



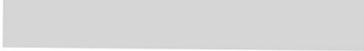
U.S. Citizenship
and Immigration
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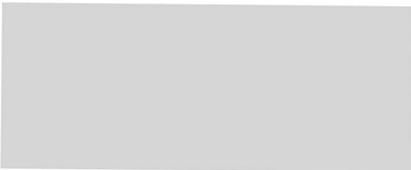
DATE: **MAR 26 2015**

OFFICE: CALIFORNIA SERVICE CENTER FILE: 

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:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the California Service Center on April 2, 2014. On the Form I-129 visa petition, the petitioner describes itself as an IT consulting company 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 on June 9, 2014, finding that the petitioner failed to establish that it will be a United States employer having an employer-employee relationship with the beneficiary as an H-1B temporary employee. Thereafter, the petitioner filed a combined motion to reopen and reconsider. The director granted the motion to reopen and reconsider but affirmed her decision to deny the petition, finding that the petitioner did not overcome the basis of the denial. The petitioner filed a timely appeal.

The record of proceeding before us contains the following: (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 dated June 9, 2014 denying the petition; (5) the Notice of Appeal or Motion (Form I-290B) for a combined a motion and supporting documentation; (6) the director's letter dated August 19, 2014 affirming her decision to deny the petition; and (7) the Form I-290B for an appeal and supporting documentation.

Upon review of the entire record of proceeding, we find that the evidence of record does not overcome the director's ground for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.¹

I. FACTUAL AND PROCEDURAL BACKGROUND

In this matter, the petitioner stated in the Form I-129 petition that it is an IT consulting company and that it seeks the beneficiary's services as a programmer analyst to work on a full-time basis for \$51,000 per year. In addition, the petitioner indicated that the beneficiary would be employed at [REDACTED] WI [REDACTED]. The petitioner stated that the dates of intended employment are from October 1, 2014 to September 13, 2017.

In a letter dated March 19, 2014, the petitioner provided the following job description:

In the position of Programmer Analyst, [the beneficiary] will be responsible for

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



system development, which includes requirements capture, solution design, code development & test, rollout, user training, and ramp to production support. He will contribute to all facets of the maintenance of systems and required system documentation, reports, system tables, and process flows within assigned areas of primary responsibility, along with serving as a support/backup resource for Operations and Customer Service groups and other internal departments. This will include providing support instructions for production systems and supportability consulting to groups developing major new functionality for specific applications and creating and maintaining internal system and end user support documentation. [The beneficiary] will also trouble shoot problems with existing web applications, recommending and implementing solutions.

[The beneficiary]'s knowledge of information technology and his expertise in software analysis, design, configuration, and coding, coupled with his proven understanding of software languages and their tools in area of [REDACTED] concern, provides [REDACTED] with a solid foundation.

[The beneficiary] will develop and program software systems using various hardware and operating systems. This will include converting symbolic statements of scientific, engineering, and other technical problem formulations and administrative data to detailed logical flow charts for coding into computer language. He will develop and write computer programs to store, locate, and retrieve specific documents, data, and information, in addition to developing or modifying restart procedures and writing macros and sub-routines to be used by other programming personnel.

Using his knowledge of software development, program construction, distributed processing and familiarity of debugging tools, [the beneficiary] will assist in analyzing business procedures and problems to redefine data and convert them into programmable forms of EDP, along with planning and preparing technical reports, memoranda, and instructional manuals to document program development.

[The beneficiary] may also be called upon to handle the following duties:

- Developing and programming computer software applications using various software and interface with the technical staff in the complex programming needs and document modification concerning the systems software; 30%
- Responsible for improvements in software computer utilization and determine necessity for modifications; 10%
- Reviewing software program for compliance with company standards and requirements and assisting in identifying deficiencies of computer runs and

perform specialized programming assignments; 5%

- Developing and enhancing the software systems for wider applications and customize it for specific requirements; 5%
- Using RDBMS to log system change orders and analyze, develop and implement new applications with GUI and analyze software requirements to determine feasibility of design within time and cost restraints; 15%
- Identifying deficiencies, troubleshooting problems and supporting user needs with professional knowledge for test planning, defect tracing and provide assistance in use of RDBMS; 10%
- Analysis and Design of system which includes Preparation of Process Flow Diagrams, Entity Relationship Diagrams, File design, Program Specification and Design Document; 10%
- Database and application analysis/design logical and physical database; 5%
- Interacting with other technical staff in researching and interpreting technical data; 5% [and]
- Assisting as part of the team to resolve technical problems requiring good judgment and creativity in developing solutions. 5%

In the letter of support, the petitioner also stated that "these duties...require an advanced theoretical knowledge and practical expertise gained through either a Bachelor's or a Master's degree in Computer Science, Information Systems, Management Information Systems, Electrical/Electronics Engineering, Physics, or a closely related field."

Moreover, the petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. We note that the LCA designation for the proffered position corresponds to the occupational classification of "Computer Programmers" – SOC (ONET/OES Code) 15-1131. The petitioner designated the proffered position as a Level I (entry level) position. In the LCA, the petitioner listed work locations as [REDACTED] WI [REDACTED], and its address at [REDACTED], Texas [REDACTED].

Furthermore, the petitioner submitted the following evidence:

- A document signed by the petitioner and the beneficiary related to the petitioner's right of control over the beneficiary, and listing validity dates of October 1, 2014 to September 30, 2017.

- An October 24, 2013 Contract for Services Agreement for Consultant External (CE) Classification between [REDACTED] and the petitioner.
- A March 13, 2014 letter from [REDACTED] to the beneficiary confirming that the State of Wisconsin Department of Transportation (State of Wisconsin) will not provide a client letter per their policy.
- A March 13, 2014 letter from [REDACTED] in reference to a Master Agreement between the petitioner and [REDACTED].

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on April 28, 2014. The director acknowledged that the petitioner had submitted various documents in support of the petition, but found that the evidence was insufficient to establish that a valid employer-employee relationship would exist for the duration of the period requested. The director outlined the types of evidence to be submitted.

In response to the RFE, the petitioner also submitted the following documents:

- A May 2, 2014 letter from [REDACTED] in reference to a Master Agreement between the petitioner and [REDACTED].
- A May 2, 2014 letter from [REDACTED] restating the State of Wisconsin's policy not to provide a client letter.
- Emails from [REDACTED] and the State of Wisconsin from 2013-2014 with work order attached.
- Copies of the beneficiary's timesheets.

The director reviewed the evidence but determined that the petitioner failed to establish eligibility for the benefit sought. The director denied the petition on June 9, 2014. Subsequently, the petitioner filed a combined motion to reopen and reconsider, and submitted the following:

- A July 1, 2014 letter from the State of Wisconsin.
- A contract between [REDACTED] and [REDACTED]. The contract runs from October 17, 2011 until June 30, 2012, with five potential one year extensions if mutually agreed upon by both parties in writing.

The director granted the motion, but affirmed her decision to deny the petition. The petitioner filed an appeal with additional documents, which include:

- An August 29, 2014 letter from [REDACTED] to clarify the terms of its contract with [REDACTED]
- A copy of information on the State of Wisconsin's [REDACTED]

II. EMPLOYER-EMPLOYEE RELATIONSHIP

We reviewed the record of proceeding in its entirety. We will now discuss whether the petitioner has established 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." 8 C.F.R. § 214.2(h)(4)(ii).

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.

8 C.F.R. § 214.2(h)(4)(ii); *see also* 56 Fed. Reg. 61111, 61121 (Dec. 2, 1991). In this matter, the record is not persuasive in establishing that the petitioner will have an employer-employee relationship with the beneficiary.

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). 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

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

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 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))).

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).

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, not who has the *right* to provide the tools required to complete an assigned project. *See id.* at 323.

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).

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).

The petitioner claims that it will have an employer-employee relationship with the beneficiary. However, as will be discussed, there is insufficient probative evidence in the record to support this assertion. 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)). 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."

In the Form I-129, the petitioner indicated that the beneficiary will work off-site as a programmer analyst. A letter dated March 13, 2014 from [REDACTED] indicates that the petitioner has an agreement regarding the beneficiary's employment with [REDACTED] who has "a confidential Master Service Agreement ("Agreement") with the State of [Wisconsin] to provide information technology solutions and services."⁵ We note that the petitioner did not disclose in its initial filing that the beneficiary's services to the end-client, State of Wisconsin, are further handled by [REDACTED] who administers a vendor management services program for the State of Wisconsin. On its combined motion to reopen and reconsider, the petitioner submitted a contract between [REDACTED] and [REDACTED] for its work at State of Wisconsin. Upon review of both agreements, we find that the petitioner did not establish its employer-employee relationship with the beneficiary.

For example, the contracts have conflicting provisions regarding employer-employee relationship and exercise of control over the means and manner in which services are provided. For example, the contract between [REDACTED] and [REDACTED] includes the following language at section 1.24:

[REDACTED], and contracted personnel are independent contractors with respect to the performance of all work to be performed hereunder and neither [REDACTED] nor Contracted Personnel shall be deemed for any purpose to be an employee, agent, servant or representative of [REDACTED] the State or any Agency. [REDACTED] shall exercise control over the means and manner in which Services are provided and performed under this Contract, and in all respects, the relationship to [REDACTED] and the [end-client] shall be that of an independent contractor, not an employee or agent.

⁵ We note that the record does not contain a copy of Master Service Agreement between [REDACTED] and the State of Wisconsin. While a petitioner should always disclose when a submission contains confidential commercial information, the claim does not provide a blanket excuse for the petitioner's failure to provide such a document if that document is material to the requested benefit. 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 (BLA 1977).

This contract reflects that [REDACTED] will exercise control over the means and manner in which services are provided, and that the beneficiary will not be an employee of [REDACTED] or the end-client. Further, in Section 1.27, it states that "[REDACTED] agrees that the Contracted Personnel provided hereunder are W2 employees of [REDACTED] (unless otherwise specified by Purchase Order)" and "warrants that it bears the sole responsibility for the payment of compensation to the Contracted Personnel, including, but not limited to, salary, taxes, contributions and benefits."⁶ Therefore, the contract reflects that [REDACTED] will control the means and manner in which the services are provided, that [REDACTED] will be the employer, and that [REDACTED] will be responsible for the payment of the beneficiary.

Moreover, in section 1.3.1., the contract indicates that "[REDACTED] is solely responsible for verifying that the Contracted Personnel have input complete and accurate work hours into [the time records]." Section 2.9.4 further states that [REDACTED] will appoint a Contract Administrator, who will "have authority to make managerial and technical decisions concerning the Services deliverable under the Contract." As such, the contract reflects that [REDACTED] is responsible for supervising the beneficiary.

However, the petitioner's contract with [REDACTED] dated October 24, 2013 contradicts the provisions in the [REDACTED] contract with [REDACTED]. Specifically, in section 2, the contract indicates that "[t]he scope and performance of services shall be under the supervision, direction, and control of [the end-client]." It also states that "[the end-client] and the petitioner shall determine when, how, and where [the petitioner] shall perform services for [the end-client]." This contract reflects that the client, in this case, the State of Wisconsin, would supervise, direct and control the performance of services; and it would be involved with when, how, and where the contractor performs services.

The petitioner's contract with [REDACTED] further provides in section 8 that "[the petitioner] acknowledges and covenants that it is an independent contractor; that nothing in this Agreement shall be considered to create an employer-employee relationship between the parties, and [the petitioner] shall not be deemed to be an employee of [REDACTED] for any purpose whatsoever." In the same section, the contract states that the petitioner is solely responsible for withholding income tax and benefits, and that the petitioner shall have no claim against [REDACTED] for worker's compensation, unemployment insurance or compensation, vacation pay, sick leave...etc. Notably, the contract does not reference the beneficiary, the end-client or the date of employment for the project.

Although this language related to the petitioner assumes the duties of an employer, we find that the petitioner did not provide sufficient evidence to substantiate its employer-employee relationship with the beneficiary. For H-1B classification, the petitioner is required to submit written contracts

⁶ The petitioner submitted a work order in response to the RFE, but it is unclear if the submitted work order is a part of this contract. Further, the work order does not provide information regarding payment of compensation.

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 this matter, the petitioner did not provide a written contract or an employment agreement; instead, it provided a document entitled "[the petitioner]'s Right to Control over [the beneficiary]." The document states that the beneficiary "will work under the supervision and control of [the petitioner]," and that "only [the petitioner] has the right to control the work of [the beneficiary] on a day-to-day basis." The document is not dated, but states that the validity period is from October 1, 2014 to September 30, 2017, and is signed by both the petitioner and the beneficiary.

While the petitioner claims its right of control over the beneficiary, we find that the petitioner did not provide sufficient documentary evidence to support its claims. As previously noted, when making a determination of whether the petitioner has established that it has or will have an employer-employee relationship with the beneficiary, we look at a number of factors, including the petitioner's right to control the manner and means by which the product is accomplished including the source of the instrumentalities and tools; the method of payment; the provision of employee benefits; the tax treatment and more. The document entitled "[the petitioner]'s Right to Control over [the beneficiary]" indicates that the petitioner "will retain full discretion over when and how long [the beneficiary] will work, the provision of employee benefits, the method of payment, and the right to hire and pay any assistants as required."

However, the petitioner did not provide any further information on this matter, such as a description of the instrumentalities and tools that are required to perform the duties. Further, we note that while the method of payment of wages can be a pertinent factor to determining the petitioner's relationship with the beneficiary, the petitioner did not submit documentation to establish the method of payment (such as pay statements or quarterly wage reports) of wages. Moreover, the petitioner also did not submit evidence regarding the provision of employee benefits and the tax treatment.⁷ In addition, the petitioner did not provide information regarding the right to hire and pay any assistants as required.

The document further states that the beneficiary "will telephone or otherwise communicate directly with [the petitioner] no less than once a week" and "will be subject to regular progress/performance reviews." It is also stated that the beneficiary's supervisor is [REDACTED] the signatory for this petition. However, the petitioner did not submit documents to establish communication with the beneficiary. In response to the RFE, the petitioner submitted copies of several email communication. However, the email communication is between [REDACTED] and the end client, and not the petitioner and the beneficiary.

⁷ According to the beneficiary's Certificate of Eligibility for Nonimmigrant (F-1) Student Status (Form I-20), the beneficiary was authorized to be employed by the petitioner beginning February 5, 2014. A letter from [REDACTED] dated March 13, 2014 indicates that the beneficiary has been working on-site at the State of Wisconsin Department of Transportation (DOT) since November 14, 2013.

Further, the email communications do not indicate that the petitioner supervises the beneficiary's work on a day-to-day basis. An email dated March 13, 2014 from [REDACTED] a supervisor for the end client, states that "[the beneficiary] works for and reports to me here at the [end-client]." In another email dated November 23, 2013 from [REDACTED] to the end client indicates that the beneficiary has been working for the end-client for two weeks and requests for feedback. In response, the end client states that "[the beneficiary] has asked for some time off in December which will slow us down a bit, but we can work around that." In another email dated April 30, 2014 from [REDACTED] to the end client, [REDACTED] indicates that the beneficiary has been on the project for six months, and requests additional feedback to pass along his "employer." Notably, this "employer" is not identified. In response, the end client states that "[the beneficiary] is doing a good job with supporting the [end-client]'s web infrastructure." Here, even if we assume that the "employer" as referred to in the email is the petitioner, the emails indicate that the petitioner does not have discretion over when and how long to work since the beneficiary requested time from the end-client. Further, the emails indicate that the beneficiary reports to the end client, and that the petitioner does not have day-to-day supervision since [REDACTED] is requesting for feedback from the end client two weeks after the start of the employment, and again, after six months had passed.

In addition, the petitioner submitted copies of the beneficiary's timesheets. However, the timesheets only identify the beneficiary, the name of the project, and the hours worked. The "task/activity" is generally described as "professional work" and do not establish the specific duties of the position or provide information regarding which entity supervises the beneficiary.

We also find that the evidence submitted fails to establish non-speculative employment for the beneficiary for the entire period requested, specifically from October 1, 2014 to September 13, 2017. For example, the letter from [REDACTED] dated March 13, 2014 indicated that the project "has an estimated duration through November 2016 with the possibility of extension." However, a letter dated July 1, 2014 from the end client indicates that the beneficiary "is on annual consulting contract that has options to be renewed." Further, the work order submitted with the emails indicates that the engagement end date is October 13, 2016. The contract between [REDACTED] and [REDACTED] was to "run from October 17th 2011 _____ through June 30, 2012, with five (5) potential, one (1) year-extensions if mutually agreed upon by both parties in writing." However, the petitioner did not submit further evidence of extensions. A work badge that states the beneficiary's and the end-client's name indicates that the expiration date is November 4, 2016. Due to inconsistencies in the record of proceeding with regard to the beneficiary's dates of intended employment, we find that the petitioner failed to establish employment for the beneficiary for the entire period requested.

In addition, we note that the petitioner did not provide an itinerary for the services to be provided. In the Form I-129, the petitioner indicated that an itinerary is included with the petition; however, the petitioner did not submit an itinerary. The LCA lists the work locations as [REDACTED] Wisconsin [REDACTED], and the petitioner's address at [REDACTED] Texas [REDACTED]. Notably, the regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) states, in pertinent part:

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 Form 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.

Notably, 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). 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 with the beneficiary for the duration of the period requested.⁸

⁸ The agency made clear long ago that speculative employment is not permitted in the H-1B program. For example, a 1998 proposed rule documented this position as follows:

Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. See section 214(i) of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998). While a petitioner is certainly permitted to change its intent with regard to non-speculative employment, e.g., a change in duties or job location, it must nonetheless document such a material change in intent through an amended or new petition in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E).

After a thorough review of the evidence of record, we find that it 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). Without evidence supporting the petitioner's claims, the petitioner has not established eligibility in this matter. 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. at 190).

III. ADDITIONAL ISSUES

We will address an additional issue beyond the decision of the director, namely whether the petitioner has established that the proffered position qualifies as a specialty occupation position.

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. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable 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 also 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 387. To avoid this illogical and absurd 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. 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.

To ascertain the intent of a petitioner, USCIS must look to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

In this matter, the petitioner stated that the position requires "a Bachelor's or a Master's degree in Computer Science, Information Systems, Management Information Systems, Electrical/Electronics Engineering, Physics, or closely related field." Such an assertion, i.e., that the duties of the proffered position can be performed by a person with a degree in any one of those disciplines, (i.e., computer science, engineering, physics or a related field) suggests that the proffered position is not, in fact, a specialty occupation. More specifically, the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but such a degree in a *specific specialty* that is directly related to the position. See section 214(i)(1)(b) of the Act, 8 U.S.C. § 1184(i)(1)(b), and 8 C.F.R. § 214.2(h)(4)(ii).

Provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added).

In other words, while the statutory "the" and the regulatory "a" both denote a singular "specialty," we do not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. See section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). This also includes even seemingly disparate specialties providing, again, the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

Here, the petitioner indicated that a bachelor's degree in a number of disciplines is acceptable for the proffered position, specifically, business, technology, computer science, and electrical engineer. However, it must be noted that these include broad categories that cover numerous and various specialties. Therefore, it is not readily apparent that a degree in any and all of these fields is directly related to the duties and responsibilities of the particular position proffered in this matter.

Moreover, we note 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 company's job requirements is critical. See *Defensor v. Meissner*, 201 F.3d at 387-388. That is, it is necessary for the end-client to provide sufficient information regarding the proposed job duties to be performed at its location in order to properly ascertain the minimum educational requirements necessary to perform those duties. *Id.* at 387-388. The court held that the former 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. 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.

In this case, we find that the job duties provided by the petitioner in its support letter dated March 19, 2014 differ from the job description provided by [REDACTED] dated March 13, 2014. In addition, the letter from end client dated July 1, 2014 states that the beneficiary's responsibilities are as follows, which also differ from the job description provided by the petitioner:

- Supports Websphere 7 and IIS environment including Java and .Net applications.
- Performs systems backups and recovery.
- Maintains data files and monitors system configuration to ensure data integrity.
- Has knowledge of commonly used concepts, practices, and procedures within a particular field.

Moreover, the letter from [REDACTED] refers to the proffered position as "WebSphere Administrator." Further, the work order indicates that the qualifications for the proffered position include the following:

- Administration-Customer Service
- Phone based technical support * 5+ Yrs.
- Problem documentation and communication*and 5+ Yrs.
- Problem resolution (development and implementation)* and 5+ Yrs.
- Project coordination and scheduling: Schedule and coordinate service delivery with vendor and custom* 5+ Yrs.

Based on the work order, it appears that the end client does not require a degree in a specific specialty. We reiterate that the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but such a degree in a *specific specialty* that is directly related to the duties and responsibilities of the position. See 214(i)(1)(b) of the Act and 8 C.F.R. § 214.2(h)(4)(ii).

We find that the petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary, 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. CONCLUSION

As set forth above, 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.

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.