



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: MAY 12 2015 OFFICE: VERMONT SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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 Director of the Vermont Service Center denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

On the Form I-129 petition, the petitioner describes itself as a 17-employee business intelligence, data warehousing, and software solution provider established in [REDACTED]. The petitioner seeks to extend the beneficiary's classification as a nonimmigrant worker in a specialty occupation in what it designates as a full-time "SAP FICO Business Analyst" position, 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 establish the existence of an employer-employee relationship between the petitioner and the beneficiary – a relationship that is necessary for an entity to have standing to file an H-1B specialty-occupation petition.

The record of proceeding 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) the Form I-290B, a brief, and supporting documentation.

For the reasons that will be discussed in this decision, we conclude that the director's decision to deny the petition for its failure to establish the existence of an employer-employee relationship between the petitioner and the beneficiary was correct. Beyond the decision of the director, we find an additional aspect of the record of proceeding which would preclude approval of this petition even if the petitioner had established the requisite employer-employee relationship with the beneficiary. That is, there is insufficient evidence to establish that the proffered position is a specialty occupation. Accordingly, the appeal will be dismissed, and the petition will be denied.

I. THE LAW

We will now address the director's determination that the petitioner failed to establish that it will have an employer-employee relationship with the beneficiary. The record supports the conclusion that the evidence fails to establish that the petitioner 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.

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

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

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

The United States Supreme Court has determined that where federal law fails to clearly define the term "employee," courts should conclude that the term was "intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mutual Ins. Co. v.*

Darden, 503 U.S. 318, 322-323 (1992) (hereinafter "*Darden*") (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). The Supreme Court stated:

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

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

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

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

¹ 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).

"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 318-319.²

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).³

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),

² 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))).

³ 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).

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. Additionally, 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).

Applying the *Darden* and *Clackamas* tests to this matter, we find 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."

II. ANALYSIS

A. Introductory Overview

We shall begin with an overview of the employment scenario presented in the petition.

The petitioner provides a multiple-page self-description of itself and its services in its "letter of support" dated July 18, 2012. In part, the petitioner described itself as "one of the leading providers of complete software solutions and services," and it stated that it "offer[s] Business Intelligence, Data Warehousing, contract programming, Custom e-commerce solutions, product design, development and integration." The petitioner's self-description also asserts, in part:

[W]e design, develop, market and support a comprehensive suite of [B]usiness Intelligence reporting Tools, software, solutions and services, enabling companies to build lasting high quality client relationships.

The documents on appeal include a letter the petitioner's attorney which, in part, acknowledges that the petitioner is "primarily an IT staffing firm that provides consultants to other businesses under third-party agreements."

As indicated above, the petitioner seeks to employ the beneficiary in a position that it describes as a "SAP FICO Business Analyst" on a full-time basis. The petitioner stated on both the Form I-129 and the LCA that it would pay her a salary of \$64,000 per year. The petitioner specified its gross annual income as \$2,911,276 and its net annual income as \$117,828. The LCA submitted by the petitioner in support of the petition was certified for use with a job prospect within the "Financial Analysts" occupational classification, SOC (O*NET/OES) Code 13-2051, with a Level I prevailing-wage rate.

The petitioner asserts that this extension petition was filed for the continuation of the same Work Order that the petitioner submitted as the basis of the previously approved petition whose validity the petitioner is attempting to extend. The petitioner is located in [REDACTED] New York, and as we noted, the petitioner attests that the beneficiary would provide her services at a [REDACTED] New Jersey location.

According to the petition and the accompanying Labor Condition Application (LCA), the beneficiary would perform the services of the Financial Analysts occupational group, under the petitioner's job title "SAP FICO Business Analyst." According to the petition, the beneficiary would perform her services at the accounting firm [REDACTED] New Jersey, on assignment from the petitioner, [REDACTED]. It is important to note at the outset that, as portrayed in the record of proceeding, the beneficiary would perform her duties in a contractual context that involves two business-entities interposed between the petitioner and [REDACTED]. The two other entities are (1) [REDACTED]) and (2) [REDACTED]).

That is, according to the petitioner, it seeks approval of this H-1B specialty-occupation petition so that it can assign the beneficiary to project-work at [REDACTED], which, the petitioner claims, has been continuously generated by the implementation of contractual agreements (1) between the petitioner [REDACTED]) and [REDACTED] (2) between [REDACTED] and its client, [REDACTED] and (3) between [REDACTED] and its client, [REDACTED] - the ultimate end-client for which the beneficiary would provide her services.⁴

⁴ As a preliminary matter - in light of the information presented about the petitioner's planning to expand into a teaching facility - its proper to note that, as acknowledged by the petitioner, resolution of the employer-employee issue depends upon the evidentiary record that the petitioner has presented with regard to the beneficiary's project-work for [REDACTED]. The petitioner acknowledged that the petition was not filed on the basis of its plans to expand into the educational. In any event, a petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

We find it materially significant (1) that the record lacks evidence of any contractual documents to which both the petitioner and the end-client [REDACTED] are parties, and (2) that, by their absence of any clauses assigning a role for the petitioner in controlling the beneficiary in her day-to-day work as it would be performed on her assignment to [REDACTED] project work, the contractual documents that are submitted into the record do not reflect more than a relatively remote and attenuated relationship between the beneficiary and the beneficiary during her assignment to [REDACTED] project work. In terms of indicia of control for consideration under the common-law approach for determining an employer-employee relationship, the documentary evidence in this record of proceeding does not substantiate the petitioner's claim to control over the manner and means by which the beneficiary is to perform her services at [REDACTED]. Nor does the evidence of record establish that the petitioner would be the source of any instrumentalities and tools required for [REDACTED] project-work; that the petitioner would have a physical presence at the work location, or for that matter, electronic or any other type of participation in assigning the beneficiary specific tasks, determining the sequence of any project-work that she would be assigned, or approving her work for payment; or that the beneficiary would be used by [REDACTED] to apply proprietary information or applications belonging to the petitioner.

As already noted, the petitioner maintains that, by operation of a series of contracts resulting in the beneficiary's placement at [REDACTED] it will have an employer-employee relationship with the beneficiary as she works at [REDACTED]. We will first review documents that the petitioner submitted as relevant to the employer-employee issue.

B. Document Review

Documents filed with the Form I-129 (Petition for a Nonimmigrant Worker)

The petitioner's "Extension of Stay" letter

In his July 18, 201[3] letter of support (Subject: Request for Extension of Stay) filed with the Form I-129, the petitioning company's CEO/President explained that the petitioner wished to continue, for three years, employment of the beneficiary in the position to which it gave the title SAP FICO Business Analyst/SAP BO Developer. The letter described the proffered position as follows:

Summary of Job: Conduct organizational studies and evaluations and design systems and procedures to assist management in operating more efficiently and effectively.

Duties in Detail:

- Responsible for analyzing data to develop and implement procedures to increase efficiency and profitability.
-

- Review the organizational structure to design work simplification procedures.
- Implement, customize, configure, integrate, test, document preparation for SAP FICO in initial phase of project.
- Provide support to SAP Functional team to sort out various open issues linked with Accounts Receivable.
- Design, develop, customize and test various Business Objects Web-Intelligence & Deski-Reports and also worked on University Design.
- Assist in design and development for new Business Objects report based on corporate document for Partners.
- Install and maintain Business Objects applications, 6.5m XIR3, SP5.
- Provide technical evaluation of new requirements; assess time estimation and provide technical support within the organization.
- Assist in Performance Testing and Benchmark Testing of Reports and Universe.
- Work on on-site maintenance support for users.

This letter from the petitioner's CEO/President also attests that the petitioner will have H-1B-level work for the beneficiary for the entire requested period (that is, October 01, 2013 to September 30, 2016). It is worth highlighting the fact that at no time does [REDACTED] or its prime-contractor, [REDACTED], adopt, endorse, or in any way ratify this listing as an accurate portrayal of the work that the beneficiary would actually perform. In fact, as we shall see, [REDACTED] submissions identify only some of the duties on the petitioner's list as pertaining to the claimed [REDACTED] project-work. This aspect of the petition undermines its credibility.

The factual scenario to which this eight-page letter attests includes the following assertions:

- That the beneficiary would "continue to perform her services on the Project with [REDACTED] located at [REDACTED] [,] New Jersey [REDACTED]."
- That the petitioner would be the beneficiary's employer, and as such it would continue to employ the beneficiary as "a full-time SAP FICO Business Analyst."
- That the "entire contractual succession for Beneficiary's services at End-Client [REDACTED] progresses" would be as depicted in the following diagram:



The letter further states that "[d]etails regarding the valid contractual relationship between the above-mentioned parties" can be found in (1) the Master Software Consulting Agreement ("Agreement") between the petitioner and [REDACTED], and (2) in "the letters from [REDACTED] [,] and

The Labor Condition Application

- As the Labor Condition Application (LCA) corresponding to the petition, the petitioner submitted an LCA certified for work at [REDACTED] New Jersey [REDACTED] which the petition identifies as [REDACTED]; business address and the location where the beneficiary would perform the duties of the proffered position.

Counsel's letter of July 12, 2013

We will focus on this document later, in our section on the specialty occupation issue, when we will discuss the materially adverse implication of its unsupported claims about the nature of the duties in which the beneficiary would engage.

The petitioner's letter entitled "Subject: Itinerary of Definite Employment," dated June 26, 2013.

The letter's section "II. Itinerary" states that the extension petition is being filed so that the beneficiary may "continue to perform her services *on the Project [singular] with* [REDACTED] (emphasis added); but that same letter opens with a statement that the beneficiary would "continue to perform her services *on a series [plural] of ongoing development and maintenance projects* for . . . [REDACTED]"

We find that "Employer/Employee" section of this letter is inconsistent with the petitioner's claims in the very same letter, and in the July 18, 201[3] letter of support for the extension petition, that the beneficiary was at present working at the [REDACTED] address. The conflict is evident in the following portion of the letter's "Employer/Employee". section, which, we find, indicates that the beneficiary is in a different job and at a different location than otherwise stated in the petition:

[A]t present [the] beneficiary is currently working as Systems Accountant for [the petitioner] under direct employment. There is a need of the beneficiary to work for [a] third party off-site location. The beneficiary will still be working directly under the supervision of the president of the organization, who will evaluate the beneficiary's job performance and control daily activities. The beneficiary will be working 40 hours a week Monday through Friday.

The petitioner's "Summary of Agreement with [the beneficiary]"

With regard to its claim of an employer-employee relationship with the beneficiary, this document's "bullet" statements include assertions that the petitioner (1) will pay the beneficiary's salary; (2) "[a]t all times . . . retain full directions and control of the means and methods by which Petitioner performs the services"; and (3) "will be responsible for paying[,] hiring, firing, servicing and controlling the beneficiary" from its office in [REDACTED] New York."

Letter from [REDACTED] Senior Vice President – Human Resources, dated May 24, 2013

This single-page letter addressed to "Whomsoever It May Concern" states that it was written "to confirm that [the beneficiary] has been sub-contracted to [REDACTED] through [REDACTED] in connection with SAP support project needs at [REDACTED]" in [REDACTED], New Jersey, where she "is currently providing services as SAP Business Objects Developer for [REDACTED]"

As we noted earlier, the list of "responsibilities handled by [the beneficiary]" dovetails with only *some* of the petitioner's support-letter's list of "Duties in Detail," but the [REDACTED] letter makes no mention of the following duties that the petitioner's letter of support ascribed to the proffered position:

- Responsible for analyzing data to develop and implement procedures to increase efficiency and profitability.
- Review the organizational structure to design work simplification procedures.
- Implement, customize, configure, integrate, test, document preparation for SAP FICO in initial phase of project.
- Provide support to SAP Functional team to sort out various open issues linked with Accounts Receivable.

This is a significant conflict, as it undermines the credibility of the petitioner's claims with respect to the scope of work to be performed by the beneficiary, and as it also precludes our providing any weight to the petitioner's claims that the beneficiary would be involved in any of the above-described functions which have not been endorsed by either [REDACTED] the prime contractor with [REDACTED], or [REDACTED] itself.

[REDACTED] letter from its "HR Manager," dated May 21, 2013

This single-page letter addressed to "Whom It May Concern" states that it was written to confirm that [REDACTED] and the petitioner have entered a "Master Services Agreement," under whose terms the petitioner "provides various information technology related services for our clients' projects, which includes [sic], but [is] not limited to Application Development and Maintenance, Project Management Services, Application Integration Services, Packaged Solutions[,] etc."

The letter also states that it was written to confirm (1) that [REDACTED] and [REDACTED] "have contracted to provide various information technology enabled services to [REDACTED]" and (2) "for this purpose," the beneficiary has been "sub contracted for the project of [REDACTED] as SAP BO Developer." The letter also states that the "project is ongoing and scheduled into [the] foreseeable future." We find it significant that this letter does not specify a definite duration-period for the [REDACTED] project-work. This aspect corresponds with the indefinite nature of the "Time and Materials" of the contract indicated in the two [REDACTED] "Work Order Supplements to Master Services Agreement," which we will discuss later in this decision.

The letter's third paragraph is worth quoting in full for its statements asserting that the beneficiary is an employee of the petitioner, but not of [REDACTED]:

The relationship between [REDACTED] and [the petitioner] is contractual. During this contract and at all times, [REDACTED] has no employment relationship with [the beneficiary]. Her primary employer is [the petitioner], [which] has the right to control the work performed by its all [sic] employees and has the right to remove assigned employees. [The petitioner] is responsible for [the beneficiary's] salary, benefits, and training needed to perform her duties at the worksite, in addition to any discretionary decision making, such as hiring, firing, and performance evaluations.

We acknowledge that this [REDACTED] letter disavows any "employment relationship with [the beneficiary]", and we also acknowledge the examples that [REDACTED] provides with regard to the petitioner's relationship with the beneficiary, and we credit that information to the petitioner's favor in weighing indicia of where an employer-employee relationship may reside within the context of the factual scenario presented in this appeal. However, we also take into account the fact that this submission does not specifically address how, if at all, the petitioner and the beneficiary would relate to each other, during the day-day-progress of the beneficiary's assignment, in terms of such control-related functions as task assignments; instructions about the application of particular methods to issues at hand; supervision of the beneficiary's ongoing work as it is actually being performed at [REDACTED]. We also find that the evidence of record does not indicate how [REDACTED] would know the full specifics of the petitioner's dealings and relationship with the beneficiary while she would be on assignment to [REDACTED] project work.

[REDACTED] letter from [REDACTED] "HR Manager," dated August 2, 2012

The content of this letter is basically the same as the [REDACTED] May 21, 2013 letter that we summarized immediately above. However, it has an additional paragraph, which reads:

The work at the [sic] [REDACTED] has been arranged through a series of contracts for specialized IT services between [the petitioner], [REDACTED], and [REDACTED]

Letter from [REDACTED] Senior Vice President – Human Resources, dated November 27, 2012

This [REDACTED] letter also states that it was written "to confirm" that the beneficiary "has been sub-contracted to [REDACTED] through [REDACTED] in connection with SAP Support project needs at [REDACTED]' and its content is virtually the same as [REDACTED] letter of May 24, 2013.

"Contractor Agreement" entered between [REDACTED] and the petitioner, entered May 6, 2011

This Contractor Agreement references the petitioner as "Contractor." The document's second paragraph contains this descriptive language:

[C]ONTRACTOR [(i.e., the petitioner)] is in the business of supplying computer consultants to perform programming, systems analysis, design software analysis, or other computer (Information Technology) related services[.]

The Contractor Agreement's next paragraph indicates that the Agreement's terms would apply to any follow-on agreement under which [REDACTED] "would utilize the services of the CONTRACTOR and its personnel (hereinafter referred to as 'CONSULTANT(s)') for the purposes [sic] of providing services to [REDACTED] clients."

The Contractor Agreement includes clauses specifying that whenever the petitioner and [REDACTED] engage in a specific agreement within the Contractor Agreement's coverage:

- The petitioner-provided persons would "remain in the employment of CONTRACTOR for the duration of the specific assignment or earlier termination by [REDACTED] and/or its clients."
- The petitioner would "not remove its CONSULTANTS from the specific assignment for the duration of the specific assignment without first obtaining [REDACTED] consent in writing."
- Only [REDACTED] would invoice its client for pay for hours worked by the persons the petitioner provided for that [REDACTED] client.
- The [REDACTED] client would pay [REDACTED] - not the petitioner – for the persons that the petitioner provided for the client's work.
- A "separate Work order" would specify the pay-rate for any petitioner-provided person.
- The amount to be paid for any petitioner-provided person would be subject to client approval.
- For the term of the Contractor Agreement and for a period of 12 months thereafter, the petitioner would be required "to refrain from contacting (either directly or indirectly) [REDACTED] clients to whom they have been introduced by [REDACTED]"
- With respect to the amounts paid to the persons that the petitioner supplies as consultants, the petitioner would "file all required returns and reports, withhold and/or pay all required federal, state, and local wage or employment-related or other tax not so withheld and/or remitted and for any costs and expenses which [REDACTED] may incur by reason of [the petitioner's] failure to meet comply with its obligations" in those areas.
- The petitioner would pay all necessary work-related insurance coverage for the

person provided to [REDACTED] while he was performing his services for the [REDACTED] client.

- The petitioner would be liable for any damages to [REDACTED] caused by the petitioner's terminating or causing the early departure of the person from whatever [REDACTED] project to which assigned, without proper notice.
- There would be a two-week window within which the [REDACTED] client could release the person supplied by the petitioner through [REDACTED] without any liability to pay for his or her services.

The petitioner's role with regard to taxes and insurance incident to the beneficiary's work is a factor, but of course, not a decisive one, weighing in favor of the petitioner's claim to the requisite employer-employee relationship. It is counterbalanced, however, by this document's (1) indications of [REDACTED] roles in determining invoice amounts and in receiving client payments, and (2) provisions by which [REDACTED] restricts the petitioner's ability to remove the beneficiary from an assignment arranged by [REDACTED]

Statement of Work executed by [REDACTED] and the petitioner

This Statement of Work (or "SOW"), which is dated May 10, 2012, appears to be the SOW to which the petitioner refers as the continuing basis of work for the beneficiary throughout the extension period sought in this petition.

The SOW identifies [REDACTED] - not [REDACTED] - as the client for whom the petitioner would supply a Contractor Representative. The document identifies the beneficiary, by name, as "Contractor Representative," indicating that she is the person to be supplied by the petitioner to [REDACTED] to perform the work for [REDACTED].

The SOW specifies its duration as "1+ year"; and it contains an "Extension" paragraph stating that the SOW "shall be deemed to have been extended beyond the foregoing estimated end date on a month to month basis" until "the services are completed" or the aforementioned [REDACTED]/petitioner Contractor Agreement is terminated.

The SOW's "Pricing" section specifies [REDACTED] as the entity that will pay the petitioner for the services of the petitioner-supplied worker.

The SOW describes the work to be performed as follows:

Scope of Work: BO XI Developer to provide production support and maintenance of BO XI systems and to closely collaborate with offshore team by providing support in areas of maintenance, production support, analysis, and development.

"Work Order Supplement to Master Services Agreement" between [REDACTED] (then [REDACTED]) and [REDACTED] executed July 20, 2012

This document's introductory paragraph incorporates by reference a contractual document not provided in the record, namely, the Master Services Agreement (MSA) of December 4, 2007, which this Work Order Supplement supplements. The Work Order Supplement to Master Service's Agreement indicates that the content of the MSA is relevant here, for the Work Order Supplement explicitly recognizes the MSA's terms and conditions as applying to the interpretation and performance of the Work Order Supplement. We see this in the Work Order Supplement's opening sentence, which reads:

This Work Order references and is executed subject to and in accordance with the terms and conditions of that certain IT Master Services Agreement dated 4-Dec-2007 ("Agreement") previously entered into by and between [REDACTED] . . . and [REDACTED].

From the "Work Order Provisions" section, we glean that the Work Order Supplement was executed for a "Client Portfolio: Finance Portfolio" project, which is designated as a "Time and Material" project. We find that the absence from the record of the details of this December 4, 2007 [REDACTED] MSA undermines our ability to fully assess with whom the common-law indicia of control would fall, because this MSA document is described as having terms and conditions with which the performance of any [REDACTED] work order supplement must comply.

As the "Scope of Work," the Work Order Supplement states the same general duties as appears in [REDACTED] letters that we discussed above. The Work Order Supplement describes the listed duties as "the scope of the consulting work to be provided by [REDACTED] for projects within the Finance portfolio."

We find it significant that, as the Work Order Supplement's "Planning Assumptions," the document states: "Resource Assigned to the project which [(sic)] will be managed by [REDACTED] manager": we find that this indicates that [REDACTED] will manage both the "project" and whatever "resource" is assigned to it - including the beneficiary. In this regard, we also note that the "Scope of Work" section identifies the beneficiary, by name, as "[t]he resource assigned as part of this Work [O]rder." Additionally, read as a whole, the "Scope of Work" section indicates that [REDACTED] is viewing the beneficiary as a [REDACTED]-provided resource, rather than one provided by the petitioner. These aspects of the Work Order Supplement weigh against the petitioner's claim to an employer-employee relationship with the beneficiary, and they also devalue all of the record's assertions to the effect that the petitioner would be substantially involved in controlling the beneficiary's day-to-day performance at [REDACTED]. In fact, this document does not even mention the petitioner.

Also significant are the facts that (1) this document's provisions nowhere mention, or assign any role to, the petitioner, in any capacity, and (2) part 7 ("HTL Deliverables") assigns responsibility for deliverables *not* to the petitioner but to [REDACTED]. Further, the "Description" segment of part 7 describes "deliverables" as "Completion of Tasks assigned by [REDACTED] Manager." We further note that the "Communications Paths" and "Address for Communications" include only [REDACTED] and

points-of-contact. In addition, the "Project Schedule and Milestones" section allocate no part to the petitioner, stating:

- Project plan will be jointly prepared. will own the project plan.
- Schedule and Milestones will clearly be defined in the project plan.

As the only two parties to the Work Order Supplement are and , it is clear that neither the petitioner, nor for that matter, , would be involved in the joint development of the project plan, including its definition of the project's Schedule and Milestones. And, of course, the petitioner is not a signatory to the Work Order Supplement.

It is also noteworthy that, according to this Work Order Supplement's section 8 ("Project Durations"), this project, which was identified at section 2 ("Type of Project") as "Time and Materials" ended on June 28, 2013. That end-date is important, because it indicates that the related project-work ended before the petition's July 16, 2013 filing date, and months before the execution date of the next Work Order Supplement, a copy of which the petitioner submits on appeal.

Further still, the fact that the Work Order Supplement expressly indicates, by the related checkmark at the related box, that it is being issued as part of a "Time and Material" contract instead of a "Fixed Price" contract indicates that, when issued, was not committing to any specific extent of work, or any definite duration for such work. This fact at least countervails the petitioner's claim that the beneficiary has been working and will continue to work (1) on a continuous basis for and (2) in accordance with the duties and responsibilities claimed in the petition. We further find that only objective statements and substantiating documents from itself would resolve the doubt created by the nature of the contract type identified in the Work Order Supplement.

We accord particular weight to any contractual-documents to which and are parties, as it appears (1) that all of the major aspects of the claimed project-work would be determined by those two parties, and (2) that, as the end-client where and for which the project work would be performed and the end-client's prime-contractor, these two entities are most closely involved in determining the terms and conditions of the beneficiary's assignment to

Three "Weekly Status" e-mails from the beneficiary to the petitioner

In each of these e-mails to (apparently the petitioner's CEO/President) at the petitioner's offices, the beneficiary reports on the work she performed during the week and on that week's "Overall Weekly Development." While these documents suggest that the beneficiary regularly reports to the petitioner, nothing in the e-mails - or anywhere else within the record of proceeding - indicates that such after-the-fact reporting is connected to any actions by the petitioner in terms of actually directing or supervising the beneficiary's day-to-day work at . Further, the e-mails should be read in the context of the term in the aforementioned /petitioner Contractor Document that prohibits contact - direct or indirect - with clients. In any event ,

there is no evidence that such weekly e-mails from the beneficiary are tied to any involvement by the petitioner during the reported period with regard to directing the scope, progress, or any other aspect of the beneficiary's day-to-day performance on the asserted project-work. Thus, we accord no weight to these documents as indicators of an employer-employee relationship between the petitioner and the beneficiary.

Further, the petitioner has not explained why it would require, or need, "Weekly Status" reporting about the week's accomplishments, if in fact, the beneficiary was coordinating her work assignments with the petitioner to an extent consistent with the petitioner's claim of immediate supervision of the beneficiary's project-work as it unfolds day-to-day and its claim of controlling the means and methods by which the beneficiary would perform her [REDACTED] project-work.

The petitioner's organizational chart

As would be expected in the light of the overall documentation in the record, which suggests that the petitioner is functioning as a staffing agency, the petitioner's organizational chart does not indicate any petitioner-presence at [REDACTED], [REDACTED], or [REDACTED]

Photographs of the beneficiary at the [REDACTED] worksite.

This evidence of the beneficiary's presence at [REDACTED] are not material to the issues that we are addressing on appeal.

Copies of the beneficiary's recent paystubs.

We weigh this evidence in the petitioner's favor, as among the submissions corroborating that the petitioner distributes pay to the beneficiary for whatever work that she performs on assignment to [REDACTED]

Copies of pages from the petitioner's Internet site.

The petitioner has not established that the content of this promotional material would be helpful to our consideration of the appeal.

Documents submitted in response to the RFE

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on January 22, 2013. The petitioner was asked to submit probative evidence to establish, in part, that a valid employer-employee relationship will exist between the petitioner and the beneficiary. In addition, the petitioner was asked to submit documentation to establish sufficient work for the duration of the period requested on the Form I-129. The director outlined some of the types of specific evidence that could be submitted.

The petitioner resubmitted a number of the documents previously submitted in support of the petition, as well as some new evidence. Among the documents newly submitted in response to the RFE are:

- Another letter from [REDACTED], this one dated April 7, 2014. Its content and import are basically the same as previous [REDACTED] letters discussed earlier in this decision.
- A 25-page excerpt "IT Services" document which appears to be copied from a 50-page [REDACTED] – IT Service Transition Manual: Services/application Business Case" related to providing IT services at [REDACTED]. The document appears in the place in the RFE-reply that counsel's REF-reply letter identified as part 6 of the RFE-reply: "Project details at [REDACTED]." The petitioner has provided no explanation of how, if at all, this technical document relates to the employer-employee issue, and we see no probative value in it for establishing an employer-employee relationship. On the other hand, if the Manual is, as it appears to be, a production of [REDACTED] it is evidence of [REDACTED] management and control over access to and use of its informational technology, which is consistent with and corroborates the indications in the aforementioned [REDACTED] "Work Order Supplement to Master Services Agreement" that [REDACTED] and its own Manager would be in charge not only of its projects but also of assigning tasks to be performed in the course of any of its projects. On the whole, this document weighs against the petitioner's employer-employee-relationship claim, and it conflicts with the petitioner's claim in its aforementioned summary of its agreement with the beneficiary that it would "[a]t all times . . . retain full directions and control of the means and methods by which Petitioner performs the services."
- A collection of documents which counsel's RFE-reply letter introduces as (verbatim): "Beneficiary's email correspondence with officials of [REDACTED] showing her involvement and availability of specialty occupation work at end client." We find that the content of the e-mails do not favor the petitioner on the employer-employee issue, as the content of the e-mails reflect the beneficiary's coordinating day-to-day project-work with various persons involved in [REDACTED] work, without "cc'ing" or otherwise involving the petitioner in the process – and there is no indication that any of those persons belong to the petitioner's management.
- [REDACTED] "Timesheet Summary" sheets, which are consistent with the petitioner's assertion that the beneficiary is still working at [REDACTED]
- Copies of (1) a completed "Code Signing Certificate Request" and (2) a set of computer-screen instructions. They were apparently submitted as evidence that the beneficiary is working at [REDACTED]

- Documentation pertaining to its development of an internal in-house project not relevant to the appeal.⁵

Documents submitted on appeal

The director reviewed the documentation and found it insufficient to establish eligibility for the benefit sought. The director denied the petition on August 14, 2014.

On appeal, counsel submits additional evidence, including another letter from the petitioner's CEO and President, duplicate copies of documents previously submitted, and a copy the document that we will now address.

Copy of an **August 28, 2014 "Verification of Work" letter from [REDACTED] Vice President – Human Resources.** The letter opens with a statement that it is provided at the request of [REDACTED] to "verify the facts stated" in the letter. The letter describes the beneficiary as "contributing to [REDACTED] leading client [REDACTED] by "working on [a] key project." The letter identifies the same list of job responsibilities as in all of the previous [REDACTED] letters (which, again, is substantially shorter than the list submitted by the petitioner). [REDACTED] repeats its assertions that the beneficiary will not be [REDACTED] employee, and it states that as long as the beneficiary abides by [REDACTED] "standard workplace policies" (which, we note, are not identified), [REDACTED] "will have no responsibilities to dictate how [the beneficiary] performs her duties." We see that [REDACTED] also asserts that it will not be responsible for "any incidents of employment."

[REDACTED] further states that, "due to confidential reason and company policy reasons," [REDACTED] had to decline a recent request from the beneficiary's employer (which is not identified by name) for a "copy of the Contract or the Statement of Work with our end-client [REDACTED]." The letter also states – without any substantiation from [REDACTED] that [REDACTED] "internal policy" precludes [REDACTED] Manager from providing a letter."⁶ We find that this letter, as well as all of the other letters from the petitioner, [REDACTED] and [REDACTED] and contractual documents to which [REDACTED] is not a party, fails to provide credible and probative information as to relevant elements of control as they would manifest themselves in the day-to-day performance of the beneficiary's assigned [REDACTED] project-work.

Copy of an **August 27, 2014 "Confirmation of Master Services Agreement between the [REDACTED] and [the Petitioner]" from [REDACTED] Associate Director – HR Operations.** The letter confirms (1) that the petitioner and [REDACTED] entered the aforementioned "Contractor Agreement of May 26, 2011," of which a copy has been submitted into the record; "pursuant to which the petitioner

⁵ We note, however, that despite identifying an Employee Performance Review Report (prepared by the petitioner) as an exhibit submitted with the response to the RFE, we were unable to locate such a document.

⁶ Of course, even if this assertion were substantiated, it would not lessen, or release the petitioner from its obligation to meet, its burden of proof. Thus, the unwillingness of an end-client to release information material to the petition will not excuse the petitioner from the application of any aspect of the statutory and regulatory requirements promulgated for the H-1B specialty-occupation program.

provides various technology enabled services for [redacted] clients' projects"; (2) that [redacted] and [redacted] have "contracted to perform various technology enabled services to [redacted]"; and (3) that the beneficiary has been "subcontracted for the project of [redacted] as a SAP BO Developer." The letter also states – "the initial project completion date was June 28, 2013, which has been extended for multiple years."

The author also asserts that [redacted] has no employment relationship with the beneficiary; that the petitioner is the beneficiary's "primary employer" and "has the right to control the work performed by its all [sic] employees," "has the right to remove assigned employees," and "is responsible for the beneficiary's salary, benefits and training needed to perform the duties at the worksite, in addition to any discretionary decision making, such as hiring, firing, and decision making."

On the basis of the pay records and other evidence submitted into the record, we find that there is sufficient evidence to establish the petitioner likely would play human-resources and administrative roles with regard to such incidents of the beneficiary's work assignments as distributing pay and handling social security, workman's compensation insurance, and tax withholdings. However, we accord no weight to the other claims that this [redacted] letter makes about the petitioner's relationship with the beneficiary during her assignment to [redacted] project-work. This is because [redacted] does not provide any documentation substantiating that it – an entity that appears twice-removed from [redacted] – has the knowledge that it suggests that it has about the specific terms and conditions that [redacted] has set with regard to its acceptance of the beneficiary for its project-work as well as about what [redacted] may have imposed about her day-to-day management and supervision and about such issues as [redacted] right to remove her, right to assess and approve her work before payment for it, and any restrictions that [redacted] may have placed upon the petitioner's own latitude of action with regard to the beneficiary while on assignment to [redacted] work (such as, for instance, in the area of her removal and replacement). In the same vein, we accord no evidentiary weight to the [redacted] statement about the requisite training to perform [redacted] duties: [redacted] has not established its basis of knowledge for these claims, nor has it substantiated their accuracy.

Finally, the extent of the unsubstantiated assertions in this letter begs the question of what terms and conditions [redacted] has set by way of all of its relevant contractual agreements with [redacted] including the aforementioned - but never submitted – [redacted] "IT Master Services Agreement dated 4-Dec-2007," which the two [redacted] Work Order Supplements incorporate by reference as containing "terms and conditions" to which the Work Order Supplements are subject.

Copy of *Second "Work Order Supplement to Master Services Agreement" between [redacted] (then [redacted]) and [redacted] this one executed September 2, 2014 and September 9, 2014*

Except for its execution date and the specified project-duration, the content of this Work Order Supplement is substantially the same as the previously submitted Work Order Supplement to Master Services Agreement between [redacted] and [redacted] which was executed on July 20, 2012.

This document's execution dates are significant in that they postdate the end-date of the previous project (as stated in the previous Work Order Supplement) by 71 days. Neither [REDACTED] nor [REDACTED] have addressed this obvious discrepancy between the project Start Date expressed in the document ("30/June/2014") and the "9 September 2014" date on which the [REDACTED] representative signed the document. Because we find that start and duration of the related project-work are material features of this work-order document, we also find that the discrepancy between the project start-date and the later work-order execution dates calls into question the accuracy of the Start Date specified in the document, and, so too, the relevance of this Work Order Supplement in which it appears.

Further still, like the first Work Order Supplement, this one also expressly indicates, by check-mark at the related box, that it is being issued as part of a "Time and Materials" contract instead of a "Fixed Price" contract, thus also indicating that when this document was issued, [REDACTED] was not committing to any specific extent of work, or any definite duration for such work. So, too, this fact at least countervails the petitioner's claim that the beneficiary has been working and will continue to work (1) on a continuous basis for [REDACTED] and (2) in accordance with the duties and responsibilities claimed in the petition. Yet, as with the first Work Order Supplement, this one is not illuminated by any objective statements and substantiating documents from [REDACTED] itself that would resolve the doubt created by the nature of the contract type identified in the Work Order Supplement.

A copy of **ten pages of "Project Description" sheets**. Presented as they are without any substantive explanation of whatever other import they may have, we see these as further evidence of a fact already established, namely, that the beneficiary has been performing [REDACTED] work, albeit of questionable extent and duration.

Copies of **additional e-mails, these from August 2014**. We find that these later e-mails have no more evidentiary import than the previous set submitted into the record.

Copies of what appear to be **additional wage and earnings statements and IRS Forms W-2**, which we take as cumulative evidence of what we see as already established, namely, that the petitioner is taking the role as beneficiary's employer for tax purposes, which is a factor in the petitioner's favor, but certainly not dispositive, on the employer-employee issue.

C. Additional Analysis

We find that the evidence is sufficient to establish that the beneficiary has been working at [REDACTED]. However, as we shall discuss, we have also concluded that the evidence of record is not sufficiently detailed and comprehensive for us to reasonably determine that the petitioner and the beneficiary would more likely than not have the requisite employer-employee relationship. We have reached this conclusion by applying the common-law touchstone of control that we reviewed in this decision's section on the law.

The evidence of record does suggest that, in the context of the facts before us, the petitioner has and would retain the administrative and basic human-resources responsibilities consistent with a staffing

agency that basically supplies personnel to other entities to assist those entities pursue projects which those entities plan and which they themselves manage and control on a day-to-day basis. Consistent with that finding, we see ample evidence that the petitioner would (1) distribute pay to the beneficiary (partly as a function of [REDACTED] or [REDACTED] determination that the work performed merits the contractually agreed payment to the petitioner); (2) would provide work-related benefits (if any); and (3) would take care of the tax, insurance, social security requirements incident to keeping the beneficiary on its payroll. We have fully considered all of the evidence that the petitioner has provided about its role in administering pay, benefits, tax ramifications, and other consequential aspects of the beneficiary's employment. However, while social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are still relevant factors in determining who will control an alien beneficiary - and these seem to be within the petitioner's realm - other incidents of the relationship, e.g., who will oversee and direct the work of the beneficiary, where will the work be located, and who has the right or ability to affect the project work 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.

With regard to providing any contractual payments as the source of any of pay the petitioner is responsible to pay the beneficiary by virtue of an approved H-1B petition, we observe that the [REDACTED]/petitioner Contractor Agreement states that any payments to the petitioner for work done by any petitioner-provided worker would be subject to [REDACTED] client's approval, and would be funneled through [REDACTED] to the petitioner. They would not go directly to the petitioner. Further reflecting the remoteness of the petitioner to the [REDACTED] that Contractor Agreement also specifies that [REDACTED] - *not* the petitioner - would invoice the client for payment for work performed by any persons supplied by the petitioner for [REDACTED] work. This aspect is affirmed in the May 10, 2012 SOW between [REDACTED] and the petitioner.

Next, we noted earlier in our review of non-exclusive types of factors to be weighed in applying the common-law touchstone of control, the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the worker is an employee. In that regard, we note that the petitioner has not even submitted an employment agreement, but rather what the petitioner styles a "Summary of Agreement with [the Beneficiary]." We see that "Summary" as no more than a restatement of the petitioner's general claims, and without any reference to the particular [REDACTED] work which the petitioner presents as the grounds for extending the validity of the previously approved petition. As such, we accord little evidentiary weight to this document.

In the petitioner's favor, we observe it has done the initial hiring that enabled it to supply the beneficiary through [REDACTED] and [REDACTED] to [REDACTED] so that she could perform work for [REDACTED]. However, the record of proceeding indicates that, during the beneficiary's staffing assignment through [REDACTED] and [REDACTED] for [REDACTED] work, the petitioner has little practical control over the beneficiary and her work.

While the petitioner may retain a right to fire the beneficiary, that right is subordinate to, and limited by, contractual realities reflected in the record's documents. The [REDACTED]/petitioner Contractor Agreement provides that the petitioner would "not remove its CONSULTANTS from

the specific assignment for the duration of the specific assignment without first obtaining [REDACTED] consent in writing." Also, that [REDACTED]/petitioner Contractor Agreement makes the petitioner liable for any damages that [REDACTED] would incur because of the petitioner's termination or otherwise causing the early departure of the beneficiary, without "proper notice," from any project to which she is assigned through [REDACTED] – and the latitude of permissible reasons that would constitute proper notice is not provided.

We do not accord any significant weight to the petitioner's claim that it "at all times . . . [will] retain full directions and control of the means and methods by which Petitioner performs the services." Whether or not the petitioner actually meant "Beneficiary" instead of "Petitioner," the basic claim is the same. As the record reflects that it is only the beneficiary who would actually be assigned from the petitioner to perform whatever services would be provided for [REDACTED] the petitioner is claiming that it would direct and control the "means and methods" by which the beneficiary's [REDACTED] work would be done. We discount this claim, for it has no substantive support in the evidentiary record. 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)).

Further, the petitioner has not addressed the countervailing evidence that tends to rebut the petitioner's claim to control over the means and methods by which the beneficiary would perform her work for [REDACTED]. In this regard, we direct the petitioner to the copies of the two Work Order Supplements executed by [REDACTED] and [REDACTED] (one filed with the Form I-129, and the other submitted on appeal.) As we earlier noted, the both of these documents state that, as "the Resource Assigned," the beneficiary would be "managed by [the] [REDACTED] [(that is [REDACTED]) manager." Further, those documents do not even mention, let alone assign any role to the petitioner. In fact, those Work Order Supplements assign responsibility for deliverables to [REDACTED], not the petitioner. Further still, those two documents define "Deliverables" as tasks assigned by the [REDACTED] manager – not the petitioner. Also, as we noted earlier, the "Communications Paths" and "Address for Communications" sections of these [REDACTED] Work order Supplements contain only [REDACTED] and [REDACTED] points-of-contact. In addition, the "Project Schedule and Milestones" section allocate no part to the petitioner, stating:

- Project plan will be jointly prepared. [REDACTED] will own the project plan.
- Schedule and Milestones will clearly be defined in the project plan.

As the only two parties to the Work Order Supplement are [REDACTED] and [REDACTED], it is clear that neither the petitioner, nor for that matter, [REDACTED] would be involved in the joint development of the project plan, including its definition of the project's Schedule and Milestones. And, of course, the petitioner is not a signatory to the Work Order Supplement.

Moreover, if there are any contractual provisions awarding control to the petitioner over the means and methods of performance, the petitioner has not provided them. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in

these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

Next, for the reasons earlier discussed, we find that the copies of the "Weekly Status" e-mails from the beneficiary to the petitioner are not indicative of any supervisory control exercisable by petitioner over the day-to-day work activities of the beneficiary in carrying out her [REDACTED] work. Not only are the reports after-the-fact in nature, but the petitioner identifies no term of any contractual document that would allow it to intrude into day-to-day management and direction of the beneficiary in the performance of her work for [REDACTED].

We also find no evidence that the petitioner will be providing instrumentalities or tools necessary for the [REDACTED] work claimed to be the basis of this extension petition; and there is no evidence that the petitioner is providing through the beneficiary any proprietary knowledge or applications developed by the petitioner. However, absent evidence to the contrary, it is reasonable to assume that the beneficiary cannot perform any work for [REDACTED] within the scope described by [REDACTED] unless she is granted access to the [REDACTED] Informational Technology systems.

Further, while the petitioner may claim power to reassign the beneficiary to other than the [REDACTED] [REDACTED] work that is the claimed subject of this petition-extension request, such a reassignment would constitute a material change in the terms and conditions of the beneficiary's employment, which would require the filing of a new or amended petition, with appropriate fees and a new LCA.

We observe that the petitioner has provided incomplete and imprecise information regarding who will supervise the beneficiary. While the petitioner states, in its various letters of support, that the beneficiary will be supervised by the petitioner's CEO and president, [REDACTED] the [REDACTED] Work Order Supplement states in provision number 5 that the "resource assigned to the project which will be managed by [REDACTED] | manager." Also, there is no indication that any management-level member of the *petitioner's* staff is located at the beneficiary's worksite or maintains any office space at the [REDACTED] worksite. Although the record contains copies of weekly status updates from the beneficiary to Mr. [REDACTED] there is insufficient evidence to establish that he exercises supervision or control of her daily or weekly tasks as they arise during the progress of the asserted [REDACTED] project-work. The Work Order Supplements further list representatives of [REDACTED] as points of contact for the project. The record as constituted, therefore, suggests that day-to-day control over the beneficiary and her particular work, including assignment, supervision, and evaluation of the quality and acceptability of the beneficiary's work, does not reside with the petitioner. Yet, by signing the petition, the petitioner endorses the accuracy of its submissions that it submits without stated reservations about their accuracy. 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).

The record does not establish that the petitioner has any substantive involvement in (1) determining the beneficiary's daily work schedule; (2) assigning particular tasks to the beneficiary during the course of the project work to which he is assigned; or (3) directing and evaluating the content, pace, and quality of the beneficiary's day-to-day project-work. While we note the petitioner's claim that it exercises performance reviews of the beneficiary, and that it reviews her weekly status reports, there is no evidence that the petitioner will have a direct influence on how the beneficiary's role in the [REDACTED] project would unfold day-to-day in terms of her actual work and task assignments and their associated performance requirements, timelines, and means and manner of performance. We note, in particular, that, although [REDACTED] and its prime contractor, [REDACTED] would both likely be able to identify how many weighty indicia of control manifest themselves in the management, supervisory, and reporting structures operating in the claimed [REDACTED] project-work, neither entity provides such extensive information.

Next, we note that, for H-1B classification, the petitioner is required to submit written contracts between the petitioner and the beneficiary, or if there is no written agreement, a summary of the terms of the oral agreement under which the beneficiary will be employed. See 8 C.F.R. § 214.2(h)(4)(iv)(A) and (B). The petitioner submits a document entitled "Summary of Agreement with [the beneficiary]," which outlines only the minimum terms of their relationship (i.e., the salary to be paid, the job title, and a reaffirmation that the petitioner will control the work of the beneficiary). The document is not signed by either party, and provides no insight on the nature of the day-to-day relationship between the parties. The vague agreement summary does not convey that (1) a specific place of employment, (2) for a particular client on a defined project, (3) with an established duration, had been established prior to the filing of the H-1B extension petition. While an employment agreement may provide some insights into the relationship of a petitioner and a beneficiary, it must be noted again that the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450. And, as noted earlier, this "Summary of Agreement" document does not even amount to an employment agreement, and so shall not be regarded as one.

Upon complete review of the record of proceeding, we find that the evidence in this matter 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 evidence of record does not establish that the petitioner would act as the beneficiary's employer. Despite the director's specific request for evidence on this issue, the petitioner has not submitted sufficient evidence to corroborate its claim. Based on the tests outlined above, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii).

As reflected in our comments on the documentary record, there is a significant amount of factors not favoring an employer-employee determination for the petitioner. However, based upon our analysis of the record of proceeding, we find that the evidence is not sufficiently comprehensive for us to provide a conclusive determination on the employer-employee issue. An evidentiary record that fails to fully disclose all of the relevant factors will not establish that the requisite employer-employee relationship will likely exist between the petitioner and the beneficiary. Accordingly, the appeal will be dismissed, and the petition will be denied.

D. Import of the prior petition's approval

We are not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). If the previous nonimmigrant petition was approved based on the same unsupported assertions that are contained in the current record, they would constitute material and gross error on the part of the director. It would be "absurd to suggest that [USCIS] or any agency must treat acknowledged errors as binding precedent." *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). A prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of eligibility for the benefit sought. *See Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Furthermore, our authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved nonimmigrant petitions on behalf of a beneficiary, we would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

E. Failure to establish the proffered position as a specialty occupation.

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 now discuss the issue only to an extent sufficient to alert the petitioner that the evidence of the record as now constituted does not demonstrate that it is more likely than not that the beneficiary would serve in a specialty occupation position 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).

By virtue of the SOC (Standard Occupational Classification System) occupational group identified in the LCA as the one to which the proffered position belongs, the proffered position should be evaluated as one belonging to the Financial Analysts occupational group, SOC Code 13-2051.

The *Occupational Outlook Handbook* states the following with regard to the duties of positions falling within the "Financial Analysts" occupational category:

Financial analysts provide guidance to businesses and individuals making investment decisions. They assess the performance of stocks, bonds, and other types of investments. Financial analysts typically do the following:

Duties

- Recommend individual investments and collections of investments, which are known as portfolios
- Evaluate current and historical data
- Study economic and business trends
- Study a company's financial statements to determine its value
- Meet with company officials to gain better insight into the company's prospects and management
- Prepare written reports
- Meet with investors to explain recommendations

Financial analysts evaluate investment opportunities. They work in banks, pension funds, mutual funds, securities firms, insurance companies, and other businesses. They are also called securities analysts and investment analysts.

Financial analysts can be divided into two categories: buy-side analysts and sell-side analysts.

- Buy-side analysts develop investment strategies for companies that have a lot of money to invest. These companies, called institutional investors, include mutual funds, hedge funds, insurance companies, independent money managers, and nonprofit organizations with large endowments, such as some universities.
- Sell-side analysts advise financial services sales agents who sell stocks, bonds, and other investments. Some analysts work for the business media and belong to neither the buy side nor the sell side.

Financial analysts generally focus on trends affecting a specific industry, geographical region, or type of product. For example, an analyst may focus on a subject area such as the energy industry, a world region such as Eastern Europe, or the foreign exchange market. They must understand how new regulations, policies, and political and economic trends may affect investments.

Investing is becoming more global, and some financial analysts specialize in a particular country or region. Companies want those financial analysts to understand

the language, culture, business environment, and political conditions in the country or region that they cover.

The following are examples of types of financial analysts:

Portfolio managers supervise a team of analysts and select the mix of products, industries, and regions for their company's investment portfolio. These managers not only are responsible for the overall portfolio, but also are expected to explain investment decisions and strategies in meetings with investors.

Fund managers work exclusively with hedge funds or mutual funds. Both fund and portfolio managers frequently make split-second buy or sell decisions in reaction to quickly changing market conditions.

Ratings analysts evaluate the ability of companies or governments to pay their debts, including bonds. On the basis of their evaluation, a management team rates the risk of a company or government not being able to repay its bonds.

Risk analysts evaluate the risk in investment decisions and determine how to manage unpredictability and limit potential losses. This job is carried out by making investment decisions such as selecting dissimilar stocks or having a combination of stocks, bonds, and mutual funds in a portfolio.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Financial Analysts," <http://www.bls.gov/ooh/business-and-financial/financial-analysts.htm#tab-2> (last visited April 6, 2015).

The *Handbook* states the following with regard to the educational requirements necessary for entrance into this field:

Financial analysts typically must have a bachelor's degree, but a master's degree is often required for advanced positions.

Education

Most positions require a bachelor's degree. A number of fields of study provide appropriate preparation, including accounting, economics, finance, statistics, mathematics, and engineering. For advanced positions, employers often require a master's in business administration (MBA) or a master's degree in finance. Knowledge of options pricing, bond valuation, and risk management are important.

Id. at <http://www.bls.gov/ooh/business-and-financial/financial-analysts.htm#tab-4> (last visited April 6, 2015).

The *Handbook* does not indicate that at least a bachelor's degree in a specific specialty or its equivalent is normally the minimum requirement for entry into this occupation. Although the *Handbook* states that most positions located within the "Financial Analysts" occupational category typically need a bachelor's degree to enter the occupation, the *Handbook* does not indicate that such a degree must be *in a specific specialty*. Rather, the narrative of the *Handbook* reports that "[a]

number of fields of study provide appropriate preparation, including accounting, economics, finance, statistics, mathematics, and engineering." Thus, for the reasons discussed above, the *Handbook* does not support a claim that "Financial Analysts" comprise an occupational group for which at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation.

In general, 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 (or its equivalent)" 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 two disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty (or its equivalent)," 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.

Again, the *Handbook* indicates that a variety of fields would "provide appropriate preparation," including accounting, economics, finance, statistics, mathematics, and engineering. The field of engineering is a broad category that covers numerous and various specialties, some of which are only related through the basic principles of science and mathematics, e.g., nuclear engineering and aerospace engineering. It is not readily apparent that a general degree in engineering or one of its other sub-specialties, such as chemical engineering or nuclear engineering, is closely related to the proffered position or that engineering or any and all engineering specialties are directly related to the duties and responsibilities of the particular position proffered in this matter.

Here and as indicated above, the petitioner, who bears the burden of proof in this proceeding, has not established either (1) that accounting, economics, finance, statistics, mathematics, and engineering in general are closely related fields or (2) that engineering or any and all engineering specialties are directly related to the duties and responsibilities of the proffered position. Absent this evidence, it cannot be found that the particular position proffered in this matter has a normal minimum entry requirement of a bachelor's or higher degree in a specific specialty or its equivalent under the petitioner's own standards. Accordingly, as the evidence of record does not establish a standard, minimum requirement of at least a bachelor's degree *in a specific specialty* or its equivalent for entry into the particular position, it does not support the proffered position as being a specialty occupation and, in fact, supports the opposite conclusion. Therefore, absent evidence of a

direct relationship between the claimed degrees required and the duties and responsibilities of the position, it cannot be found that the proffered position requires anything more than a general bachelor's degree. USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. USCIS has consistently stated that, although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).

It follows that a position's inclusion within the Financial Analysts occupational group is not sufficient in itself to establish it as one for which the normal entry requirement is at least a bachelor's degree, or the equivalent, in a specific specialty, as would be required to satisfy the first supplementary criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). Further, the petitioner has not provided persuasive evidence from any authoritative source to otherwise establish the proffered position as one requiring at least a bachelor's degree, or the equivalent, in a specific specialty.

Next, we find that the evidence of record about the proffered position and its duties does not demonstrate the level of uniqueness, complexity, and/or specialization required to satisfy the particular elements of either the second prong of the alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) or the alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The evidence of record is also insufficient to establish the claimed educational requirements as recruiting and hiring thresholds common to positions that are at once (1) within the petitioner's industry, (2) in organizations similar to the petitioner, and (3) in positions parallel to the proffered position. Thus, the petitioner has not satisfied the second prong of the supplementary criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), either.

We also find that the evidence of record does not provide the type of recruiting and hiring history required to satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Further, the descriptions of the duties and responsibilities provided in the petitioner's letters do not accord with the information in the *Handbook* about the duties comprising positions within the petition's claimed occupational group, Financial Analysts, which we have quoted above. This is a major flaw which casts fatal doubt upon the accuracy of the factual foundation of the specialty occupation claim. Again, 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). This failure to reconcile materially conflicting information about the fundamental nature and educational requirements of the proffered position also precludes approval of the proffered position. Also, that same level of unresolved conflict – and the same adverse consequences against the petition's approvability – resides in (1) the aforementioned differences between the petitioner's and [REDACTED] listing of the proposed duties, and (2) and between both the petitioner's and [REDACTED] listings of duties, on the one hand, and, on the other hand, the materially more expansive descriptions provided by counsel in the second and third full paragraphs at page 2 of his July 12, 2013 letter introducing the petition.

We also note, that aside from the credibility and accuracy issues, the conflicting information about the duties comprising the proffered position makes application of the pertinent regulatory criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) a futile exercise, because it is the substantive nature of the duties 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.

Further still, there is an additional flaw so fundamental as to itself fatally undermine the credibility of the petitioner's claim that the beneficiary would be providing the services of the Financial Analysts occupational category, namely, the failure to provide any evidence from [REDACTED] on this aspect, even though [REDACTED] – as the end-client and in the absence in this record of evidence to the contrary - presumably determines the occupational types and the minimum education and/or experience requirements, if any, of the persons to be assigned to its project-work. In the same vein, neither [REDACTED] or [REDACTED] asserted any need for a Financial Analyst.

Further still, we find that the petitioner's reliance upon the following statement in [REDACTED] letters is misplaced:

Please note that because of the sophistication of our computer systems and computer software needs, our company requires computer consulting professionals to possess at least a Bachelor's degree in computer science, engineering, finance, or related.

First, there is no evidence in the record from [REDACTED] as to what credentials it required for persons being assigned through [REDACTED] to perform the [REDACTED] project-work claimed to be the basis of this petition. Second, aside from the relevance issue that we just identified, we accord no weight to [REDACTED] claim as to its educational requirements, as the evidence of record does not substantiate the claim.

Finally, as should be evident in our earlier comments regarding the documentary aspects of the documentary evidence that raises questions as to the extent, continuity, and duration of [REDACTED] work that the petitioner claims as the basis of this extension petition, we agree with the director's finding that the petitioner's failed to establish that sufficient H-1B caliber work existed for the beneficiary for the duration of the period requested.

Prior to adjudication, the petitioner submitted a copy of its statement of work with [REDACTED] indicating that the beneficiary would be assigned to work on a contractor basis for [REDACTED] beginning October 1, 2012 for "1 + year." The petitioner also submitted a work order supplement between [REDACTED] and [REDACTED] indicating that the beneficiary would work on the project identified therein through June 28, 2013. As previously noted, however, the petitioner requested approval for a three-year period commencing on October 1 2013 through September 30, 2016. None of the documents submitted in

support of the petition established a legitimate assignment for the beneficiary within the time period noted on the petition.

While a new Statement of Work referencing the beneficiary was submitted on appeal, the work order was executed on September 4, 2014, nearly one month after the denial of this extension petition. Moreover, the statement of work encompasses a period from June 30, 2014 through June 26, 2016. Not only is this document insufficient to establish eligibility here since it post-dates the filing of the instant extension petition, it likewise would not be sufficient had we found it to have probative value, since it does not encompass the entire requested validity period set forth on the Form I-129. 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). USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

For all of the reasons above, the petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, it cannot be found that the proffered position qualifies as a specialty occupation, and the petition cannot be approved.

IV. CONCLUSION AND ORDER

We conclude that the evidence of record does not demonstrate the existence of an employer-employee relationship between the petitioner and the beneficiary. Beyond the decision of the director, we find that the evidence does not establish that the proffered position qualifies for classification as a specialty occupation.

An application or petition that fails to comply with the technical requirements of the law may be denied by this office 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 at 145 (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 this office's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*. 345 F.3d 683.

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.

(b)(6)



NON-PRECEDENT DECISION

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