

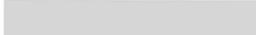


U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: JUN 19 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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

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

I. PROCEDURAL BACKGROUND

In the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as an IT consulting business with 50 employees established in [REDACTED]. In order to employ the beneficiary in what it designates as a programmer 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, concluding that the petitioner did not establish that it meets the regulatory definition of a United States employer. On appeal, the petitioner asserts that the Director's basis for denial was erroneous and contends that it satisfied all evidentiary requirements.

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

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

II. EMPLOYER-EMPLOYEE RELATIONSHIP

A. Legal Framework

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Analysis

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

Applying the *Darden* and *Clackamas* tests to this matter, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." We examined each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, and find that the petitioner did not establish the requisite employer-employee relationship with the beneficiary. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

For H-1B classification, the petitioner is required to submit written contracts between the petitioner and the beneficiary, or if there is no written agreement, a summary of the terms of the oral agreement under which the beneficiary will be employed. See 8 C.F.R. § 214.2(h)(4)(iv)(A) and (B). The record contains an employment agreement signed by the petitioner and the beneficiary on February 4, 2014. The agreement states that the beneficiary will be working for [REDACTED] MO, and the anticipated start date is 02/17/2014.⁵ However, the employment agreement does not provide any level of specificity as to the beneficiary's position, duties and requirements for the position or the duration of assignment at the client site.⁶

Moreover, the agreement states that the "employee shall maintain a daily record of all hours worked and have it approved by an authorized manager at the Client." It further states that the employer shall email his time sheet on weekly basis." In addition, the agreement indicates that the "employee understands and agrees that [the petitioner] compensates [e]mployee for hours worked and approved by [the petitioner]'s client." Therefore, while the beneficiary is required to submit a time sheet to the petitioner on a weekly basis, it appears that it is the client that provides day-to-day supervision onsite and approves the hours worked. While an employment agreement may provide some insights into the relationship of a petitioner and a beneficiary, it must be noted again that the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450.

⁵ USCIS records indicate that the beneficiary had an employment authorization document valid from January 18, 2014 to January 17, 2015.

⁶ The agreement states that the beneficiary "shall be compensated at a base hourly rate in the amount of \$30.00 per hour [or \$62,400 per year] on W[-]2." Notably, this is lower than the prevailing wage of \$66,373 and the proffered salary of \$80,000 per year as indicated in the LCA for [REDACTED], MO. For more information about prevailing wage in [REDACTED] Missouri, see [http://www.flcdatabcenter.com/OesQuickResults.aspx?code=15-1199\[REDACTED\]&year=14&source=1](http://www.flcdatabcenter.com/OesQuickResults.aspx?code=15-1199[REDACTED]&year=14&source=1) (last visited June 9, 2015).

Section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A), states in pertinent part that the petitioner must offer wages that are at least "the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question" or "the prevailing wage level for the occupational classification in the area of employment, whichever is greater."

While the requested employment and the corresponding wages are not in effect until September 14, 2014, we note that the petitioner did not submit an updated employment agreement to demonstrate that the beneficiary will be paid the prevailing wage for the occupational classification in the area of employment. 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).

In response to the RFE, the petitioner claimed that the beneficiary is supervised by its own employees. Specifically, the petitioner indicated that the beneficiary is currently supervised by Mr. [REDACTED] until the end of March 2015; thereafter, he will be supervised by Mr. [REDACTED] until the end of September 2017. In support, the petitioner provided a document entitled "Work Allocation Breakdown," which names Mr. [REDACTED] and Mr. [REDACTED] as onsite managers. Notably, the document is signed by Mr. [REDACTED], but his contact addresses are listed as NJ and PA.⁷

Moreover, the record contains a letter from [REDACTED] dated March 12, 2014. The letter states that at [REDACTED] the beneficiary's "day-to-day project deliverables are reviewed by [REDACTED]" The petitioner did not identify [REDACTED] as its own employee. While the letter also states that the beneficiary "remains under the control and overall supervision of his own employer," the letter did not offer further information on how the petitioner provides day-to-day control and supervision of its employees.

The petitioner also submitted a copy of performance review for the beneficiary dated July 1, 2014, which contains performance competencies and the beneficiary's rating. However, the document lacks information regarding how the petitioner determines and rates an employee on these criteria, as well as whether the petitioner measures the details of how the work is performed or the end result. It is not apparent how Mr. [REDACTED], who appears to be located in NJ or PA, would have direct knowledge of the listed evaluation criteria or be in a position to direct or assess the beneficiary's day-to-day work in Missouri. The petitioner did not submit a description of Mr. [REDACTED] duties and responsibilities, nor did it address how he supervises the beneficiary's duties. There is a lack of information regarding what the role of supervisor actually entails. Moreover, we note that while the evaluation is signed by the beneficiary, it is not signed by the supervisor.

In response to the RFE, the petitioner submitted additional documentation including a leave request from the beneficiary to the petitioner; beneficiary's benefit enrollee detail report; and wage statements showing payment from the petitioner to the beneficiary.⁸ We acknowledge that the method of payment of wages can be a pertinent factor to determining the petitioner's relationship with the beneficiary. While social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are still relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect

⁷ We further note that Mr. [REDACTED] phone number has a New Jersey area code.

⁸ While the petitioner indicates that the beneficiary has been employed at [REDACTED] since March 2014. However, the pay stubs dated from May to June 2014 indicate that the beneficiary's address is in [REDACTED] Massachusetts. Further, the pay stubs do not indicate deduction for MA or MO income tax. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence.

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.

The evidence in the record, therefore, is insufficient to establish that the petitioner qualifies as a United States employer, as defined by 8 C.F.R. § 214.2(h)(4)(ii). Merely claiming in its letters that the petitioner exercises complete control over the beneficiary, without evidence supporting the claim, does not establish eligibility in this matter. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). The evidence of record prior to adjudication did not establish that the petitioner would act as the beneficiary's employer in that it will hire, pay, fire, or otherwise control the work of the beneficiary. Despite the director's specific request for evidence such as a letter from the end client, the petitioner did not submit such evidence. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Further, we find the record does not establish that the petitioner has available non-speculative work for the beneficiary in a specialty occupation. The Form I-129 states that the petitioner intends to employ the beneficiary as a programmer analyst from October 1, 2014 to September 14, 2017.

The record of proceeding contains a statement of work between [redacted] and [redacted]. The SOW names the beneficiary and has effective dates of February 17, 2014 to December 31, 2014. The SOW references a November 29, 2010 agreement between [redacted] and [redacted] but the petitioner did not submit a copy of this agreement. Moreover, the SOW is not signed by [redacted] and it is unclear whether or not this SOW was actually executed or if any work was performed pursuant to its terms.

Further, the letter from [redacted] dated March 12, 2014 states "[t]he projects which [the beneficiary's] services are required for is expected to continue through 11/17/2014 unless the projects should be completed earlier." We note that the petitioner did not submit additional SOWs or evidence to substantiate availability of projects for the validity of the requested H-1B employment period. In the letter, [redacted] asserts that it "has repeatedly renewed service contracts with [redacted] for the past 25 years." However, there is no documentary evidence to support this statement in the record of proceeding. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 ((citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190)).

Therefore, we find that the petitioner has not established that the petition was filed for non-speculative work for the beneficiary, for the entire period requested, that existed as of the time of the petition's filing. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes

eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248. Thus, even if it were found that the petitioner would be the beneficiary's United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii), the petitioner has not demonstrated that it would maintain such an employer-employee relationship for the duration of the period requested.⁹

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

III. SPECIALTY OCCUPATION

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

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

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.

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).

In this matter, the petitioner did not submit any documents from the end client, [REDACTED] that outline the nature and scope of the beneficiary's employment. We acknowledge that the record of proceeding contains a Sub-Supplier Agreement dated January 18, 2014 between the petitioner and [REDACTED]. The agreement states in Section 4:

4.1 There may be instances in which [REDACTED] Client [REDACTED] may require that certain of the terms and conditions set forth in the primary agreement between [REDACTED] and its Client (the "Prime Contract") apply to Sub-Supplier ("flow-down provisions"). [REDACTED] and Sub-Supplier agree that all such engagements shall be governed by the flow-down provisions of this Section 4.

4.2 If Sub-Supplier [the petitioner] provides Services which, in [REDACTED] sole judgment are subject to any such flow-down provisions, then all Services provided in connection with any such Prime Contract shall be performed and provided strictly in accordance with and subject to the applicable terms and conditions of the Prime Contract, which are hereby incorporated by reference.

Based on this section, it is apparent that the relationship between the petitioner, [REDACTED] and [REDACTED] and the subsequent employment treatment of the beneficiary is dependent upon the "Prime Contract" between [REDACTED] and [REDACTED]. Despite the director's specific request, the petitioner did not submit the requested material evidence citing reasons of confidentiality. We note that failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Further, while a petitioner should always disclose when a submission contains confidential information, the claim does not provide a blanket excuse to avoid providing such a document if that document is material to the requested benefit.¹⁰ Although a petitioner may always refuse to submit confidential commercial information if it is deemed too sensitive, the petitioner must also satisfy the burden of proof and runs the risk of a denial. *Cf. Matter of Marques*, 16 I&N Dec. 314 (BIA 1977).

Here, the record of proceeding in this case is devoid of sufficient information from the end-client, [REDACTED], regarding the specific job duties to be performed by the beneficiary for that company. 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

¹⁰ Both the Freedom of Information Act and the Trade Secrets Act provide for the protection of a petitioner's confidential business information when it is submitted to USCIS. *See* 5 U.S.C. § 552(b)(4), 18 U.S.C. § 1905. Additionally, the petitioner may request pre-disclosure notification pursuant to Executive Order No. 12,600, "Predisclosure Notification Procedures for Confidential Commercial Information." Exec. Order No. 12,600, 1987 WL 181359 (June 23, 1987).

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.

On appeal, the petitioner asserts that providing information from the end client would necessitate that USCIS determine that the end client and not the petitioner has an employer-employee relationship with the beneficiary. On the contrary, providing information from the end client concerning the work to be performed by the beneficiary under the terms of the submitted contracts would allow USCIS to fully evaluate the facts of the instant petition and would not preclude USCIS from finding that the petitioner is the beneficiary's employer for the purposes of these proceedings. However, because the record does not contain information from the end client regarding the work to be performed, we cannot conclude that the beneficiary will be employed in a specialty occupation.

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

IV. BENEFICIARY QUALIFICATIONS

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

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

V. CONCLUSION AND ORDER

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.