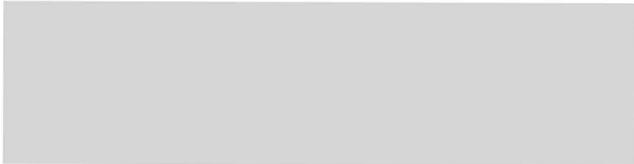




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **JUN 16 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:

NO REPRESENTATIVE OF RECORD

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, 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 35-employee "IT Services – Software Development & Information Technology Consulting Services" firm established in [REDACTED]. In order to employ the beneficiary in what it designates as a "Computer Systems Analyst" 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, finding that the petitioner did not establish (1) that it has standing to file as the beneficiary's prospective United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii) and (2) the availability of specialty occupation work at the time the petition was filed.

The record of proceeding 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) Form I-290B and supporting materials. We reviewed the record in its entirety before issuing our decision.¹

As will be discussed below, we have determined that the Director did not err in her decision to deny the petition on the employer-employee issue. Accordingly, the Director's decision will not be disturbed. The appeal will be dismissed.

II. THE PROFFERED POSITION AND THE LOCATION(S) OF EMPLOYMENT

In the Form I-129, the petitioner indicated that the beneficiary will work off-site and provided the address of employment as "[REDACTED]." The Labor Condition Application (LCA) submitted to support the Form I-129 listed two places of employment: (1) [REDACTED] Massachusetts; and the petitioner's own address at (2) [REDACTED] Virginia.

In a letter dated April 3, 2014, the petitioner stated that "[the beneficiary] will be engaged with [REDACTED]" and "will be performing his duties at [REDACTED] Massachusetts." The petitioner further indicated that the beneficiary will perform the following duties for [REDACTED]:

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

- Day to day administration of enterprise SAN and Storage that included V-Max, DMX ¾ HP 3PAR P740, EVA 8400 and CLARiiON CX3/CX4 using SMC 7.x, SYMCLI 7.x Navisphere Manager 6.x and NaviCLI/NavisecCLI
- Allocation storage using Auto-provisioning groups of V-MAX by creating storage groups, port groups, initiator groups and masking views using SMC and SYMCLI
- Allocation storage by mapping and masking on DMX-3/-4, created Meta devices, changed device and FA attributes by using SymCLI and ECC 6.x.
- Migration of Storage from one VMware ESX server to another using VMware SVmotion.
- Allocation storage to AIX, Solaris, HP, Linux, RedHAT, ESX, and Windows servers and also for cluster servers.
- San software upgrades (HiCommand Suite, Storage Manager, HDLM)
- Ensure smooth workflow for day to day Storage administration activities based on SLA guidelines and criticality.
- Storage space provisioning, Configure storage and file systems on UNIX servers
- Ensuring regular Issues are handled as per SLA agreements & Criticality
- Specialized in Mentoring engineers for Handling High Severity Incidents
- Design and Implement backup solutions for LAN free and ZDB.
- Troubleshoot routine critical issues including threshold optimization, servicer throughput, ports availability, meeting zoning requirements, one-path down, host not seeing storage and storage management problems.
- Installation of Powerpath on all kinds of operatins systems for load balancing and so as NAVI agent to register with Clariions.
- Maintaining of the ECC infrastructure, Configured DCPs and alerts for management of the entire SAN infrastructure
- Implementation of Virtual LUN Migration to perform non-disruptive migration of vcarious volumes among storage tiers fo the same Symmetrixs array and between RAID protection schemes.
- Implementation of Business Continuity solutions for production data using TimeFinder BCV (emulation mode on V-MAX and DMX arrays
- Creation Dynamic RDF groups and implemented SRDF/A for setting up Disaster Recovery between V-MAX to-V-MAX and enabled consistency on the RDF groups.
- Prior to the Migration, engaged in running EMCgrabs/reports on the servers and uploaded them on to the HEAT site to generate host remediation report.
- Performance Data Migration from DMX ¾ to V-MAX using Open Migrator/LVM at the host and SRDF/Open Replicator at the array level in separate instances.
- Involvement in the migration of data using SAN/Copy from CLARiiON CX 700/CX-3 to CX-4-480.

- Implementation Virtual Provisioning and provisioned storage by configuring storage pools (Thin Raid groups), Creating LUNs and Storage groups using Navisphere Manager 6.x.
- Installed and configured Cisco Multilayer Fibre Switches, Multilayer Fibre Switches, creating VSANs, Port-channels, TE ports and zoning using CLI and Fabric Manager.
- Configuration Brocade 5100, 5300, 48k/DCX switches, implemented zoning by creating aliases, zones and configurations using Brocade CLI and Web Tools.
- Engage in migrating SAN environment from Brocade 48K Enterprise director to Cisco MDS 9513 directors.
- Installation and configuration Host Bus Adapters (Emulex and Qlogic) on Windows and Linux operating systems for SAN connectivity.
- Installation Solutions Enabler 7.1.1 and Symmetrix Management Console 7.1.1. On Windows.

III. EMPLOYER-EMPLOYEE RELATIONSHIP

The primary basis cited in the decision of denial is the Director's finding that the evidence submitted does not demonstrate that, if the visa petition were approved, 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).

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.²

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

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).

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*

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; *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).

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).

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).

Employment Location

The petitioner provided inconsistent information regarding the place of employment. As noted earlier, in the Form I-129, the petitioner stated that the beneficiary would work in [REDACTED] Massachusetts, and its own location in [REDACTED] Virginia. The LCA is certified for those two locations. In the letter dated April 3, 2014, the petitioner indicated that the beneficiary would work at [REDACTED] Massachusetts.

In support of the Form I-129, the petitioner submitted a letter from its client, [REDACTED] dated March 28, 2014 which stated that it has contracted with the petitioner to use the beneficiary's services for development of the [REDACTED] project. Notably, the client's letterhead does not list its address nor does it mention the location of the beneficiary's project.⁵

In response to the Director's RFE, the petitioner stated in a letter dated August 4, 2014, that the beneficiary will work at its client's location at [REDACTED] Georgia. The petitioner also submitted a Professional Services Contract with [REDACTED] dated March 21, 2014. The contract states that the beneficiary will work "On-Site" and lists [REDACTED] address as "[REDACTED]"

However, on appeal, the petitioner claims that the beneficiary will work at [REDACTED] MA and that its assertion that the beneficiary would work in [REDACTED] Georgia was the result of "human error." The petitioner provided another Professional Services Contract, signed by the petitioner and [REDACTED] on May 21, 2014, stating that the beneficiary will be assigned to work for [REDACTED] at the [REDACTED] Massachusetts address for two years. However, that contract was executed by the petitioner and [REDACTED] on May 21, 2014, after the

⁵ The letter is signed by [REDACTED] President and CEO of [REDACTED]. The letter provides his office and mobile phone numbers but does not list an address. We note that the area codes for both numbers are Georgia area codes.

instant visa petition was submitted.⁶ Further, the contract still lists [REDACTED] address as [REDACTED]. The petitioner did not provide additional evidence to explain the discrepancies.

Professional Services Contracts

As discussed, the petitioner submitted two separate Professional Services Contracts with its client, [REDACTED]. Notably, the second contract submitted on appeal was signed on May 21, 2014. However, on the front page, the contract is dated July 2, 2014. Further, we note that both contracts are printed on [REDACTED] letterhead. However, [REDACTED] is identified as a customer. The petitioner did not explain the discrepancies.⁷

Moreover, both contracts state that the start date is on or about October 1, 2014 for 2 years.⁸ However, we note that in the Form I-129, the petitioner indicated that the dates of intended employment are from October 1, 2014 to September 25, 2017. The petitioner did not submit further information to establish that it has additional projects for the validity of the requested employment period. Therefore, 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 did not demonstrate that it would maintain such an employer-employee relationship for the duration of the period requested.⁹

⁶ 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 becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

⁷ When a petition includes numerous errors and discrepancies, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

⁸ Notably, this contradicts the letter from [REDACTED] dated March 28, 2014. The letter states that the beneficiary's assignment has been scheduled from October 1, 2014 to March 2017 with "a strong possibility of an extension." However, there is no evidence in the record of proceeding to substantiate its claim.

⁹ 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

Supervision

In response to the RFE, the petitioner submitted a document entitled "Supervision and Control of Employees." The petitioner asserted that the beneficiary "will work under the supervision and control of [the petitioner] throughout the term of his employment." However, the petitioner is located in Virginia and it proposes to assign the beneficiary to work for [REDACTED] in either Massachusetts or Georgia which raises the issue of who would supervise, control, and oversee the beneficiary's work. The record contains insufficient evidence of who will supervise the petitioner's personnel at [REDACTED] location(s) and who will assign the beneficiary's tasks and supervise his performance. Although the petitioner has identified its own employee, [REDACTED] as the beneficiary's supervisor, the record does not indicate that Mr. [REDACTED] would accompany the beneficiary to [REDACTED] location(s) to supervise his work.

The petitioner asserts that the supervision of the beneficiary's work off-site would be accomplished by telephone contact, either weekly or somewhat more often; however, the record contains insufficient evidence that the petitioner would assign the beneficiary's tasks and supervise his performance while the beneficiary is working at [REDACTED] location(s). The beneficiary may, as claimed, periodically report on the progress of the project to which he is assigned and the petitioner may produce an evaluation of the beneficiary's performance based on those reports. This does not alter the fact that the end-user of the beneficiary's services, the entity that would assign the beneficiary's tasks and perform a first-hand evaluation of the results of the beneficiary's work and the acceptability of that work for the project under development, would, more likely than not, have the primary responsibility for the beneficiary's day-to-day supervision and for the evaluation of his performance.

Offer Letter

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).

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). In response to the RFE, the petitioner submitted an offer of employment letter dated March 27, 2014. Thus, the letter was prepared just a few days prior to the submission of the Form I-129 petition; however, the petitioner did not provide the dates of the beneficiary's employment. Moreover, the offer of employment letter states that the beneficiary will serve as a computer systems analyst, but it does not provide any level of specificity as to the beneficiary's duties and the requirements for the position. Notably, the letter is signed by the beneficiary, but is not dated. Moreover, the font size of the offer letter on page 2 is visibly different from page 1. Further, while page 1 is on the petitioner's letterhead and lists the petitioner's address on the bottom, page 2 does not have the company logo or the address. 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 letter also states that the beneficiary will be paid \$69,000 per year with fringe benefits and subject to deductions for taxes and other withholdings. 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.

Under these circumstances, we find that, more likely than not, the petitioner would not have an employer-employee relationship with the beneficiary if the visa petition were approved. The appeal will be dismissed and the visa petition denied for this reason.

IV. ADDITIONAL BASIS

The record suggests an additional issue that was not addressed in the decision of denial but that, nonetheless, also precludes approval of this visa petition.

With the visa petition, the petitioner submitted evidence that the beneficiary has a bachelor of engineering degree in electronics and communication engineering from Bharathiar University in India. The petitioner also submitted evidence pertinent to the beneficiary's previous employment.

The petitioner seeks to rely on the beneficiary's Indian education and degree, or possibly his employment experience, or both, to show that he is qualified to work in a specialty occupation

position. If the petitioner intends to rely on a beneficiary's foreign education and degree to show that the beneficiary is qualified to work in a specialty occupation position, 8 C.F.R. § 214.2(h)(4)(iii)(C)(2) and 8 C.F.R. § 214.2(h)(4)(iii)(D), require that the petitioner provide an evaluation of the beneficiary's foreign education and degree. If the petitioner seeks to rely on the beneficiary's employment experience or non-academic training, even in part, to show that the beneficiary is has the equivalent of the otherwise requisite college degree required by the proffered position, 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) and 8 C.F.R. § 214.2(h)(4)(iii)(D)(1) require that the petitioner provide "[a]n evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience," attesting that the beneficiary has the equivalent of the otherwise requisite degree. No evaluation was provided in this case. Therefore, petitioner has not demonstrated, pursuant to the salient regulations, that the beneficiary is qualified to work in any specialty occupation position. The visa petition must be denied for this additional reason.

V. CONCLUSION

An application or petition that does not 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 the AAO conducts appellate review on a *de novo* basis).

Moreover, when we deny a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that we abused our discretion with respect to all of the enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1037, *aff'd*, 345 F.3d 683; *see also BDPCS, Inc. v. Fed. Communications Comm'n*, 351 F.3d 1177, 1183 (D.C. Cir. 2003) ("When an agency offers multiple grounds for a decision, we will affirm the agency so long as any one of the grounds is valid, unless it is demonstrated that the agency would not have acted on that basis if the alternative grounds were unavailable.").

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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