



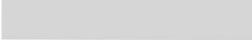
U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **MAY 04 2015**

OFFICE: VERMONT 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:

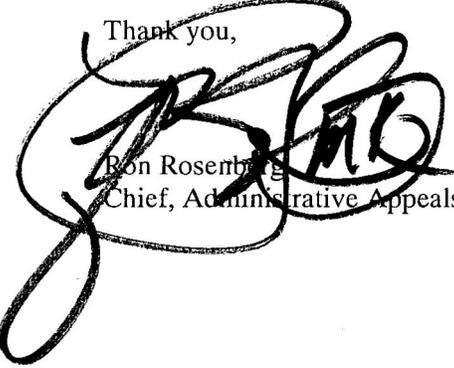
SELF-REPRESENTED

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 (hereinafter "the director") denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed. The petition will be denied.

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner describes itself as an information technology services company. In order to employ the beneficiary in what the petitioner identifies as a position in the Computer Programmers occupational category, with "Computer Programmer/Programmer Analyst" as its job title,¹ the petitioner seeks to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, concluding that the evidence of record failed to demonstrate the existence of an employer-employee relationship between the petitioner and the beneficiary.

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 denying the petition; and (5) on appeal, the Form I-290B and supporting documentation.

For the reasons that we shall discuss in the body of this decision, based upon our review of the entire record of proceeding as expanded by the submissions on appeal we conclude that the director was correct in denying the petition on the ground for denial that she specified in her decision. Accordingly, the appeal will be dismissed, and the petition will be denied.

I. EVIDENTIARY STANDARD ON APPEAL

As a preliminary matter, we affirm that, in the exercise of our appellate review in this matter, as in all matters that come within our purview, we follow the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010). In pertinent part, that decision states the following:

Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.

* * *

The "preponderance of the evidence" of "truth" is made based on the factual circumstances of each individual case.

¹ The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for the SOC (O*NET/OES) Code 15-1131, the associated Occupational Classification of "Computer Programmers," and a Level I prevailing wage rate. The petitioner identifies the job title as "Computer Programmer/Programmer Analyst" in the Form I-129 and simply as "Programmer Analyst" in the LCA.

* * *

Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. See *INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Id.

We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In doing so, we apply the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon our review of the present matter pursuant to that standard, however, we find that the evidence in the record of proceeding does not support the petitioner's contentions that the evidence of record requires that the petition be approved.

Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, we find that the director's determinations in this matter were correct. Upon review of the entire record of proceeding, and with close attention and due regard to all of the evidence submitted in support of this petition, we find that the record does not contain sufficient relevant, probative, and credible evidence to lead us to believe that it is "more likely than not" or "probably" true that the beneficiary and the petitioner would be engaged in the employer-employee relationship required to provide the petitioner standing to file the petition.

II. LACK OF STANDING TO FILE THE PETITION AS A UNITED STATES EMPLOYER: THE EMPLOYER-EMPLOYEE ISSUE

A. The Law

The issue presented to us on appeal is whether, contrary to the director's decision, the petitioner has established that it has satisfied that part of the regulatory definition of a "United States employer" that requires that the entity filing the H-1B petition 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" as set out at 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.

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

The record is not persuasive in establishing that the petitioner will have the requisite employer-employee relationship with the beneficiary. The evidence of record simply is not sufficiently comprehensive to bring to light all of the relevant circumstances that pertain to the parties among themselves and also with relation to the beneficiary with regard to the U.S. Department of Labor's Bureau of Labor Statistics [redacted] work that the petitioner asserts as the basis of this petition.

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

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

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))).

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).

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, 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).

We shall now discuss why application of the *Darden* and *Clackamas* tests to the record of proceeding now before us precludes us from concluding that the petitioner has established itself as a "United States employer" by virtue of the requisite "employer-employee relationship" with the

beneficiary.

B. Overview of the Record

The record reflects that the beneficiary is in F1-OPT status which will expire on November 28, 2015. Accordingly, we note that this petition was filed to change the petitioner's status from F-1 to H-1B.

The petition presents five business-entities as involved, to one extent or another, in providing the particular assignment that the petition presents as its basis. These are (1) the petitioner, [REDACTED] to whom we shall hereafter refer simply as "the petitioner"; (2) [REDACTED]; (3) [REDACTED]; (4) [REDACTED]; and (5) the [REDACTED], the entity for which and at whose location it is claimed the beneficiary would directly perform her services if this petition is approved.

As best we can discern from the record of proceeding, the petitioner asserts that the work claimed as the basis of the petition would be generated in the following contractual scenario:

- [REDACTED] has a contract with [REDACTED] – the ultimate entity for which the beneficiary's work would be performed;
- [REDACTED] has contracted with [REDACTED] for a person to perform work required by its contract with [REDACTED];
- [REDACTED] has contracted with [REDACTED] to obtain for [REDACTED] a person that can perform the [REDACTED] work; and
- [REDACTED] has contracted with the petitioner for the beneficiary, so that [REDACTED] can in turn provide the beneficiary to [REDACTED] for [REDACTED] to supply to [REDACTED]
- [REDACTED] would in turn provide the beneficiary to [REDACTED]

The record of proceeding contains no credible evidence of any direct-communication lines between the petitioner and [REDACTED] the end-user for whom it is claimed the beneficiary would perform her services; and there is no evidence of any contract between the petitioner and [REDACTED] let alone one in which [REDACTED] ensures or allows the petitioner any participation in determining and supervising the substantive nature of the beneficiary's work as it would be performed day-to-day, pursuant to various specific taskings, during the course of the claimed project. Rather, from the body of evidence in the record, it appears that, upon the beneficiary's assignment to [REDACTED] work, the petitioner's relationship with the beneficiary would be rather remote, consisting mostly of administrative responsibilities, such as administering the beneficiary's pay and benefits; meeting the tax and insurance requirements associated with the beneficiary's employment; and performing periodic performance evaluations.

C. Discussion and Analysis

In the Form I-129, signed on March 28, 2014, the petitioner indicated that it is seeking the beneficiary's services as a "computer programmer/programmer analyst" on a full-time basis at a minimum rate of pay of \$60,000 per year. As noted previously, the petitioner submitted an LCA that had been certified for a job prospect within the occupational classification of "Computer Programmers" - SOC (ONET/OES Code) 15-1131, at a Level I wage. In its March 28, 2014 letter of support, the petitioner's CEO stated that the company is "engaged in the business of computer software development for various large and mid-size organizations," and that "in-depth knowledge of various technology areas enables us to provide end-to-end solutions and services."

The petitioner stated that the beneficiary would work at the offices of the end-client, ██████████ in ██████████. The petitioner requested approval of the H-1B petition for the beneficiary for the period of October 1, 2014 to August 31, 2017. The petitioner also stated that, upon completion of her ██████████ assignment, the beneficiary would work at the petitioner's home office. However, the petitioner neither identified any in-house project upon which the beneficiary would work as a programmer analyst nor did it provide any substantive details to support specialty-occupation classification for such any such work. So the petitioner should note that we accord no weight to the petitioner's generalized and unsubstantiated assertion about the beneficiary's employment after completion of the purported ██████████ project-work. 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 8 C.F.R. § 103.2(b)(1); *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

The "Position" section of the petitioner's March 28, 2014 letter of support includes the following paragraphs:

The Computer Programmer/Programmer Analyst analyzes the data processing requirements to determine the computer software, which will best serve those needs. Thereafter, she will design a computer system using that software, which will process the data in the most timely and inexpensive manner, and implements that design by overseeing the installation of the necessary system software and its customization to the client's unique requirements. The actual computer programming may be performed with the assistance of the programmers.

Throughout this process, the Computer Programmer/Programmer Analyst must constantly interact with the management, explaining to it each phase of the system development process, responding to its questions, comments and criticisms, and modify the system so that the concerns raised by the clients are adequately addressed. Consequently, the Computer Programmer/Programmer Analyst must constantly revise and revamp the system as it is being created to respond to

unanticipated software anomalies [heretofore] undiscovered, to the extent that occasionally, the system finally created bears seemingly little resemblance to that which was initially proposed.

The letter's "Position" section also includes a table which briefly describes six phases which the petitioner ascribes to "development of the system." However, no information is provided from the end-client [REDACTED] or from any of the three business-entities interposed between the petitioner and [REDACTED] that corroborates that the beneficiary would be employed in those six phases.

The petitioner should also note, therefore, that we attribute very little weight to the above-referenced parts of its letter of support, in that there is no evidence of record corroborating that the scope of any work to which the beneficiary would be assigned is as broad as the letter describes. 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 petitioner's support letter also describes "the day-to day responsibilities" of the proffered position as follows:

- Involved in designing, coding, testing and documenting SAS Programs/Macros and established a validation Process by the utilization of Procs Compare that saved both time and resources. **% of Time: 15**
- Developed a system called [REDACTED] to get the LDB data and report it in the required format and developed UNIX script to automate the process and to FTP it to the specified location. **% of Time: 20**
- Worked on creating quarterly and annually establishment level reports by different categories for job creation with expanding and opening establishments and job destruction with contracting and closing establishments. **% of time: 20**
- Created scheduled Jobs and alerts for updates and backups. **% of time: 20**
- Updated the formats catalog with necessary user-defined formats that are required to generate tables and listings. **% of time: 15**
- Performed system testing for verification and validation. **% of time: 10**

It is noteworthy that all but the first of the duty segments are presented in the past tense, and thus as responsibilities already fulfilled, rather than as ones that would attach to the beneficiary if this petition were approved. However, it serves no purpose for us to address those duties, as nowhere in the record does [REDACTED] (the end-client) or even its apparent prime-contractor, [REDACTED] confirm, endorse, adopt, or in any way acknowledge those duties as comprising the work that the beneficiary specifically would perform for any period. Consequently, we find that the evidence of record fails

to corroborate that the duties which the petitioner ascribes to the proffered position would in fact be performed in the course of the [REDACTED] project-work asserted to be the core of the petition.

1. Documentary Evidence⁵

Documentation submitted at the petition's filing

Among other documents enclosed with the Form I-129 on its filing were:

- A **February 23, 2014 "Engagement Confirmation Letter of [the Beneficiary]"** from the [REDACTED] president. It attests that the beneficiary "will be providing consulting services" through [REDACTED] to [REDACTED] (to which the letter refers as [REDACTED] client). *The letter does not mention [REDACTED]*. The letter also provides a scenario at odds with the relationship with the beneficiary that the petitioner claims for itself: here [REDACTED] president attests that the beneficiary "will be supervised by her employer, [REDACTED] and report directly to [REDACTED] - president of [REDACTED], on a weekly basis." Moreover, the president of [REDACTED] states that compensation "will be paid by [REDACTED] who will be [the beneficiary's] actual employer"; that the beneficiary "will operate at all times under the administrative control of [REDACTED] management"; that "all activities, including managerial supervision, hiring and firing decisions are controlled by [REDACTED]"; and that [p]erformance reviews are conducted directly by [REDACTED]. Not only is [REDACTED] *not* the petitioner here, but the above-quoted assertions by the [REDACTED] president conflict with some control factors that the petitioner claims for itself. We also note that [REDACTED] president here attests that [REDACTED] "anticipates" that the beneficiary will be providing services "for the foreseeable future," because, the letter states, "as the project is ongoing, no specific end-date is set." We count this as an indication of the uncertainty about the duration of [REDACTED] project-work, and we find that this aspect highlights the fact that the record does not establish a definite period of employment for the beneficiary.
- A copy of a **June 15, 2013 "Offer Letter - Employer-Employee Relationship Document,"** in the form of a letter from the petitioner to the beneficiary, which the beneficiary countersigned. This letter (to which the petitioner refers as its employment contract with the beneficiary) does not reference [REDACTED], the purported end-client, or any specific assignment. However, this emphasis on

⁵ In light of the their volume, we shall not here identify and discuss all of the items introduced into the record. Nonetheless, we have reviewed and considered all of the documents submitted into the record, examining each one for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, and with due regard to any positive weight it may carry in support of the petitioner's claims, as required by the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010).

the beneficiary's readiness to move wherever the petitioner may assign her is consistent with the type of limited work-relationship between a beneficiary seen as a staffing asset and a petitioner functioning primarily as a staffing pool that assigns persons in its pool to other entities to temporarily augment project-work teams that are not under the petitioner's control.

- A copy of an **"Addendum to Employment Contract Dated June 15, 2013 between [the Petitioner] and [the Beneficiary]."** This three-page document, which appears to be an addendum to the above-described "Offer Letter," notifies the beneficiary of a broad array of "functional areas" for which she "is being hired" to handle as her responsibility when assigned to any project of a petitioner's client. The document includes statements (1) that the beneficiary "will be required to provide her weekly update to our Tech Lead and attend weekly calls (twice a week) with our Tech Lead as well," and (2) that she "is also required to alter/modify or take corrective actions as advised by our Practice Lead. For successful execution of the project on time and budget." The document also includes two tables, which the document introduces as outlining "[h]er Roles, Responsibilities, and Key Activities." We observe that there is no indication in this document, or anywhere else within the record of proceeding, that its content has been endorsed, approved, or required by *any* of the entities figuring in this petition's scenario (i.e., [REDACTED]). Nor does the evidence of record substantiate that the document's outlined activities, responsibilities, and reporting requirements comport with the content of the contractual documents that have been submitted into the record. In particular, we see no documentary evidence of any role specified for a "Team Lead" of the petitioner in the "real time" management or supervision of the work-site operations of any [REDACTED] project-work. Accordingly, we find no probative value in this document. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972).
- Copies of [REDACTED] **timesheets for January and February of 2014.** The time sheets pertain to the beneficiary, but they do not identify any end-client for which the beneficiary accrued the recorded work-hours. Further, by the entry of separate project-numbers, the time sheets specify *two* projects upon which the beneficiary has worked, and they do so by project numbers rather than names. In any event, we see nothing in the timesheets that indicate any particular element of control that the petitioner would have a right to exercise in the day-to-day supervision of the beneficiary during assignment to [REDACTED] work.
- Copies of **the beneficiary's weekly status reports to the petitioner, for January and February of 2014.** The reports reflect that the beneficiary reported regularly to the petitioner for that two-month period while assigned to

work in her F-1 OPT status. However, these after-the-fact reporting documents do not reflect the extent, if any, that the petitioner had been determining or otherwise influencing the task assignments upon which the beneficiary reported. Therefore, we accord minimal weight to these documents in balancing common-law employer-employee factors.

- A copy of the petitioner's "**Organizational Chart.**"
- A copy of the petitioner's "**Year End Performance Review Form**" as completed for the beneficiary for 2013. We observe that, while this document reflects that the petitioner has maintained a general assessment of the beneficiary's work in her F-1 OPT status, there is no evidence in the record that the end-user of the beneficiary's services, or any of the other business entities identified by the petitioner as playing a role in the beneficiary's assignment to work, would either have an interest in, or be in anyway bound, by the petitioner's annual performance reviews. As such, this document also carries little weight in our employer-employee analysis.
- Copies of the petitioner's "**Employee Benefits Package**" power-point slides. We find that the slides are consistent with other evidence in the record that the petitioner would pay for any employment-related benefits due the beneficiary, distribute the beneficiary's pay to her, and take care of tax, social security, and insurance payments arising from the beneficiary's employment – and we have weighed that factor in the petitioner's favor.
- A copy of the petitioner's "**Performance Management**" power-point slides. We find that the petitioner has not established how any of the information in these slides demonstrates that the constellation of contractual terms and conditions generating the beneficiary's assignment to work would allow the petitioner any latitude of control over how the beneficiary's day-to-day work activities would be assigned, supervised, or evaluated during their performance.
- A copy of "**The Employer/Employee Relationship Process**" power-point slides. We view these slides, and the ones just discussed above, as evidence that the petitioner has a formalized program for evaluating the performance of persons on its payroll – and that is a factor that we have also weighed in the petitioner's favor. However, they do not establish themselves as factors influencing the beneficiary's day-to-day work while on assignment away from the beneficiary.
- A **February 25, 2014 letter** from , which mostly addresses the work that the beneficiary has been doing in F-1 OPT status, as a "Software Engineer"

[(and *not* as a computer programmer/programmer analyst)]" from March 19, 2012. The letter avers that, at the time of its signing, [REDACTED] had a contract with [REDACTED] pursuant to which [REDACTED] was providing "information technology services" to [REDACTED] through a certain "Bridge Contract" for the period January 1, 2014 through December 31, 2014. The letter also states that the beneficiary was providing her services - that is, as a Software Engineer - pursuant to that contract. [REDACTED] also expressed its confidence that it would be awarded the follow-on contract, which it was re-competing. The letter also asserts that, if [REDACTED] is awarded the follow-on contract, as [REDACTED] anticipates, the contract "could begin at any time between July 1, 2014 and January 1, 2015." Also, the letter states that [REDACTED] "retains [the beneficiary's] services via a contract with [REDACTED]." Significantly, [REDACTED] mentions no connection at all with the petitioner. It is also significant that the documentation states that the beneficiary is working as a Software Engineer at [REDACTED] and that the related contract would not extend beyond December 2014. (As earlier noted, the petition was filed for the period October 1, 2014 to August 31, 2017). At no time does [REDACTED] reference the job-title provided by the petitioner for the proffered position, namely, Computer Programmer/Programmer Analyst. Also, the letter indicates that as late as February 25, 2014, [REDACTED] had not secured any follow-on contract for [REDACTED] work spanning the employment period requested in the petition. Notably, the letter does not speak in terms of what roles, if any, the petitioner would play in controlling the beneficiary once the petitioner dispatches her to a [REDACTED] assignment.

- A copy of the beneficiary's [REDACTED] **identification badge.**
- A copy of a **March 10, 2014 confirmation-of-employment letter from [REDACTED] president.** This letter's content materially conflicts with the aforementioned February 23, 2014 "Engagement Confirmation Letter" from [REDACTED] president. Here [REDACTED] states that the beneficiary is working for [REDACTED] the end-client, but *not* as an employee of [REDACTED]. The letter asserts that the petitioner is the beneficiary's employer and is responsible for "full and ultimate control over" the beneficiary, including salary, hiring and firing, and performance review "among other things." Also, as duties that the beneficiary "will be performing" the letter lists eight duty-components, all of which are stated in the past tense as if they had already been completed.
- A copy of a "**Subcontractor Services Agreement**" ("**SSA**") **between [REDACTED] and the petitioner, identified as "Subcontractor."** The SSA's effective date is October 17, 2013. This document provides terms and conditions that are to be deemed automatically incorporated into any follow-on contractual request by [REDACTED] to the petitioner to "provide temporary workers for services to be performed by [REDACTED] client[s] at client sites." According to procedural provisions in the SSA, the petitioner would,

upon [REDACTED] request, provide job candidates for [REDACTED] to interview as candidates for particular work assignments. The SSA also provides that, upon finding a suitable candidate, [REDACTED] would assign him or her to work at one of its clients' sites by issuing a "Project Notification Form," which the SSA identifies as an attachment. The petitioner has not submitted a copy of that form into the record.

- A copy of a **March 6, 2013 "Statement of Work (SOW)" between [REDACTED] and the petitioner.** This SOW identifies (1) the beneficiary, by name, as "Consultant"; (2) the job title as "Programmer Analyst"; and (3) as the "Client Address," what we recognize as the [REDACTED] headquarters address in [REDACTED]. The SOW's "Client" section reads as follows:

These requested services shall be provided to [REDACTED] vendor [REDACTED] and its end client [REDACTED]. The services shall be provided for the period beginning on January 6, 2014.

As "Contract Duration" the SOW specifies "12+Months with possibility of extension." Interestingly, the document describes the petitioner as "Subcontractor," but does not identify the terms "company" and "contractor," although the document states (1) that "[f]or authorized work performed, *Contractor* shall submit written, signed monthly invoices detailing the nature of the work performed in rendering services hereunder with appropriate signed and approved timesheets"; and (2) that "[t]he *company* will pay such contractor's monthly invoices upon receipt of the payment from the same from the Client." The SOW expressly incorporates the "term[s] referenced in" the Agreement executed by [REDACTED] and the petitioner on "07/05/2013" – *but a copy of that document is not provided.* The SOW also states that its details "are agreed to be supplemental to the terms and conditions of the Professional Services Agreement at all times." The record of proceeding does not establish whether this "Professional Services Agreement" is the same as the previously referenced 07/05/2013 "Agreement." *However, we see no copy of any 07/05/2013 "Professional Services Agreement" in the record, either.*

- A copy of a **June 10, 2013 "Statement of Work" (SOW) between [REDACTED] and the petitioner.** Much of this SOW's form and content is the same as the earlier, March 6, 2013 SOW that we have just discussed. This later SOW also identifies (1) the beneficiary, by name, as "Consultant"; (2) the job title as "Programmer Analyst"; and (3) the [REDACTED] headquarters address in [REDACTED] as the Client's Address. This SOW's "Client" section reads the same as the earlier SOW except for the new start-date (June 15, 2013):

These requested services shall be provided to [REDACTED] vendor [REDACTED] and its end client [REDACTED]. The services shall be provided for the period beginning on June 15, 2013[.]

As "Contract Duration" the SOW also specifies "12+Months with possibility of extension." Interestingly, the document describes the petitioner as "Subcontractor," but does not identify the terms "company" and "contractor," although the document states (1) that "[f]or authorized work performed, Contractor shall submit written, signed monthly invoices detailing the nature of the work performed in rendering services hereunder with appropriate signed and approved timesheets"; and (2) that "[t]he company will pay such contractor's monthly invoices upon receipt of the payment from the same from the Client." The division of responsibilities and exercise of control over the beneficiary and his work is further clouded by the fact that the SOW expressly incorporates the "term[s] referenced in" the Agreement executed by [REDACTED] and the petitioner on the same day as the SOW – *but a copy of that document is not provided*. The SOW also states that its details "are agreed to be supplemental to the terms and conditions of the Professional Services Agreement at all times" – *but a copy of the Agreement is not provided*.

- A copy of a **June 15, 2013 "Contractor Services Agreement" ("CSA") signed by [REDACTED] and [REDACTED]**. Here [REDACTED] signs as "the Contractor" in "the business of providing consulting services." This agreement notes that [REDACTED] has entered into a contract ("the Prime Contract") with [REDACTED], and that it is pursuant to that [REDACTED] contract that [REDACTED] "has agreed to furnish certain consulting services relating to [REDACTED] Contract with [the] [REDACTED] [REDACTED]." The CSA refers to this [REDACTED] contract as "the Project" to which the CSA will apply; and it outlines terms and conditions that will be deemed to be automatically incorporated into any "[REDACTED] Statement of Acceptance" or "other written document mutually agreed to" by [REDACTED] and [REDACTED]. When signed by both parties, such an "[REDACTED] Statement of Acceptance," or acceptable substitute, will set the particular services which [REDACTED] is to perform, as well as the compensation to be paid for those services. Significantly, the CSA expressly incorporates by reference, as part of its own terms, "[a]ll Prime Contract [(i.e., [REDACTED] contract)] terms which are applicable to the services provided by ([REDACTED]) hereunder." However, the record contains no copy of the [REDACTED] prime contract.
- A copy of a **June 15, 2013 "Statement of Acceptance" signed by [REDACTED] and [REDACTED]**. Interestingly, here the two signatories (i.e., the president of [REDACTED] and the president of [REDACTED]) each agree to characterizing [REDACTED] [rather than the the petitioner] as the beneficiary's employer. This document states that "[REDACTED] Consulting agrees to accept [the beneficiary][,] an employee of

[REDACTED] [(not of the petitioner)] to provide SAS programming services to the [REDACTED]."
This document's specific terms read as follows:

JOB DESCRIPTION: SAS PROGRAMMING SERVICES

START DATE: June 15th, 2013

STAFF QUALIFICATION REQUIRED: _____

BILLING RATE: \$ 48 per hour

EXPENSE: NONE

CONDITIONS AND REVISIONS: _____

- A copy of a **June 15, 2013 "Work Order" signed by [REDACTED] and [REDACTED]**. This document opens with a statement that it "is made pursuant to the [CSA], date[d] 15th of June 2013, by and between [REDACTED] and [REDACTED] ("Subcontractor")." As with the just discussed [REDACTED] Statement of Acceptance, this document also identifies the beneficiary as a [REDACTED] *employee*, stating that [REDACTED] agrees "to accept [the beneficiary] an employee of Subcontractor [(i.e., [REDACTED])]." This document provides [REDACTED] as the work location; and it specifies June 15, 2013 as the projected start-date and June 30, 2014 as the projected end-date. The document identifies "the Project" as "SAS Development Services for the [REDACTED]" and it states the Scope of Work as "Provide SAS Development Services for the [REDACTED]" The billing rate remains the same as in the Statement of Acceptance that we just summarized above. This document also does not mention the petitioner.
- A copy of a **January 1, 2014 "Work Order" signed by [REDACTED] and [REDACTED] (again as "Subcontractor")**. This Work Order also identifies the beneficiary as "an employee of Subcontractor [(REDACTED)]," and it agrees to accept her to perform work for the same Project and the same Scope of Work as were identified in the [REDACTED] Work Order that we discussed immediately above. This document further details a new projected start-date (January 6, 2014) and a new projected end-date (December 31, 2014). The Work Order specifies the same [REDACTED] work-location as the earlier [REDACTED] Work Order, discussed immediately above; but it increases the billing rate by \$2 per hour. This document also does not mention the petitioner.
- Copies of **e-mails between the beneficiary and numerous individuals at [REDACTED]**. We find the e-mails significant not just because they corroborate that the beneficiary has been working at [REDACTED] during her F-1 OPT period,

but because they reflect that the beneficiary has been working as part of a team, rather than as an independent asset under the petitioner's immediate control, and that she has been receiving direction from [REDACTED] personnel.

- **Photographs of the [REDACTED] offices**, including the beneficiary's work location at [REDACTED]
- Copies of **checks issued by [REDACTED] to [REDACTED]** between November 2013 and January 2014.
- Copies of **documentation regarding the beneficiary's credentials and nonimmigrant status** in the United States.

Documentation submitted in Response to the RFE

The director found the evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on May 2, 2014. The petitioner was asked to submit probative evidence to establish the requisite employer-employee relationship with the beneficiary. The petitioner was also asked to submit evidence to establish that the beneficiary was maintaining valid nonimmigrant status.

The petitioner responded to the RFE by a six-page letter of reply, dated June 4, 2014, which was accompanied by a number of documents submitted to support the petitioner's contention that it based the petition upon H-1B specialty-occupation work that the beneficiary would perform at [REDACTED] in [REDACTED]. We observe that it appears that the petitioner mistakenly believes that, if this petition were approved, the petitioner could keep the beneficiary in H-1B status on the basis of work that the petitioner did not establish as secured for the beneficiary as of the time the petition was filed. We base this observation on the following segment of the RFE-reply letter:

Location of the work

[The [REDACTED] address in [REDACTED] | Once she completes her assignment at the current place, she is going to report [to] work at our location. . . .

As we noted earlier, we accord no weight to the petitioner's unsubstantiated suggestion that, upon completion of the asserted [REDACTED] work-assignment, it would engage the beneficiary in H-1B-caliber work that has not been yet specified. As we also noted earlier, H-1B specialty-occupation classification may only be approved on the basis of definite, non-speculative work that the evidence of record establishes as having been secured for the beneficiary as of the time of the petition's filing.

The petitioner's RFE-reply included the following documents:

- An additional copy of the **February 25, 2014 letter from [REDACTED]**, which we have already discussed.

- Another copy of the beneficiary's [REDACTED] **identification badge.**
- Apparently original copy of [REDACTED] **June 4, 2014 confirmation-of-employment letter**, which we have already discussed.
- Apparently original copy of the **June 10, 2013 SOW** between [REDACTED] and the petitioner, which we have already discussed.
- Another copy of the **October 17, 2013 "Subcontractor Services Agreement" ("SSA")** between [REDACTED] and the petitioner, identified as **"Subcontractor."**
- Another copy of the **June 15, 2013 "Contractor Services Agreement" ("CSA")** signed by [REDACTED] and [REDACTED] which we have already discussed.
- Another copy of the **June 15, 2013 "Statement of Acceptance"** signed by [REDACTED] and [REDACTED], which we have already discussed.
- An additional copy of the **June 15, 2013 "Work Order"** signed by [REDACTED] and [REDACTED] which we have already discussed.
- An additional copy of the **January 1, 2014 Work Order** signed by [REDACTED] and [REDACTED], which we have already discussed.
- Resubmission of the copies of **emails between the beneficiary and numerous individuals** at [REDACTED] which we have already discussed.
- Resubmission of the [REDACTED] **photographs** which we have already discussed.
- Resubmission of **documentation regarding the beneficiary's credentials and nonimmigrant status**, which we have already discussed.
- A copy of a **June 10, 2013 "Offer Letter - Employer-Employee Relationship Document,"** in the form of a letter from the petitioner to the beneficiary, which the beneficiary countersigned. Except for the date and a difference in the signatures, this appears to be identical to the June 15, 2013 letter of the same title, which we have already discussed.
- An additional copy of the **"Addendum to Employment Contract Dated June 15, 2013 between [the Petitioner] and [the Beneficiary],"** which we have already discussed.
- An additional copy of **the petitioner's Organizational Chart**, which we have

already discussed.

- An additional copy of **the petitioner's completed Performance Review Form** that we have already discussed.
- An additional copy of **the petitioner's "Employee Benefits Package" power-point slides**, which we have already discussed.
- An additional copy of **the petitioner's "Performance Management" power-point slides**, which we have already discussed.
- An additional copy of **"The Employer/Employee Relationship Process" power-point slides**, which we have already discussed.
- Copies of **miscellaneous documents related to the beneficiary's employment history**.
- A copy of an **IRS Form W-2, Wage and Tax Statement**, specifying wages and taxes that the petitioner paid for the beneficiary in 2013S.
- A **promotional brochure** published by the petitioner.

The director reviewed the information provided by the petitioner to determine whether the petitioner had established eligibility for the benefit sought. On June 16, 2014, the director denied the petition.

On appeal, the petitioner submits a letter that contends that the director's findings were erroneous. Documentation submitted with the letter includes:

- A July 8, 2014 document entitled **"Employment Letter and Job Duties of the Beneficiary,"** which was produced by the petitioner. We accord little weight to the petitioner's statements about the scope and responsibilities of the beneficiary's work, as they have not been endorsed by the end-client for whom the work was performed.
- A copy of a **July 1, 2014 "Contractor Services Agreement" (CSA) entered by [REDACTED] and the petitioner.** This agreement notes that [REDACTED] has entered into a contract with [REDACTED] pursuant to which [REDACTED] "has agreed to furnish certain consulting services relating to [REDACTED] Contract with [REDACTED] ([REDACTED]). The Agreement enlists the petitioner to provide consulting services as a subcontractor "in connection with [REDACTED] performance of services in connection with" [REDACTED] contract with [REDACTED] In the attached [REDACTED] "Statement of Acceptance," [REDACTED] agrees to accept the beneficiary to provide "SAS programming services" to [REDACTED] Critical aspects of this contractual document is that it both postdates the director's decision of June 16, 2014 and, more importantly, was executed and became effective after the filing of the petition. Consequently, we

find that it and the related Work Order (the next document in line) are beyond the zone of consideration as evidence for this appeal as they do not constitute evidence of definite, non-speculative project work that was secured for the beneficiary by the time the petition was filed. Again, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See 8 C.F.R. § 103.2(b)(1); *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. at 176.

- A copy of the **July 1, 2014 "Work Order" signed by [REDACTED] and the petitioner.** Executed pursuant to the [REDACTED]/Petitioner CSA just discussed, this document confirms [REDACTED] agreement to accept the beneficiary to provide "SAS programming services" to [REDACTED]. We also note that it identifies the beneficiary as an employee of the petitioner. As we have just indicated in our discussion of the related CSA, we find that this document is irrelevant, as it evidences an agreement not in existence at the time the petition was filed. Further still we find that the document itself is not evidence of definite, non-speculative work for the beneficiary, anyway: it only speaks in terms of a "Projected" start-date and a "Projected" end-date, and it is not buttressed by any evidence from [REDACTED] or its prime contractor [REDACTED], confirming the actual need for the stated project-work services from the beneficiary for any period within the period covered by the projected start and end dates.
- A duplicate copy of [REDACTED] **February 25, 2014 letter**, which we have previously discussed.
- **Two affidavits from the beneficiary's co-workers at [REDACTED]** confirming that the beneficiary is working at [REDACTED] and outlining her duties. Neither co-worker references the petitioner, and neither provides any substantive details about supervision and management of the related [REDACTED] project.
- A **July 17, 2014 letter from the [REDACTED] president** confirming that the beneficiary will be providing consulting services through [REDACTED] to a particular client of [REDACTED] that is, [REDACTED]. The letter further confirms that the beneficiary "will be supervised by her employer, [the petitioning company] and report directly to [REDACTED], President of [the petitioning company], on a weekly basis."
- A copy of a **"Purchase Order" between [REDACTED] and [REDACTED]**. The document does not reference the petitioner, the beneficiary or the end-client, [REDACTED]. Further, the matters to which this document refers are not expressed in terms that are understandable on their face.
- Copies of **pay stubs and Forms W-2** issued to the beneficiary by the petitioner.

- **Weekly status reports from the beneficiary** to the petitioner for June and early July 2014.
- A copy of the "**Year End Performance Review Form**" for the petitioner and the beneficiary, signed in July 2014.
- A copy of **the beneficiary's health insurance card** from United Healthcare and proof of its payment by the petitioner.
- A copy of **the petitioner's "Employee Handbook."**
- Duplicate copies of other documents submitted with the initial H-1B submission and in response to the director's RFE, which we have also discussed.

2. Additional Comments and Findings

As reflected in our earlier discussion of the common-law touchstone of control, in determining whether a petitioner has established the requisite employer-employee relationship for standing to file as an H-1B specialty occupation petitioner, we evaluate the totality of the record's evidence relevant to the relationship between the petitioner and the beneficiary as it would operate within the specific factual context of the beneficiary's work situation that the petitioner identifies as the basis of the petition. In doing so, we consider not just the volume but also the quality and weight of the evidence and also the extensiveness of the evidence, that is, the extent to which it addresses all of the indicia of control over the beneficiary and the beneficiary's work during his or her assignment away from the petitioner. Such evidence would include, but not be limited to, contractual terms and conditions whose implementation would be relevant to control over the beneficiary and the beneficiary's day-to-day performance. Thus, part of the petitioner's burden is to ensure that it provides evidence that is sufficiently comprehensive to surface all of the factors of control operating in the particular factual context of the petition, and, as necessary, to also resolve any issues with regard to any of those factors. The range of relevant evidence in this record of proceeding does not reach that level.

We will now note numerous aspects of the evidence of record that we regard as factors weighing against a favorable determination on the petitioner's claim that it satisfies the employer-employee requirement. In this regard, we find that the evidence of record:

1. Indicates that the beneficiary would be assigned to a location (in [REDACTED]) that is distant from the petitioner's (which is in Illinois).
2. Does not indicate that the petitioner has placed any supervisory person at the beneficiary's work site, or that the petitioner otherwise maintains an ongoing role in determining the methods and means by which the beneficiary's would perform his day-to-day work as it would unfold during the beneficiary's assignment away

from the petitioner. Likewise, as voluminous as it is, the record's documentary evidence does not establish that [REDACTED] or its prime-contractor [REDACTED] have allocated the petitioner any substantive role in [REDACTED] project-work, i.e., aside from serving as a pool from which the beneficiary could be drawn, making the beneficiary available to work at [REDACTED] and taking care of work-related administrative functions such as pay, social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and any work-related benefits.

3. Indicates that the petitioner's management and evaluation actions regarding the beneficiary's work (a) are not provided at the workplace, and (b) are neither continuously issued nor based upon daily or other regular observation of the beneficiary by the petitioner in the regular course of the beneficiary's work for [REDACTED]. Further, there is no evidence of record that the petitioner's performance evaluations are binding upon the end-client or upon any intermediate vendor. Also, there is no indication that, based upon its performance evaluations, the petitioner could unilaterally keep the beneficiary at the project site regardless of contrary performance determinations by the end-client or an intermediate vendor.
4. Does not indicate that the petitioner plays any substantial role in determining the particular, concrete duties and tasks that the beneficiary would be assigned, day-to-day, to the beneficiary during the course of her assignment to [REDACTED] work.
5. Nowhere indicates that the work to which the beneficiary would be assigned would require the petitioner to provide its own proprietary information or technology.
6. Does not indicate that the beneficiary would be used to produce an end-product for the petitioner's own use. Rather, the totality of the evidence indicates that whatever might be produced by the beneficiary is solely for the use and benefit of the end-client, [REDACTED], and must conform to [REDACTED] requirements – not the petitioner's.

We recognize that some of the evidence indicates that the petitioner would likely handle social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and any petitioner-provided benefits related to the beneficiary's assignment to [REDACTED] project-work; and we have weighed that evidence among relevant factors for determining who will control an alien beneficiary in the sense of the common-law employer-employee concept. However, other incidents of control, e.g., who will oversee and direct the work of the beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as

to who will be the beneficiary's employer within the context of the U.S. Employer requirements at 8 C.F.R. § 214.2(h)(4)(ii).

However, we find that, as reflected in our earlier descriptions and comments with regard to the individual pieces of documentary evidence in the record, the totality of the evidence about the petitioner focuses upon the petitioner as a source and supplier of a person that [REDACTED] and [REDACTED] would easily assimilate into a team doing [REDACTED] project-work. It does not, however, focus upon or provide comprehensive and consistent information about either (1) the management and supervisory operations into which the beneficiary would be inserted at [REDACTED] or (2) what latitude of action, if any, the petitioner would have with regard to the beneficiary and the beneficiary's work as it would actually be performed day-to-day during the progress of any [REDACTED] project-work to which the beneficiary would be assigned. Nor does the record of proceeding, even with all of its submissions and all of the petitioner's assertions, fully illuminate whatever aspects of control each of the four entities other than the petitioner may have over the beneficiary and his work, as functions of all of the contractual documents which are in play but have not been fully disclosed in the record. We shall not speculate about undisclosed contractual terms and conditions that may affect various levels of work relationships with the beneficiary, but we do find that the extent of the evidence presented is not sufficiently comprehensive to persuade us as to how the petitioner would retain any practical control over the beneficiary when on an assignment that has been generated by the cascade of contracts claimed to be operative here.

Thus, we conclude, that, notwithstanding its volume, the scope of the record's documentary evidence is not expansive enough to capture many relevant indicia of control that should be considered for a conclusive determination on the employer-employee issue. This is partly a function of the petitioner's not providing copies of the full range of contractual documents pertinent to the contractual landscape in which the beneficiary would operate. Further, the petitioner has not taken the opportunity to provide information from appropriate, knowledgeable officials from [REDACTED] and [REDACTED] that would disclose the management and supervisory framework and operational procedures that would determine what the beneficiary would do day-to-day, how she would be supervised, and how the quality and pace of her work would be evaluated as it was being performed.

Aside from the deficiency of the evidentiary scope of the record - which in itself precludes approval of the petition - as our earlier review of the documentary evidence reflects, there is a fault line of apparently conflicting information running through the documentary record, and it undermines the credibility of the petition.

A prominent example resides in documents regarding [REDACTED] and [REDACTED]. In the June 15, 2013 and the January 1, 2014 Work Orders executed by [REDACTED] and [REDACTED] and filed with the Form I-129, [REDACTED] noted that the beneficiary is an employee of [REDACTED]. Likewise, the June 15, 2013 "Statement of Acceptance" executed by [REDACTED] and [REDACTED] and submitted by the petitioner in response to the director's RFE noted again that the beneficiary is an employee of [REDACTED]. Further, in the February 23, 2014 letter from the [REDACTED] president submitted by the petitioner with the initial H-1B petition, [REDACTED] noted that the beneficiary "will be supervised by her employer, [REDACTED]

Inc., and report directly to [REDACTED]-President of [REDACTED] on a weekly basis." Moreover, the president of [REDACTED] stated that compensation "will be paid by [REDACTED] who will be [the beneficiary's] actual employer"; that the beneficiary "will operate at all times under the administrative control of [REDACTED] management"; that "all activities, including managerial supervision, hiring and firing decisions are controlled by [REDACTED]"; and that "[p]erformance reviews are conducted directly by [REDACTED]". The above-quoted statements from the president of [REDACTED] are materially inconsistent with statements made by the petitioner with regard to particular aspects of its claimed control over the beneficiary and his work. Yet, by submitting these documents without stating any reservations about their content, the petitioner presented them as representative of the operational context in which the beneficiary would work.

We have taken into consideration that, on appeal, the petitioner submits (1) a July 1, 2014 "Statement of Acceptance" executed by [REDACTED] and the petitioner which stated that the beneficiary is an employee of the petitioning company, and (2) another letter from the president of [REDACTED], dated July 7, 2014, stating that the beneficiary "will be supervised by her employer, [the petitioning company] and report directly to [REDACTED]-President of [the petitioning company], on a weekly basis." However we note that neither the petitioner nor [REDACTED] have explained the reasons for the apparently contrary information in the previous documents. Material inconsistencies must be resolved by relevant, objective evidence showing the truth of matter. *Matter of Ho*, 19 I&N Dec. at 591-92.

We also refer the petitioner to the discrepancies between the duty descriptions as presented in the petitioner's support letter and as presented on appeal in the petitioner's "Employment Letter and Job Duties." We also refer the petitioner to the discrepancies between both of those documents, on the one hand, and the [REDACTED] letter, on the other, in their descriptions of the specific duties or responsibilities of the proffered position.

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

We will not speculate as to the full constellation of material terms and conditions that pertinent but unprovided contractual documents (such as, for instance, the "prime" contract between [REDACTED] and [REDACTED] that would likely shed light on factors of control operating in this petition's [REDACTED] project-work scenario) However, we do find that the record of proceeding lacks probative evidence of the actual supervisory and management framework that would determine, direct, and supervise the beneficiary's day-to-day work at [REDACTED]. Based upon this fact and upon all of the aspects of the record that we have discussed as bearing on the employer-employee issue, we conclude that the evidence of record is inconclusive on the issue of whether it is more likely than not that the petitioner and the beneficiary would have the requisite employer-employee relationship in the

context of the work claimed as the basis of this petition. We reach this conclusion based upon the application of the above-discussed common law principles to the totality of the evidence of record.

As the record of proceeding before us does not document the full array of employer/employee-related contractual terms and conditions, or on-the-job lines of supervision and management that would control the beneficiary's day-to-day work, we do not have before us a sufficiently comprehensive record to identify and weigh all of the indicia of control that should be assessed to resolve the employer-employee issue under the above discussed common law touchstone of control. We will not speculate where those indicia would lie. It is the petitioner's burden to provide sufficient evidence to establish that the claimed employer-employee relationship exists.

We have reviewed the full array of indicia of control that the petitioner lists in its letter on appeal. However, as reflected in our decision's comments and findings, the petitioner has not substantiated sufficient indicia to show that it would have the requisite employer-employee relationship with the beneficiary. 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)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

As the evidence of record is insufficient to establish that the petitioner qualifies as a "United States employer" as defined by 8 C.F.R. § 214.2(h)(4)(ii), the appeal will be dismissed, and the petition will be denied.

Additionally, as also reflected in our earlier discussion of the documentary evidence, the evidence of record does not establish the petitioner as performing the essential U.S. Employer function of engaging the beneficiary to come to the United States for definite, non-speculative H-1B-caliber work that had been secured for the beneficiary by the time of the petition's filing.

Beyond the decision of the director, we have identified another aspect of the record of proceeding that precludes approval of the petition, namely, the failure of the evidence of record to establish the proffered position as a specialty occupation. We review the record of proceeding *de novo* (see *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis), and it was in the course of review that this material defect surfaced.

As our decision on the employer-employee issue is dispositive of this appeal, we shall not now discuss in detail the petition's failure to establish the proffered position as a specialty occupation. We shall, however, provide a general discussion that should be sufficient to alert the petitioner to the major evidentiary flaws that preclude us from recognizing the proffered position as a specialty occupation as described by the statutory and regulatory framework at Section 214(i)(1) of the Act (8 U.S.C. § 1184(i)(1)), 8 C.F.R. § 214.2(h)(4)(ii), and the supplementary criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petitioner has not cited any information from the *Occupational Outlook Handbook*, O*NET, or any other authoritative source as supportive evidence that entry into the Computer Programmers occupational classification, i.e., the occupational group specified in the LCA, normally requires at least a U.S. bachelor's degree, or equivalent, in a specific specialty. Thus, as the petitioner has not established that the proffered position's inclusion in the Computer Programmers occupational group is sufficient to establish the position as one that normally requires at least a bachelor's degree, or equivalent, in a specific specialty, it is incumbent upon the petitioner to provide sufficiently substantive evidence that the proffered position satisfies the overarching degree/degree-equivalency by virtue of the position either (1) being one for which there is a common requirement for a bachelor's degree or the equivalent, in a specific specialty, in positions that are parallel to the proffered position and within organizations in the petitioner's industry that are similar to the petitioner; (2) being so complex or unique as to require the services of a person with at least a bachelor's degree, or the equivalent, in a specific specialty; (3) being one whose performance requirements generated a history of the petitioner's exclusively recruiting and hiring for the position only persons with at least a bachelor's degree or the equivalent in a specific specialty; or (4) being comprised of specific duties so complex and specialized that their performance would require the application of knowledge usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. The evidence of record also fails to meet any of those specialty-occupation thresholds. Consequently, the evidence of record fails to establish the proffered position as a specialty occupation.

In the above regard, we also find that documentation in the record of proceeding casts substantial doubt not only upon the levels of complexity and specialization that would actually be involved in any [REDACTED] project-work that would be assigned to the beneficiary, but also upon the extent of the duties that the beneficiary would actually perform. We draw the petitioner's attention to the significant differences among the petitioner's letter of support, the February 25, 2014 [REDACTED] letter, and the petitioner's "Employment and Job Duties" document submitted on appeal in how they describe the duties of the proffered position. As distinctly different as those documents are in their reporting of the proposed duties, it was incumbent upon the petitioner to address and resolve that apparently conflicting information about a factor so fundamental to an H-1B petition as the specific duties that would comprise the proffered position. This the petitioner has not done. This doubt cast by the conflicting information about the proffered position's specific duties materially undermines the credibility of the petition, as the petitioner has not resolved the inconsistencies by independent, objective evidence pointing to where the truth, in fact, lies. See *Matter of Ho*, 19 I&N Dec. at 591-92.

Additionally, we refer the petitioner to our earlier finding that the petitioner failed to establish that, by the petition's filing, it had secured definite, non-speculative employment for the beneficiary for the H-1B classification period requested in the petition. This aspect of the petition also precludes its approval.

As the petitioner has not presented credible, probative evidence sufficient to establish the substantive nature and associated educational requirements of specific services that the beneficiary would actually provide during the employment period sought in the petition, it has not satisfied any

of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. For this reason also, the petition must be denied.

V. CONCLUSION

An application or petition that does not comply with the technical requirements of the law may be denied by us even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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

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

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