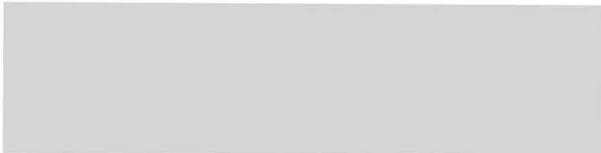




U.S. Citizenship
and Immigration
Services

(b)(6)



JUN 17 2015

DATE:

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.

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a 49-employee "Software Consulting" company, established in [REDACTED]. In order to employ the beneficiary in a position it designates a "SAP GRC Consultant" 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 determining that the evidence of record did not establish: (1) that the proffered position qualifies for classification as a specialty occupation; (2) the existence of an employer-employee relationship between the petitioner and the beneficiary; and (3) that the LCA submitted by the petitioner is valid. On appeal, the petitioner asserts that the Director's bases for denial of the petition were erroneous and contends that it has satisfied all evidentiary requirements.

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) the Notice of Appeal or Motion (Form I-290B) and supporting materials. We reviewed the record in its entirety before issuing our decision.¹

Upon review of the entire record of proceeding, we find that the petitioner has not overcome the Director's grounds for denying this petition. Accordingly, the appeal will be dismissed.

I. THE PROFFERED POSITION

On the Form I-129, the petitioner indicated that the beneficiary will work off-site and provided the address of employment as [REDACTED]. The petitioner submitted the required Labor Condition Application (LCA) certified for a job prospect within the occupational classification of "Computer Systems Analysts" - SOC (ONET/OES Code) 15-1121, at a Level I wage. The LCA identifies the beneficiary's work locations as (1) [REDACTED], North Carolina (the petitioner's corporate office location), and (2) [REDACTED] Washington. In its letter of support dated March 14, 2014, the petitioner stated that it had listed its "office address on the LCA in addition to the beneficiary's work site so that the beneficiary can meet with us for meetings and reviews from time to time." The petitioner identified the companies involved in the beneficiary's employment as the petitioner, [REDACTED], and [REDACTED].

Regarding the proffered position and educational requirements to perform the duties of the position, the petitioner stated:

As a GRC [Governance, Risk, Compliance] Consultant, [the beneficiary] has the

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

following responsibilities for the project with [REDACTED]:

- Prepare Business Blueprinting Documents for Access Control configuration 10%
- Design GRC Landscape for SAP GRC10 10%
- Help to Basis team for Deployment of GRC Components like GRCFND_A and GRCPINW, GRCPIERP. 10%
- Software installation guidance to Basis team 5%
- Blue print Designing 10%
- Post installation & Base line Configurations 10%
- BC sets activation for Rules 5%
- BC modification as per Client requirement 5%
- Workflow activation 10%
- ARA Configuration settings 5%
- EAM Configuration 10%
- MSMP settings 10%

As the attached materials demonstrate, this position requires the theoretical and practical application of an advanced highly specialized body of knowledge in the field of Computer Science, which requires the attainment of a[t] least a Bachelor's degree in Electrical Engineering, Computer Science, or a closely related field as the minimum requirement for entry into the occupation.

A letter, dated March 20, 2014, signed by the chief executive officer (CEO) of [REDACTED] states that the beneficiary "is employed as a contractor to work at our client [REDACTED]" for at least the next 36 months. The [REDACTED] CEO noted that the minimum education to perform the job position is a master's degree or equivalent and that the successful applicant must have varying degrees of experience, from two to five years, in various SAP, BRF+, Sterling Integrator, UNIX, Microsoft tools technologies as well as five plus years of experience working on critical projects and managing time. The [REDACTED] representative also identified the duties of the computer systems analyst as follows:

- Designing, creating, and testing configuration in GRC system.
- Diagnosing and troubleshooting production issues within SLA parameters
- Independently analyzing root cause of problematic issues
- Understanding the potential impacts of new development on other programs, systems and applications
- Communicating effectively with external and internal customers
- Translating business requirements into the technical design for system enhancements
- Contributing to new interface and business process flow designs
- Perform periodic SOX audit check on all systems. Identify security vulnerabilities.
- Providing estimates that impact project plans and solution delivery

- Ensuring that the quality development is met through validation testing, code reviews, integration testing, and user acceptance testing
- Ensuring that all new development is documented completely and reviewed with team
- Ensuring that proven, supported technologies are re-used wherever possible

The [REDACTED] representative added that the beneficiary will operate under the petitioner's control and that the project is expected to last at least two to three years.

In response to the Director's RFE, the petitioner stated that the beneficiary will no longer work at the [REDACTED] location in [REDACTED] Washington, but that he would work full-time at the petitioner's place of business in [REDACTED] North Carolina, on a project for [REDACTED]. A letter from [REDACTED] provided the following list of duties:

- SAP GRC Access Control 10.0 Project Blue Design
- SAP GRC AC 10.0 System Configuration
- SAP GRC AC 10.0 Landscape Design
- Assisting to SAP Basis Team on GRC System Build
- SAP GRC AC 10.0 MSMP workflow Configuration
- SAP GRC AC 10.0 EAM Configuration
- SAP GRC AC 10.0 & IDM integration
- Helping to [REDACTED] Customer on GRC Presentation (Tele)
- Helping to [REDACTED] Sales to on GRC Domain Knowledge
- Building GRC POC system for Presentations.

[REDACTED] letter also stated that the "minimum requirement for performance of these duties is a bachelor's degree in computer science, SAP GRC domain expertise and SAP GRC Certification."

II. EMPLOYER-EMPLOYEE RELATIONSHIP

We will first 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 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.

8 C.F.R. § 214.2(h)(4)(ii) (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 the H-1B context, 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

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).

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).

"employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee" or "employer-employee relationship" combined with the agency's otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition" or, more importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. *Cf. Darden*, 503 U.S. at 318-319.³

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

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

The factors indicating that a worker is or will be an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. *Darden*, 503 U.S. at 323-324; *Clackamas*, 538 U.S. at 445; *see also* *Restatement (Second) of Agency* § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. *See Clackamas*, 538 U.S. at 445; *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

³ To the extent the regulations are ambiguous with regard to the terms "employee" or "employer-employee relationship," the agency's interpretation of these terms should be found to be controlling unless "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359, 109 S.Ct. 1835, 1850, 104 L.Ed.2d 351 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945))).

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

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).

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).

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."

B. Analysis

We note the petitioner's assertion on the Form I-129 and supporting documentation that the beneficiary will work solely at the offices of the end-client [REDACTED] Washington; and we further note the petitioner's response to the Director's RFE in which it claimed that the beneficiary will now work on a new project at the petitioner's place of business in [REDACTED] North Carolina on an [REDACTED] project.

In its response to the Director's RFE, the petitioner expanded the beneficiary's duties, adding items such as "Helping to [REDACTED] Customer on GRC Presentation (Tele) [*sic*]," "Helping to [REDACTED] Sales to on GRC Domain Knowledge [*sic*]," and "Building GRC POC system for Presentations [*sic*]." [REDACTED] letter also changed the requirements for the proffered position, stating that the "minimum requirement for performance of [the] duties is a bachelor's degree in computer science, SAP GRC domain expertise and SAP GRC Certification. The petitioner stated in its letter in support of the petition that the proffered position required at least a bachelor's degree in electrical engineering,

computer science, or a closely related field while [REDACTED] the former mid-vendor, stated a different set of requirements and job duties.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, its associated job responsibilities, or the requirements of the position. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification for the benefit sought. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner in its response to the Director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather added new duties and responsibilities.⁵

It should be noted that we fully considered all of the submissions from the entities involved, including the letters submitted by representatives of [REDACTED]. Neither the March 20, 2014 [REDACTED] letter nor any other documentary evidence provides specific information with regard to the actual supervisory and management framework that would determine, direct, and supervise the beneficiary's day-to-day work at [REDACTED]. Without full disclosure of all of the relevant factors relating to the end client, including evidence corroborating the beneficiary's actual work assignment, we are unable to find that the requisite employer-employee relationship will exist between the petitioner and the beneficiary; and, of course, such disclosure is necessarily precluded where, as here, there is no definite employment.

The evidence of record 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 beneficiary is the petitioner's employee does not establish that the petitioner exercises any substantial control over the beneficiary and the substantive work that he performs. Nor do clauses in overarching agreements such as the letter from [REDACTED] carry probative weight in the absence, as here, of specific contractual documents that bring such agreements into play with regard to work for which it is shown that the beneficiary would be employed.

⁵ Moreover, as the Director noted, the petitioner had not entered into a contract with [REDACTED] when the petition was filed. Thus, the [REDACTED] contract is outside the scope of this particular petition, as the job(s) pursuant to the [REDACTED] contract and the supervisory and management framework that would determine, direct, and supervise the beneficiary's day-to-day work was not available when the petition was filed. 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 (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).

Additionally, the evidence of record does not establish the petitioner as performing the essential U.S. employer function of engaging the beneficiary to come to the United States for actual work established for the beneficiary at the time of the petition's filing.

The petitioner has not established that, at the time the petition was submitted, it had H-1B caliber work for the beneficiary that would entail performing the duties as described in the petition, and that was reserved for the beneficiary for the duration of the period requested. We therefore cannot conclude that the petitioner has satisfied its burden and established that it qualifies as a United States employer with standing to file the instant petition in this matter. See section 214(c)(1) of the Act (requiring an "Importing Employer"); 8 C.F.R. § 214.2(h)(2)(i)(A) (stating that the "United States employer . . . must file" the petition); 56 Fed. Reg. 61111, 61112 (Dec. 2, 1991) (explaining that only "United States employers can file an H-1B petition" and adding the definition of that term at 8 C.F.R. § 214.2(h)(4)(ii) as clarification).

As discussed above, the petitioner has not established the requisite employer-employee relationship between the petitioner and the beneficiary. For this reason the petition must be denied.

III. SPECIALTY OCCUPATION

Further, we find that the petitioner did not establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position.

A. Legal Framework

To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

Specialty occupation means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business

specialties, accounting, law, theology, and the arts, and which [(2)] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), USCIS consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers,

computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384.⁶ The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

We reiterate that, as recognized by the court in *Defensor, supra*, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. *See Defensor v. Meissner*, 201 F.3d at 387-388. The court held that the former Immigration and Naturalization Service (INS) had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. *Id.* at 384. Again, such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work. Thus, the court's holding recognized that the former INS's long standing interpretation and analysis of the pertinent statute and regulations was indeed sound.

B. Analysis

Preliminarily we note that the petitioner refers to unpublished decisions in which we determined that the positions of computer programmer and software engineer proffered in those matters qualified as specialty occupations. We find that the petitioner's reliance on unpublished non-precedent decisions is misplaced. The petitioner has furnished insufficient evidence to

⁶ The petitioner's assertions in this matter regarding the applicability of *Defensor v. Meissner* relate primarily to the petitioner's interpretation of the existence of an employer-employee relationship and its concern regarding the requirement of itineraries. Here, we reiterate that the petitioner must submit evidence of the specific duties the beneficiary is expected to perform. When the services to be provided incorporate the duties requested and required by an end client, it is necessary to understand what those duties entail, and the requirements demanded and needed by the end client to perform those duties. This basic information is necessary to properly ascertain the minimum educational requirements for the performance of the actual duties of the position and thus whether the actual position performed falls within the parameters of a specialty occupation.

establish that the facts of the instant petition are analogous to those in the unpublished decisions. For example, the record does not include evidence of the wage level or specific duties performed by the individuals in those positions. When "any person makes an application for a visa or any other document required for entry, or makes an application for admission, [. . .] the burden of proof shall be upon such person to establish that he is eligible" for such benefit. 8 U.S.C. § 1361; *see also Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972). Moreover, while 8 C.F.R. § 103.3(c) provides that our precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Here, the record of proceeding in this case does not provide sufficient probative documentary evidence from the end client, [REDACTED], regarding the job duties, the statement of work for the project, and the duration of the project. Further, the duties of the proffered position have been stated in generic terms that fail to convey the actual tasks the beneficiary will perform on a day-to-day basis. Additionally, the descriptions submitted do not appear consistent. For example, the [REDACTED] description appears to be an overview of a variety of broadly stated responsibilities while the petitioner has identified several SAP GRC generic tasks for the [REDACTED] project that may or may not fall under one of [REDACTED] broadly stated objectives. It is not evident from either description that the beneficiary will be primarily performing the work of a computer systems analyst, except in the most general fashion.⁷

As the petitioner here has not provided information regarding the proposed project(s) that will engage the beneficiary, it is not possible to discern what stage the project(s) is in, what modules require work, if any, whether, the beneficiary will be primarily gathering client requirements, designing, developing, or troubleshooting completed modules, or otherwise performing quality assurance. The petitioner has not submitted evidence of the role this specific beneficiary will play in the project(s), and how the beneficiary will contribute in the execution of the project(s) deliverables. Thus, it is not possible to ascertain whether the beneficiary will be required to perform duties that fall within the parameters of a specialty occupation position. That is, to the

⁷ Again 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 (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).

However, even if considering the description of duties that [REDACTED] submitted, it differs from the petitioner's initial description of proposed duties. We note that the petitioner added that the proffered position is for a "SAP Governance, Risk and Compliance (GRC) configuration and functional designer" and that this "position will work with clients and implementation team to design and build configuration and design custom development objects" and that the "[r]ole is involved in maintenance, enhancement and development work of complex modules and those that interface with other applications," in response to the Director's RFE. However, it appears these are additions to and not clarifications of the duties of the proffered position and were added to conform the petitioner's described duties to the [REDACTED] description.

extent that they are described, the proposed duties do not provide a sufficient factual basis for conveying the substantive matters that would engage the beneficiary in the performance of the proffered position for the entire period requested. The job descriptions do not persuasively support the claim that the position's day-to-day job responsibilities and duties would require the theoretical and practical application of a particular educational level of highly specialized knowledge in a specific specialty directly related to those duties and responsibilities. The overall responsibilities for the proffered position contain generalized functions without providing sufficient information regarding the particular work, and associated educational requirements, into which the duties would manifest themselves in their day-to-day performance within the petitioner's operations. Thus, the petitioner has not demonstrated how the performance of the duties of the proffered position, as described by the petitioner, would require the attainment of a bachelor's or higher degree in a specific specialty, or its equivalent.

The petitioner has not established the substantive nature of the work to be performed by the beneficiary, which therefore precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

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

IV. VALIDITY OF LCA AND ITINERARY

The next issue before us is whether the petitioner submitted a valid LCA for all work locations and complied with the itinerary requirement at 8 C.F.R. § 214.2(h)(2)(i)(B). General requirements for filing immigration applications and petitions are set forth at 8 C.F.R. § 103.2(a)(1) in pertinent part as follows:

Every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions . . . and such instructions are incorporated into the regulations requiring its submission.

Further discussion of the filing requirements for applications and petitions is found at 8 C.F.R. § 103.2(b)(1):

Demonstrating eligibility. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request and must continue to be eligible through adjudication. Each benefit request must be properly

completed and filed with all initial evidence required by applicable regulations and other USCIS instructions. Any evidence submitted in connection with a benefit request is incorporated into and considered part of the request.

The regulations require that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner obtain a certified LCA from DOL in the occupational specialty in which the H-1B worker will be employed. See 8 C.F.R. § 214.2(h)(4)(i)(B). The instructions that accompany the Form I-129 also specify that an H-1B petitioner must submit evidence that an LCA has been certified by DOL when submitting the Form I-129.

Additionally, the regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) provides as follows:

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

The itinerary language at 8 C.F.R. § 214.2(h)(2)(i)(B), with its use of the mandatory "must" and its inclusion in the subsection "Filing of petitions," establishes that the itinerary as there defined is a material and necessary document for an H-1B petition involving employment at multiple locations, and that such a petition may not be approved for any employment period for which there is not submitted at least the employment dates and locations.⁸ Here, even if the petitioner had submitted evidence that it had work available for the beneficiary in [REDACTED] North Carolina, and that the beneficiary would work at multiple locations at some point during the requested period of employment, the petitioner did not provide this initial required evidence when it filed the Form I-129 in this matter.

To further elaborate, the petitioner indicated on the Form I-129 that the beneficiary would be working off-site at the [REDACTED] offices in [REDACTED] Washington for the duration of the H-1B employment period, i.e., October 1, 2014, to August 1, 2017. The certified LCA submitted *with* the

⁸ The petitioner's implicit assertion that it is the implementation of the *Defensor* decision that generated the requirements of an itinerary is misguided. This is a regulatory requirement. If the petitioner intended that the beneficiary work at its [REDACTED] North Carolina office during the duration of the requested employment period, the petitioner is obligated to submit evidence of the nature of the work and the duties associated with it when the petition is filed. Additionally, pursuant to the regulations, as the proposed work would encompass two locations, the petitioner was required to submit an itinerary detailing the work and the duration of the employment at each location when the petition was filed. It is evident from the record, that the petitioner in this matter 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).

Form I-129 also indicates that the beneficiary will work at the [REDACTED] Washington location, while also including the petitioner's business address in [REDACTED], North Carolina. The petitioner lists the beneficiary's itinerary of services in its letter in support of the petition as [REDACTED] Washington for a three-year duration, and no other. As noted above, the petitioner explains that its [REDACTED] North Carolina office address has been included "so that the beneficiary can meet with us for meetings and reviews from time to time."

Again, the petitioner states on the Form I-129 and in the letter in support of the petition that the beneficiary will be working in [REDACTED] Washington for the duration of the H-1B employment period. Moreover, the petitioner did not provide any evidence that it had employment available to the beneficiary at the home office when the petition was filed. Only in response to the Director's RFE, does the petitioner claim that the beneficiary would be working at its office location in [REDACTED] North Carolina. The petitioner submitted further inconsistent information in response to the Director's RFE, that upon completion of the new [REDACTED] project, which is month to month, the beneficiary will resume his job duties directly with the petitioner. This conflicts with the [REDACTED] letter, dated July 24, 2014, which states that the project is long term and that the beneficiary "is expected to continue on this engagement on long term basis." 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.*

The petitioner in this matter did not list the locations where the beneficiary would be employed in its letter in support of the petition accompanied by an itinerary with the dates the beneficiary will provide services at each location. The petitioner's attempt to amend the petition by re-assigning the beneficiary to work at its offices, the only place also listed on the attested LCA, to salvage a petition filed for speculative employment is untenable. Again, a petitioner must establish eligibility at the time of filing a 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).⁹

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 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.

In view of the foregoing, the petitioner has not overcome the Director's basis for denying the petition on this ground, and it has also not met the itinerary requirement at 8 C.F.R. § 214.2(h)(2)(i)(B). For these reasons, the petition may not be approved. Accordingly, we will not disturb the Director's denial of the petition on this ground, and we conclude that the petition cannot be approved on the additional ground that the requisite itinerary was not filed with the petition.

V. CONCLUSION

The petition must be denied for the above stated reasons, with each considered as an independent and alternate 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.

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).