents pertinent to an agreement between [REDACTED] (2) documents pertinent to computer applications that the petitioner produced or is producing; (3) documents pertinent to an agreement between the petitioner and [REDACTED]⁵ (4) documents pertinent to an agreement between the petitioner and [REDACTED]⁵ (5) an organizational chart; and (6) a letter, dated July 14, 2014, from counsel.

The documents pertinent to [REDACTED] show that those entities agreed that [REDACTED] would provide certain services for [REDACTED] projects. More specifically, two task orders pertain to specific services requested by [REDACTED] Task Order No. [REDACTED] has an effective date of January 1, 2014 and has a term of 12 months and is renewable by "1additional terms of 3months/years." Task Order [REDACTED] has an effective date of January 1, 2013 and it, too, has a term of 12 months and is renewable by "1additional terms of 3months/years."

The organizational chart shows the petitioner's "Onsite Resources," but do not reveal the site to which it pertains. It shows that [REDACTED] would work as "Technical Lead ODF," and would supervise, among others, the beneficiary, who would work as an "S/W Developer."

In his July 14, 2014 letter, counsel cited an agreement between the petitioner and [REDACTED] as evidence that the petitioner would: (1) determine which of its employees to assign to work for [REDACTED] (2) determine the period of time during which its employees would remain on [REDACTED] projects,

⁴ Based on evidence subsequently submitted that [REDACTED] is a name used by the petitioner, the petitioner was referring to the agreement between [REDACTED]

⁵ The petitioner has not explained the relevance of the [REDACTED] documents to the instant matter. Those documents do not specify that the beneficiary will be assigned to [REDACTED]; therefore, we will not address these documents further.

⁶ The petitioner has not explained the relevance of the [REDACTED] documents to the instant matter. Those documents do not specify that the beneficiary will be assigned to [REDACTED]; therefore, we will not address these documents further.

(3) determine what services its employees would provide, and (4) supervise and control its personnel on [REDACTED] projects. Counsel also stated that the petitioner "anticipates that it will use the Beneficiary's services for its [REDACTED] project engagement for a period of three (3) years (October 1, 2014 to September 1, 2017)."

The Director denied the visa petition on July 31, 2014, finding, as was noted above, that the petitioner had not demonstrated that it has standing to file the instant visa petition as the beneficiary's prospective U.S. employer. That decision noted that, although evidence was submitted to establish a business relationship between the [REDACTED] no evidence had been provided to establish any relationship between the petitioner and either of those entities.

On appeal, the petitioner submits evidence, noted above, showing that [REDACTED] is an alternative name of the petitioner. The petitioner also submits a brief, contending that the petitioner has demonstrated that it would have an employer-employee relationship with the beneficiary if the visa petition were approved.

II. EMPLOYER-EMPLOYEE RELATIONSHIP

We will consider whether the petitioner has established that it meets the regulatory definition of a United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii). In this context, 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.*

A. Legal Framework

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.⁷

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.*

⁷ 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).

Darden, 503 U.S. at 318-319.⁸

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).⁹

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; 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

⁸ 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))).

⁹ 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).

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."

While social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are still relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary's employer. Without full disclosure of all of the relevant factors, we are unable to find that the requisite employer-employee relationship will exist between the petitioner and the beneficiary.

In the instant case, although the petitioner's address is in [REDACTED] New Jersey, the petitioner asserted that the beneficiary would work in [REDACTED], Ohio on a [REDACTED] project. The LCA provided is valid for employment in and near [REDACTED] Ohio, and in no other location.

As evidence of the existence of such work, the petitioner provided the June 15, 2005 Master Agreement between [REDACTED]¹⁰ We accept that [REDACTED] has been shown to be a name used by the petitioner and that agreement is an agreement between the petitioner and [REDACTED]. However, that agreement does not state: (1) which of the petitioner's employees would be assigned pursuant to it, (2) what duties they would perform, or (3) where they would work. In fact, that agreement only sets out general terms pursuant to which [REDACTED] might subsequently request

¹⁰ Again, the Contract ID No. is [REDACTED]

assignment of the petitioner's personnel to work on [REDACTED] projects. It does not, in itself, show that any assignment pursuant to that Master Agreement was ever requested.

As noted earlier, the petitioner submitted two task orders showing that, at one time, [REDACTED] did issue requests for the petitioner's services. However, they do not appear to pertain to the submitted Master Agreement that the petitioner claimed is in place and pertinent to the beneficiary's assignment at [REDACTED] project location in [REDACTED], Ohio. As noted above, the Master Agreement's Contract ID No. is [REDACTED] however, the two task orders pertain to an agreement with a Contract ID No. of [REDACTED]. 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). As such, the Master Agreement and task orders are not sufficient evidence of work available to which the petitioner could have assigned the beneficiary during the period of requested employment or of the terms that would govern any such employment. While the petitioner asserts that it intends to assign the beneficiary to work on a [REDACTED] project in [REDACTED] Ohio, none of the [REDACTED] documents indicate that [REDACTED] has agreed to utilize the beneficiary's services.

We also note an inconsistency with respect to the petitioner's claimed supervision of the beneficiary while at the claimed [REDACTED] project. In the petitioner's March 31, 2014 letter submitted with the petition, the petitioner stated that [REDACTED] would oversee the beneficiary's work at [REDACTED]. However, none of the [REDACTED] documents mention [REDACTED]. In a July 4, 2014 letter submitted in response to the RFE, counsel referred to [REDACTED] as "The Beneficiary's Manager." None of the [REDACTED] documents refer to [REDACTED]. The organizational chart submitted indicates that [REDACTED] would supervise the beneficiary's employment. While the two task orders mentioned above name [REDACTED]¹¹ as "Architect / Team Lead," those two task orders have not been demonstrated to be relevant to the Master Agreement which the petitioner claims is pertinent to the beneficiary's [REDACTED] assignment.

The identity of the person who would assign the beneficiary's duties and supervise his performance is material in that it indicates whether an employee of the petitioner or an employee of some other company exercises that control over the beneficiary. That is a critical index of whether the petitioner would have an employer-employee relationship with the beneficiary. However, the petitioner has submitted conflicting evidence on that point. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* Again, 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.*

¹¹ While we note the inconsistent spellings, we assume that [REDACTED] are the same individual.

Although the petitioner has asserted that the beneficiary would work on the [REDACTED] project in [REDACTED] Ohio and that, at that location, the petitioner would assign his duties and supervise his performance, the record does not establish that [REDACTED] has agreed that the beneficiary may work there, nor even that any of the petitioner's workers will work there during the period of employment requested in the instant visa petition pursuant to the 2005 Master Agreement. The details of the claimed arrangement with [REDACTED] and how it will be executed have not been adequately explained by the petitioner. Further, the record contains insufficient evidence to show that the petitioner would maintain any supervisory presence at the remote location where the work would be performed. We find that 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." The visa petition must be denied for this reason.¹²

III. CONCLUSION

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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

¹² 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).