



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: MAY 12 2015

PETITION RECEIPT #: [REDACTED]

IN RE:

Petitioner:  
Beneficiary:

[REDACTED]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(H)(15)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page ([www.uscis.gov/i-290b](http://www.uscis.gov/i-290b)) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you

Nea Rosenberg

Chief, Administrative Appeals Office

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

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a 70-employee "Computer consulting services" business established in [REDACTED]. In order to employ the beneficiary in a position it designates as a "Programmer Analyst (Computer Programmer)" position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition determining that the petitioner failed to establish (1) the existence of an employer-employee relationship between the petitioner and the beneficiary; and (2) that the proffered position qualifies for classification as a specialty occupation. On appeal, the petitioner asserts that the director's bases for denial of the petition were erroneous and contends that the petitioner satisfied all evidentiary requirements.

The record of proceeding before this office includes the following: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Notice of Appeal or Motion (Form I-290B), a brief, additional and re-submitted documentation. We reviewed the record in its entirety before issuing our decision.

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

I. EVIDENTIARY STANDARD ON APPEAL

We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). As a preliminary matter, we affirm that, in the exercise of our appellate review in this matter, as in all matters that come within our purview, we follow the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010). In pertinent part, that decision states the following:

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

\* \* \*

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

\* \* \*

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

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

*Id.*

Upon our review of the present matter pursuant to this standard, however, we find that the evidence in the record of proceeding does not support the petitioner's contentions that the evidence of record requires that the petition at issue be approved. Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, we find that the director's determinations in this matter were correct. Upon our review of the entire record of proceeding, and with close attention and due regard to all of the evidence, separately and in the aggregate, submitted in support of this petition, we find that the petitioner has not established that its claims are "more likely than not" or "probably" true. As the evidentiary analysis of this decision will reflect, the petitioner has not submitted relevant, probative, and credible evidence that leads us to believe that the petitioner's claims are "more likely than not" or "probably" true.

## II. FACTUAL AND PROCEDURAL BACKGROUND

On the Form I-129, the petitioner indicated that it is seeking the beneficiary's services as a "Programmer Analyst (Computer Programmer)" on a full-time basis at a minimum rate of pay of "\$60,000+" per year. The petitioner submitted the required Labor Condition Application (LCA) certified for a job prospect within the occupational classification of "Computer Programmers" - SOC (ONET/OES Code) 15-1131, at a Level I wage. The LCA identifies the beneficiary's work locations as [REDACTED], [REDACTED] County, Missouri and [REDACTED], [REDACTED] County, Missouri.

Preliminarily, we note that this petition identifies three business entities as involved in providing the computer programmer work that the petitioner presents as the basis of the H-1B specialty-occupation claim. These are: (1) [REDACTED]; (2) [REDACTED]; and (3) the petitioner, which is [REDACTED]. [REDACTED] (hereafter referred to as "the petitioner" or "[REDACTED]"). The petitioner indicated that the beneficiary would be working offsite in [REDACTED] Missouri, but that the beneficiary could also work remotely from its headquarters, in [REDACTED] Missouri. The petitioner requested approval of

the H-1B petition for the beneficiary for the period of October 1, 2014 to September 25, 2017.

In its letter in support of the petition, dated March 31, 2014, the petitioner stated that it provides "a wide range of software engineering services and consultants ranging from project management, system design and development, internet, web services, client/server, mainframes, databases, telecommunications, networking and data management."

In the same letter the petitioner affirmed its desire to employ the beneficiary in a full-time, temporary position of "Computer Programmer." The petitioner also noted the position here proffered "is internally titled Programmer Analyst or Software Engineer."<sup>1</sup> The petitioner also provided an overview of the beneficiary's duties of the position as follows:

He will be part of a team that is responsible for the development and support of software applications for our client. He will work with a team that is working to accomplish aggressive and exciting goals. He will be developing prototypes and performing complex application coding and programming. He will interpret end-user business requirements to develop and/or modify the technical design specifications for off-the-shelf and/or custom-developed applications. He will also analyze and review software requirements to determine feasibility of design within time and cost restraints. In addition, those in this position perform unit integration testing and assist with developing unit test scripts.

[The beneficiary's] specific duties break down as follows:

- Code and successfully perform unit and integration testing of software to ensure proper and efficient execution as well as compliance with the business and technical requirements
- Work with other programmer analysts to design interfaces between software applications in order to complete design requirements
- Use system traces and debugging tools for problem determination and system tuning
- Participate in the migration of applications to quality assurance and/or the production environment
- Work with managers and team members to develop development standards
- Perform necessary production-support tasks involving on-call responsibilities

The petitioner also indicated that the beneficiary's duties would encompass working with a number of programming languages and technology. The petitioner stated: "this position requires that an applicant have a Bachelor's degree in engineering, computer science, information technology or a closely related analytic or scientific discipline, or the equivalent thereof." The petitioner claimed

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<sup>1</sup> While the petitioner may refer to the proffered position of "computer programmer," internally as a "software engineer" and a "programmer analyst," we note that, these are three different occupations and, as well be discussed *infra*, subject to different prevailing wages.

that it required all of its employees in this position to have a bachelor's degree and that it preferred that its potential employees also have work experience.

The documents filed with the Form I-129 also included: (1) a letter from [REDACTED], dated February 20, 2014, addressing the nature of its agreement with the petitioner; and (2) documentation regarding the beneficiary's credentials.

The director found the evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on June 4, 2014. The director requested that the petitioner submit, among other things, probative evidence to establish that a specialty occupation position exists for the beneficiary, and that the petitioner would maintain the requisite employer-employee relationship with the beneficiary.

On July 7, 2014, the petitioner responded to the RFE. The petitioner submitted a duplicate copy of the letter from [REDACTED] dated February 20, 2014, and a copy of a "Supplier Agreement" between [REDACTED] and the petitioner, dated and signed on September 12, 2012. The petitioner also submitted a copy of its organizational chart, a sample copy of an employee performance evaluation, an excerpt from the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* regarding the "Computer Programmer" occupational group, and a copy of an academic equivalency evaluation from The Trustforte Corporation stating that the beneficiary has the educational equivalent of a bachelor of science degree in electronic engineering issued by an accredited university in the United States, as well as the beneficiary's foreign diploma and transcript.

The director reviewed the information provided by the petitioner to determine whether the petitioner had established eligibility for the benefit sought. On October 25, 2014, the director denied the petition.

On appeal, the petitioner contends that the director's findings were erroneous. In support, of this contention the following documentation was provided:

- A letter from a [REDACTED] signing as a member of "Sourcing & Supplier Management" at [REDACTED] dated June 9, 2014. The letter identifies a particular [REDACTED] Master Services Agreement as the contractual agreement governing the particulars of the role that [REDACTED] plays with regard to "each staffing provider [such as the petitioner]."<sup>2</sup> The letter confirmed that [REDACTED] is "responsible for providing centralized staffing management services to [REDACTED]" and that "[REDACTED] has agreed to handle for [REDACTED] all responsibilities related to verifying and administering all matters regarding the eligibility of temporary workers who provide services to [REDACTED], including

<sup>2</sup> The petitioner has not submitted either the Master Services Agreement or a comprehensive explanation of its terms and conditions relevant to the day-to-day control over the day-to-day determination, assignment of duties, and evaluation of work-product quality and efficiency of workers that might be accepted by [REDACTED] for assignment to a particular [REDACTED] project.

the provision of documentation to staffing providers for H-1B candidate positions. Accordingly, necessary information for the consideration of any candidate, including the nature of the candidate's employment, assignment details, and duration will be confirmed solely by [REDACTED]."

- A duplicate copy of [REDACTED] February 20, 2014 letter which had been previously submitted.
- A duplicate copy of the "Supplier Agreement" between [REDACTED] and the petitioner, dated September 12, 2012, which had been previously submitted.
- A duplicate copy of an excerpt from the *Handbook* regarding the "Computer Programmer" occupational group and a copy of an excerpt from the *Handbook* regarding the occupational group of "Software Developers."

The petitioner asserts that it is the beneficiary's employer and that it has a valid employer-employee relationship with the beneficiary and the right to control the beneficiary as established by the above documents. The petitioner asserts further that the proffered position is a specialty occupation and that it incorporates the duties of both a computer programmer and software developer and references the *Handbook*, in support of this assertion.<sup>3</sup>

### III. EVIDENTIARY OVERVIEW

The Form I-129 and the accompanying LCA specified that the petition was filed to secure H-1B employment for the beneficiary as a Computer Programmer. However, nowhere in the record does [REDACTED] or for that matter, [REDACTED] confirm, endorse, adopt, or in any way acknowledge those duties as comprising the work that the beneficiary specifically would perform for any period. In comparing the petitioner's list of duties with the content of the [REDACTED] February 20, 2014 letter, we find the [REDACTED] letter (1) does not identify any specific duties particular to any [REDACTED] project

<sup>3</sup> As will be discussed, the record does not establish that the proffered position is a specialty occupation. However for informational purposes, we note that where a petitioner seeks to employ a beneficiary in two distinct occupations, the petitioner should file two separate petitions, requesting concurrent, part-time employment for each occupation. While it is not the case here, if a petitioner does not file two separate petitions and if only one aspect of a combined position qualifies as a specialty occupation, USCIS would be required to deny the entire petition as the pertinent regulations do not permit the partial approval of only a portion of a proffered position and/or the limiting of the approval of a petition to perform only certain duties. *See generally* 8 C.F.R. § 214.2(h). Furthermore and as is the case here, the petitioner would need to ensure that it separately meets all requirements relevant to each occupation and the payment of wages commensurate with the higher paying occupation. *See generally* 8 C.F.R. § 214.2(h); U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf). Thus, filing separate petitions would help ensure that the petitioner submits the requisite evidence pertinent to each occupation and would help eliminate confusion with regard to the proper classification of the position being offered.

that may be the subject of a Job Offer to Staffing Suppliers like the petitioner, and (2) does not establish that it is referring to any position that would comport with the computer programmer position and its duties as described in the petition.

Also, the [REDACTED] letter does not deal with computer programmers or programmer analysts. Rather the letter addresses positions with different occupational titles and higher prevailing-wage levels than those that the petitioner has ascribed to the proffered position. The petition was filed for a Level I, entry-level<sup>4</sup> position within the Computer Programmers occupational group. However, the [REDACTED] letter identifies potential positions that might be staffed by the petitioner's candidates as "Senior and Mid-Level Software Engineers." We find there is insufficient evidentiary support in the record that Senior and Mid-Level Software Engineer positions are equivalent to or interchangeable with the proffered position, which the petitioner has identified as that of an entry-level computer programmer meriting only a Level I prevailing-wage.<sup>5</sup> We find that these conflicts between the [REDACTED] letter and the proffered position as otherwise described in the petition materially undermine the credibility of the petitioner's claim as to the type of work that would engage the beneficiary if this petition were approved. We also find that those conflicts are neither addressed nor resolved anywhere in the record of proceeding. The petitioner is obligated to clarify inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-

<sup>4</sup> See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

<sup>5</sup> That is, if the occupational classification is for a computer programmer at a Level I wage in [REDACTED] County, Missouri, the prevailing wage, when the petition was filed is \$48,464 annually. For more information regarding the prevailing wage for computer programmers in [REDACTED] County, Missouri, see the All Industries Database for 7/2013 – 6/2014 for Computer Programmers at the Foreign Labor Certification Data Center, on the Internet at <http://www.flcdatabase.com/OesQuickResults.aspx?> [REDACTED] (last visited Apr. 22, 2015). If the occupational classification is for a programmer analyst, a subset of the occupational classification of computer systems analysts at a Level I wage in [REDACTED] County, Missouri, the prevailing wage, when the petition was filed is \$55,765 annually. For more information regarding the prevailing wage for computer systems analysts in [REDACTED] County, Missouri, see the All Industries Database for 7/2013 – 6/2014 for Computer Systems Analysts at the Foreign Labor Certification Data Center on the Internet at <http://www.flcdatabase.com/OesQuickResults.aspx?> [REDACTED]

[REDACTED] (last visited Apr. 22, 2015). Thus, the petitioner's proffer of an annual salary of "\$60,000+" would fall within the required prevailing wage for the occupations of computer programmer or programmer analyst. If, however, the occupational classification is for a software developer, applications at a Level I wage in [REDACTED] County, Missouri, the prevailing wage, when the petition was filed is \$63,294 annually. For more information regarding the prevailing wage for software developers (applications) in [REDACTED] County, Missouri, see the All Industries Database for 7/2013 – 6/2014 for Software Developers (Applications) at the Foreign Labor Certification Data Center on the Internet at <http://www.flcdatabase.com/OesQuickResults.aspx?> [REDACTED] (last visited Apr. 22, 2015). Accordingly, the petitioner's LCA would not correspond to the petition.

92 (BIA 1988).

According to the petitioner, it would provide the beneficiary to [REDACTED] in order for [REDACTED] to, in turn, assign the beneficiary to [REDACTED]. It then would be [REDACTED] that would generate whatever Information Technology (IT) and computer-related project to which the beneficiary would be assigned at its offices in [REDACTED] Missouri. We have reviewed the four following documents and find the documents submitted do not assist in establishing eligibility for this visa classification.

A. The [REDACTED] Petitioner Supplier Agreement

The record of proceeding contains a copy of a formal contract-document entitled "Supplier Agreement," executed by [REDACTED] and the petitioner, with an effective date of September 12, 2012. The document was first introduced into the record as part of the petitioner's RFE response.

It is important to note that this [REDACTED] /petitioner Supplier Agreement provides an umbrella of terms and conditions which would apply to any agreement between [REDACTED] and the petitioner. Neither the Supplier Agreement nor any other document within the record of proceeding constitutes an offer - let alone a contractual acceptance - by [REDACTED] or [REDACTED] for the beneficiary to perform any particular type of work, for any specific period, as either a computer programmer or in any other capacity. Thus, we find that all of the documents submitted into the record are indefinitely prospective, or speculative, with regards to the substantive nature and duration of any position that the beneficiary might perform. As will be later discussed, this aspect itself is a major obstacle to both establishing the requisite employer-employee relationship between the petitioner and the beneficiary and also establishing that, by the petition's filing, the petitioner had actually secured work for the beneficiary that it claims is specialty occupation work.

The Supplier Agreement identifies the petitioner's role as that of a "Staffing Supplier" that would supply "Contract Workers" to provide "temporary Contract services under the direction of [REDACTED]." The [REDACTED] /petitioner Supplier Agreement's introductory paragraph indicates (1) that [REDACTED] "has been selected to provide centralized management services to [REDACTED] in connection with [REDACTED]'s use of temporary contract workers", and (2) that [REDACTED] would "engage with Staffing Suppliers to provide such temporary contract workers."

It is also important to note that the Supplier Agreement refers to a Master Services Agreement ("MSA") - referenced in the Supplier Agreement as the "[REDACTED] Agreement" - "pursuant to which [REDACTED] will provide centralized supplier management services to [REDACTED]." We reiterate that the record contains neither a copy nor a comprehensive explanation of the substantive terms of this [REDACTED] MSA as they would relate to the control of any person accepted from the petitioner or other Staffing Suppliers to perform contract work for [REDACTED]. While we will not speculate as to the particular contents of the MSA, we do find that the content of the Supplier Agreement clearly indicates that [REDACTED] in collaboration with [REDACTED], would play a substantial role in selecting and thereafter managing any candidates proposed by the petitioner or any other staffing supplier. That is, the Supplier Agreement specifically stipulates that [REDACTED] will be "provid[ing] centralized management services to [REDACTED]" pursuant to whatever the undisclosed terms of the [REDACTED] MSA may be.

The Supplier Agreement also reveals that, as a "Staffing Supplier," the petitioner may be contacted by [REDACTED] if so directed by [REDACTED] "at [REDACTED]'s option and sole discretion," to solicit candidates for temporary-staffing positions at [REDACTED]. The solicitations would be issued in the form of "Job Postings for available contract worker positions" which [REDACTED] would issue to [REDACTED], and which, in turn, [REDACTED] would publish "in the System managed by [REDACTED] or the designated Systems Administrator." As stated in the Supplier Agreement, as a Staffing Supplier, the petitioner would be: "granted access to the System for the purpose of reviewing open Job Postings available to Staffing Supplier, entering information regarding proposed candidates to fill such positions, and updating and reviewing information regarding Contract Workers on Assignment with [REDACTED]."

According to the Supplier Agreement, neither [REDACTED] nor [REDACTED] would be obliged to accept any candidate that the petitioner might proffer for service as a Contract Worker in response to a Job Posting.

The Supplier Agreement also indicates that, for the petitioner to be responsive to whatever substantive requirements might be set forth in any particular Job Offer, the petitioner would have to include not only the person's resume and job qualifications and the proposed billing rate, but also "such other information as may be required in the Job Posting for such assignment or in the Staffing Supplier Manual." As it appears that [REDACTED] would be issuing multiple Job Offers during the term of the Supplier Agreement, to begin to assess the substantive nature, the associated educational requirements, and the lines of day-to-day management and relative degrees of supervisory control over any person to be employed at [REDACTED] pursuant to the Supplier Agreement, we would have to review the content of the related Job Offer, and at least whatever Staffing Supplier Manual terms, procedures, and processes would be incorporated into the contractual obligations of the petitioner and [REDACTED]. None of those details are provided in this record of proceeding.

The Supplier Agreement indicates that the contents of the aforementioned Staffing Supplier Manual would likely have information relevant to the question of the actual extent of control, if any, that the petitioner would be allowed to exercise during the beneficiary's day-to-day work pursuant to any assignment that [REDACTED] might approve for him at a [REDACTED] project. This is a reasonable conclusion based upon the following indications that the Manual contains binding policies and procedures that would regulate whatever role the petitioner might have with regard to its assigning the beneficiary to any Job Offer work for which [REDACTED] would select him to perform for [REDACTED].

- The "Definitions" section of the [REDACTED] /petitioner Supplier Agreement defines the Manual as follows :

**"Staffing Supplier Manual"** means the document detailing the required operational procedures which may be updated from time to time by [REDACTED] setting forth policies and procedures to be followed by the Staffing Supplier in using the System and providing Contract Workers or potential Contract Workers under this Agreement. The policies and procedures set forth in the Staffing Supplier Manual will be applicable to all services provided by

Staffing Supplier, and Staffing Supplier agrees to comply with such policies and procedures.

- The Supplier Agreement's clause 4, Order Process, at subparagraph (b), **Proposed Candidates**, includes the following language:

██████████ will notify Staffing Supplier if Staffing Supplier's candidate has been preliminarily selected to fill an available Job Posting. Upon receipt of such notice, Staffing Supplier shall undertake the pre-Assignment steps set forth in the Staffing Supplier Manual, satisfying the MasterCard standards and any additional standards set forth in the Job Posting . . . .

Notably, the petitioner has not submitted a copy of the aforementioned Staffing Supplier Manual for our review, even though the Supplier Agreement indicates that the Manual's contents would be relevant to the employer-employee and potentially the specialty occupation issues.

#### B. The February 20, 2014 ██████████ Letter

The initial documents submitted with the Form I-129 included a two-page, February 20, 2014 letter to U.S. Citizenship and Immigration Services (USCIS) from the Director of Global Operations at ██████████, writing from ██████████ Maryland. The express purpose of the letter is to confirm that, as "the Onsite Vendor Management Company, for ██████████," ██████████ "has a valid current contract with [the petitioner] to provide Information Technology Services resources for ██████████." However, a review of the document reveals nothing by which we can conclude that the "valid current contract" to which the letter alludes is other than the above-discussed ██████████/petitioner Supplier Agreement. Like that Agreement, the letter does not refer to any contract by which ██████████ or ██████████ had awarded any particular project-work for the beneficiary to perform, whether as a computer programmer or otherwise. Like the Supplier Agreement, this document does not indicate that by the date of its signing the petitioner had secured any definite, non-speculative work for the beneficiary with regard to any ██████████ project. Thus, like the Supplier Agreement, this ██████████ letter also is not probative evidence that the petitioner and the beneficiary would have the employer-employee relationship claimed in the petition or that the potential work to be performed by the beneficiary would be specialty occupation work.

In fact, the letter reflects that there was no binding agreement by ██████████ or ██████████ to definitely employ the beneficiary or any other person that the petitioner might propose for ██████████ work. The ██████████ letter speaks only of "recruiting and presenting" endeavors in which the petitioner would engage in the future and also of "[a] work order" to be "completed at the start for each ██████████ contractor that will be placed at ██████████." Further, the letter states that the petitioner's recruitment and candidate-presentation efforts would be directed at "Senior and Mid-Level Software Engineers" which materially conflicts with the type of position specified in the LCA, that is, a Level-I (entry) prevailing-wage position for a Computer Programmer.

It is also important to note that this ██████████ letter, dated February 20, 2014, does not mention any degree or objective degree-equivalency requirement for any of the Senior and Mid-Level Software

Engineer positions for which it foresees the petitioner would provide candidates.

C. The Petitioner's "Employee's Performance Appraisal and Development Program" Form

Submitted in the RFE response as evidence of the petitioner's claimed right to control the beneficiary, this eight-page document reflects that the beneficiary would be subject to the petitioner's appraisal during periods when the beneficiary would be working on assignment. While this document is indicative of a level of control that the petitioner would have over the beneficiary if he were to be assigned to [REDACTED] we note again that there is insufficient evidence that the beneficiary would in fact be assigned to [REDACTED] for the period specified in the petition, so as to make this appraisal form relevant to the petition now before us on appeal. Moreover, even if the petitioner had established some relevance, the evidentiary weight of the form would be reduced to little or no probative value because there is insufficient evidence in the record of proceeding that [REDACTED] or [REDACTED] would have to either participate in, review the results of, or abide by the results of the petitioner's evaluation process for any purpose.

D. Letter from [REDACTED]'s Sourcing & Supplier Management, dated June 9, 2014

This one-page letter, which was first introduced into the record at the appeal stage, is the record of proceeding's only document from [REDACTED]. It confirms the role of [REDACTED], which the letter describes as "responsible for providing centralized staffing management services to [REDACTED]." The letter also identifies [REDACTED] as the sole party for confirming "necessary information for the consideration of any candidate, including the nature of [a] candidate's employment, assignment details, and durations." This letter also references the [REDACTED] agreement as defining the scope of the [REDACTED] role, conveying that [REDACTED] operates "pursuant to the terms and conditions of the Master Services Agreement between [REDACTED] and [REDACTED] dated April 26, 2012." However, the record does not include the [REDACTED] MSA and this short, two-paragraph letter provides no substantive details with regard to the terms and conditions in that MSA. Moreover, this letter makes no mention of the petitioner, the beneficiary, or any project work that has been awarded to the petitioner.

E. Conclusion Regarding the Above Documents

As is evident from the discussion of the four documents above, the evidence of record does not establish that as of the time of the petition's filing the petitioner had secured definite work that would be available for the beneficiary at [REDACTED] if the petition were approved. This alone is a material flaw that fatally undermines the petitioner's efforts both to establish the requisite employer-employee relationship and to qualify the proffered position as a specialty occupation. Upon review of the four documents analyzed in this section, we find that the petitioner has not established that it had specialty occupation work available for the beneficiary to perform as the beneficiary's employer when the petition was filed. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

## IV. EMPLOYER-EMPLOYEE

Continuing with our analysis of this petition, we will next discuss in further detail whether the petitioner has established that it meets the regulatory definition of a "United States employer" and whether the petitioner has established that it will have "an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee" as set out at 8 C.F.R. § 214.2(h)(4)(ii).

As already noted in our evidentiary overview, the record contains assertions in the [redacted]/petitioner Supplier Agreement and in the aforementioned letters from [redacted] and [redacted], to the effect that the petitioner is the employer and/or sole employer of whatever persons it would provide as a Staff Supplier to work at [redacted]. We have considered all such assertions both individually and as part of the totality of evidence bearing on the employer-employee issue. However, while those statements are factors to be considered, there is insufficient indication that they were based upon application and analysis of the common-law employer-employee test which governs determinations of the employer-employee relationship in the H-1B specialty-occupation context. Thus, those assertions regarding the petitioner as employer merit little to no probative weight towards resolving the employer-employee issue before us.

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

subject to section 212(j)(2), who is coming temporarily to the United States to perform services. . . in a specialty occupation described in section 214(i)(1) . . ., who meets the requirements for the occupation specified in section 214(i)(2) . . ., and with respect to whom the Secretary of Labor determines and certifies to the [Secretary of Homeland Security] that the intending employer has filed with the Secretary [of Labor] an application under section 212(n)(1) . . . .

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

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

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

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

The record is not persuasive in establishing that the petitioner will have the requisite

employer-employee relationship with the beneficiary. The evidence of record is not sufficiently comprehensive to bring to light all of the relevant circumstances that pertain to the parties among themselves and also with relation to the beneficiary with regard to the [REDACTED] project.

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 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 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.<sup>6</sup>

Specifically, the regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to engage a person to work within the United States, and to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee" or "employer-employee relationship" combined with the agency's otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition" or, more importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. Cf. *Darden*, 503 U.S. at 318-319.<sup>7</sup>

<sup>6</sup> 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).

<sup>7</sup> 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 *Roberts 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))).

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).<sup>8</sup>

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

The factors indicating that a worker is or will be an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. *Darden*, 503 U.S. at 323-324; *Clackamas*, 538 U.S. at 445; *see also* *Restatement (Second) of Agency* § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. *See Clackamas*, 538 U.S. at 445; *see also* *New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1) (adopting a materially identical test and indicating that said test was based on the *Darden* decision); *see also* *Defensor v. Meissner*, 201 F.3d 384, 388 (5th Cir. 2000) (determining that hospitals, as the recipients of beneficiaries' services, are the "true employers" of H-1B nurses under 8 C.F.R. § 214.2(h), even though a medical contract service agency is the actual petitioner, because the hospitals ultimately hire, pay, fire, supervise, or otherwise control the work of the beneficiaries).

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

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

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<sup>8</sup> 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).

*right to* assign them, it is the *actual* source of the instrumentalities and tools that must be examined, and not who has the *right to* provide the tools required to complete an assigned project. *See id.* at 323.

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

Applying the *Darden* and *Clackamas* tests to this matter, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee."

We note the petitioner's assertion that the beneficiary will work at the offices of [REDACTED] in [REDACTED] Missouri; and we further note the petitioner's contentions that at all times it will maintain an employer-employee relationship with the beneficiary. However, the record of proceeding does not establish what project(s) would require the beneficiary to perform the duties and responsibilities that the petitioner ascribed to the proffered position.

First, the record of proceeding does not establish the existence of any [REDACTED] project work that would definitely be awarded to the beneficiary, or any other worker that the petitioner might, in response to a [REDACTED] Job Offer not yet made, propose to [REDACTED] as a candidate for assignment at [REDACTED]. In this regard we hereby incorporate our earlier comments and findings with regard to the documentary evidence that the petitioner submitted as indicia of its business relationships with various companies. As there reflected, the record of proceeding does not contain persuasive evidence that the [REDACTED] petitioner Supplier Agreement had even produced any Job Offers for which the beneficiary has been proposed as a candidate for selection to work at [REDACTED]. Certainly the record of proceeding includes no copy of any such Job Offer and no copy of any [REDACTED] or [REDACTED] document confirming the acceptance, and associated terms and conditions, of the beneficiary or any other candidate proposed by the petitioner for work at [REDACTED]. Additionally, as noted above, the evidence of record fails to establish that the petitioner or any of its staff would determine, assign, and evaluate the beneficiary's day-to-day work during any assignment at [REDACTED]. Absent a Job Offer or other [REDACTED] document, delineating the contractual terms and conditions relevant to the employer-employee common law touchstone of control - we are unable to determine that balancing all of the relevant indicia of control would favor the petitioner - rather than one of the other parties - so as to establish the requisite employer-employee relationship.

Further, the petitioner has provided inconsistent information with respect to the duration of the relationship between the parties and the location(s) where the beneficiary will work for the duration of the requested H-1B employment period. More specifically, on the Form I-129, the petitioner requested that the beneficiary be granted H-1B classification from October 1, 2014 to September 25, 2017. However, the February 20, 2014 letter from [REDACTED] indicates that "the projects can be up to two years."

We find, therefore, that the evidence of record does not establish that, by the date of the filing of the petition, the petitioner had yet secured definite, non-speculative work for the beneficiary for the

period of employment specified in the petition. In this respect, we also find that the record does not support a finding that the beneficiary's services would be required for the previously quoted duties that the petitioner claimed for the proffered position. The record of proceeding simply lacks documentary evidence from the asserted end-client ( ) of the existence of, or details regarding, any particular project to which the beneficiary would be assigned in the United States.

Also, because the evidence of record does not establish either an actual offer-and-acceptance by related to the beneficiary for any work at , the actual scope of any services to be performed remains merely speculative and, therefore, not a sufficient basis to support a determination that the petitioner would be engaging the beneficiary for actual work in the United States, as would be required to establish the petitioner as a United States employer in accordance with the provision at 8 C.F.R. § 214.2(h)(4)(ii).

Next, we note that while social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are still relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary's employer.

We make several findings regarding the record's indicia of the petitioner's control with regard to the beneficiary and his work – that is, if the beneficiary should be accepted by for work at . It appears that the petitioner would be responsible for paying for liability insurance, social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings. Under certain circumstances, the petitioner could unilaterally transfer or remove the beneficiary after assignment to a project, and it would retain the authority to fire the beneficiary. However, the record establishes that and would always retain the power to insist – with the prospect of contract cancellation for non-compliance – that the petitioner remove any assigned worker.

We now note numerous aspects of the evidence of record that are factors which weigh against a favorable determination on the petitioner's claim that it satisfies the employer-employee requirement. The record indicates that, if in fact the beneficiary were selected for a particular project pursuant to the candidate-selection process, he would be assigned to a location ( at , Missouri) other than the petitioner's office address (in , Missouri). There is insufficient evidence that the petitioner would maintain any supervisory presence at the work-location. In contrast, we see that, as noted in the February 20, 2014 letter, would serve as 's "Onsite Management Company," with the reasonable implication being that – rather than the petitioner or any other Staffing Provider – would provide whatever general management would be required for projects temporarily staffed by Staffing Suppliers. We also note that the Supplier Agreement appears to allow the petitioner, as a Staffing Supplier, to reassign workers that it supplied, under certain conditions (i.e., in accordance with the terms at paragraph 4(g), Assignment Rule). However, it is clear that retains the absolute right to fire any assigned worker and to do so at its sole

discretion. In particular, the paragraph 4(f), Removal of Contract Workers, includes the following language:

Staffing Supplier acknowledges that the Contract Workers shall be subject to the continuing approval of [REDACTED]. If at any time [REDACTED] in its reasonable judgment, determines that a Contract Worker is inadequate, unsatisfactory, or has failed to comply with [REDACTED] or [REDACTED] rules, regulations, or policies, [REDACTED] will so advise Staffing Supplier and Staffing Supplier shall immediately take action to correct the situation by removing the Contract Worker. Failure by Staffing Supplier to remove an unsatisfactory Contract Worker shall be a breach of this agreement and, in such event[,] [REDACTED] will have the right to terminate this Agreement upon written notice to the Staffing Supplier.

Although the petitioner's Evaluation Review form that it has submitted into the record does not appear to include any proscription against the petitioner evaluating the beneficiary or any other person that it may assign to temporarily staff [REDACTED] projects, there is no evidence that the petitioner's evaluations are binding upon [REDACTED] or [REDACTED]. Also, there is no indication that, solely on the basis of its performance evaluations, the petitioner could unilaterally keep anyone at the project site regardless of contrary performance determinations by [REDACTED] or [REDACTED]. Again, paragraph 4(f), Removal of Contract Workers, in the aforementioned petitioner/[REDACTED] Supplier Agreement indicates that workers whose services are accepted by [REDACTED] from the petitioner, or any supplied by any Staffing Supplier, would always remain both subject to [REDACTED]'s evaluation and [REDACTED]'s removal.

The record of proceeding does not contain sufficient probative evidence that the petitioner would play any substantial role in determining the particular duties and tasks that any worker accepted for assignment at [REDACTED] would perform in the day-to-day work associated with such assignment. Evidence indicating that such a role would not be likely includes the [REDACTED] letter's descriptions of [REDACTED] as the provider of "centralized management services for [REDACTED]" and the [REDACTED] self-description as "the Onsite Vendor Management Company." Moreover, we find that the record of proceeding contains insufficient documentary evidence from [REDACTED] or [REDACTED] either allocating any immediate supervisory duties to the petitioner or including the petitioner in day-to-day determinations and evaluations of tasks to be performed by workers assigned to [REDACTED].

The evidence of record reflects that [REDACTED] would, more likely than not, ultimately generate and determine the substantive scope and duration of any work of the type that the petitioner asserts as the basis of the petition.

With regard to the petitioner's claim of the right to manage and evaluate its workers, we have already noted the evidence of performance evaluation forms. However, neither the petitioner, [REDACTED], nor [REDACTED] identify any specific management authorities and responsibilities that have been reserved for the petitioner to exercise over designating the beneficiary's day-to-day tasks, evaluating the quality and efficiency of the beneficiary's work, and providing guidance on immediate-work issues as needed (again, if [REDACTED] accepted the beneficiary for assignment to [REDACTED])

There is insufficient evidence that any work to which the beneficiary might be assigned would require the petitioner to provide its own proprietary information or technology, or that the petitioner would play any active role in supervising and guiding the beneficiary's work at [REDACTED] - that is, if he were accepted by [REDACTED] for assignment to [REDACTED].

The totality of the evidence reflects that the beneficiary's work would inherently require *access to and use of* the end-client's IT instrumentalities (such as the end-client's own IT systems, computer programs, and software applications).

As indicated in the [REDACTED] letter, any worker supplied for [REDACTED] within the scope of the duties described in that letter would not be used to produce an end-product for the petitioner's own use or distribution/sale to the public or any of its clients. Rather, the totality of the evidence indicates that whatever work-products might be produced by any such worker would be solely for the end-client [REDACTED]'s use and benefit and would have to conform to [REDACTED]'s requirements - not the petitioner's.

The petitioner has not provided detailed information from either the [REDACTED] MSA or the Staffing Supplier Manual for our review, documents which information in the record of proceeding suggests as likely having content bearing upon the extent of the petitioner's role and authority with regard to any person accepted by [REDACTED] for temporary contract work.

We also find that the petitioner has undermined the credibility of the petition by its statements, made in its March 31, 2014 letter of support and repeated on appeal, that "[a]ll activities, including managerial supervision and hiring and firing decisions as well as performance evaluations are controlled by [the petitioner]" and that "[the petitioner's] clients have no managerial authority over our employees and our employees do not fill positions at client sites." If, as the context suggests, the petitioner includes within the scope of its "employees" any persons whom it would assign to [REDACTED] pursuant to the [REDACTED]/petitioner Supplier Agreement, then the petitioner's statements are materially inconsistent with information presented in that Supplier Agreement as well as in the letters from [REDACTED] and [REDACTED]. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). It is further noted that the petitioner provided no explanation for the inconsistencies. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

We fully considered all of the submissions from the entities involved, including the letters submitted by representatives of [REDACTED] and [REDACTED]. Based upon our review, we reiterate our finding that the only contract-document submitted into the record is the [REDACTED]/petitioner Supplier Agreement and that, neither it or any other documentary evidence provides specific information

with regard to the actual supervisory and management framework that would determine, direct, and supervise the beneficiary's day-to-day work at [REDACTED] if he were selected to work there. Based upon this fact and upon all of the aspects of the record that we have discussed as bearing on the employer-employee issue, we conclude that the evidence of record is inconclusive on the issue of whether it is more likely than not that the petitioner and the beneficiary would have the requisite employer-employee relationship in the context of the work to be performed if this petition were approved. We reach this conclusion based upon the application of the above-discussed common law principles to the totality of the evidence of record. As it is the petitioner's burden to establish that an employer-employee relationship exists, and the petitioner has not met this burden, the appeal will be dismissed and the petition will be denied.

Without full disclosure of all of the relevant factors relating to the end-client, including evidence corroborating the beneficiary's actual work assignment, we are unable to find that the requisite employer-employee relationship will exist between the petitioner and the beneficiary; and, of course, such disclosure is necessarily precluded where, as here, there is no definite employment.

The evidence of record, therefore, is insufficient to establish that the petitioner qualifies as a "United States employer," as defined by 8 C.F.R. § 214.2(h)(4)(ii). Merely claiming in its letters that the beneficiary is the petitioner's employee does not establish that the petitioner exercises any substantial control over the beneficiary and the substantive work that he performs. Nor do clauses in overarching agreements such as the letters from [REDACTED] or [REDACTED] carry probative weight in the absence, as here, of specific contractual documents that bring such agreements into play with regard to work for which it is shown that the beneficiary would be employed.

The petitioner's reliance on claims that it would set the beneficiary's wages, control the beneficiary's work locations, and manage and evaluate the beneficiary's performance is misplaced. As we have noted, the existence of actual work for the beneficiary has not been established. The record of proceeding before us does not document the full panoply of employer-employee related terms and conditions that would control the beneficiary's day-to-day work; therefore, we do not have before us a sufficiently comprehensive record to identify and weigh all of the indicia of control that should be assessed to resolve the employer-employee issue under the above discussed common law touchstone of control.

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

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

only "United States employers can file an H-1B petition" and adding the definition of that term at 8 C.F.R. § 214.2(h)(4)(ii) as clarification).

Full consideration of the totality of the evidence leads us to conclude that the petitioner has established no more than, at least in the factual context of this petition, (1) that it is a staffing firm that locates suitable candidates for available positions and (2) that it filed the petition in anticipation of a Job Offer that had not yet been extended but for which it intended to proffer the beneficiary as a candidate for [REDACTED] to accept as a temporary contract worker for [REDACTED].

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

## V. SPECIALTY OCCUPATION

Next we will address whether the petitioner has provided sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, including the evidence submitted on appeal, and for the specific reasons described below, we agree with the director and find that the evidence fails to establish that the position as described constitutes a specialty occupation.

### A. The Law

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

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

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

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

*Specialty occupation* means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

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

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

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

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), USCIS consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at 147 (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly

represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

### B. Analysis

The petitioner's specialty-occupation claim resides in the work that the petitioner asserts the beneficiary will provide per contractual agreement between the petitioner and another entity, or entities. Thus, to meet its burden of proof, it is incumbent upon the petitioner to provide evidence of the pertinent contractual requirements that is sufficient to show that their actual performance would require the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty – in compliance with the "specialty occupation" definition at section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii). Additionally, the petitioner must establish that the petition was filed on the basis of definite, non-speculative employment that had been secured for the beneficiary by the time the petition was filed. Again, USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

Thus, when determining whether a proffered position qualifies as a specialty occupation, USCIS must determine, *inter alia*, whether the petitioner has (1) provided sufficient evidence to establish that the beneficiary will perform the duties of the proffered position as stated in the petition; and (2) established that, at the time of filing, it had secured non-speculative work for the beneficiary that is in accordance with the petitioner's claims about the nature of the work that the beneficiary would perform in the proffered position. For the reasons we shall now discuss, the evidence of record is insufficient to meet either of these requirements.

The record does not establish that, by the petition's filing, the petitioner had secured any work that would require the beneficiary to perform the duties of the proffered position for the period specified in the petition. Although the petitioner has established a contractual relationship with [REDACTED] the claim in this petition is that the beneficiary will work for a third-party employer through that agreement with [REDACTED]. However, the agreement between [REDACTED] and the end-client, [REDACTED], has

not been provided.

That is to say that, without follow-on contractual commitments for specific work in such forms as Statements of Work, Work Authorizations, Schedules, Job Offers, or Purchase Orders, as [REDACTED] confirmed it would have in its February 20, 2014 letter, the documents in the record do not indicate that the petitioner has secured any definite work to be performed for any particular period. We find that, while the documents discussed above indicate that the petitioner has a business relationship with [REDACTED], who in turn has an agreement with [REDACTED], again, they do not establish that those relationships actually had generated work that the beneficiary would perform in accordance with the duties and responsibilities that the petitioner ascribed to the proffered position. The record is also devoid of any documentation establishing in-house work that would require the beneficiary to perform the duties and responsibilities that the petitioner has attributed to the proffered position.

As discussed in the previous section of this decision, the petitioner has not established that the petition was filed for non-speculative work for the beneficiary that existed as of the time the H-1B petition was filed. The petitioner did not submit sufficient, probative evidence corroborating that, when the petition was filed, the beneficiary would be assigned to perform services pursuant to any specific contract(s), work order(s), and/or statement(s) of work (or other probative evidence) for the requested validity period and/or that the petitioner had a need for the beneficiary's services during the requested validity dates. There is insufficient documentary evidence in the record corroborating what the beneficiary would do, where the beneficiary would work, and the availability of work for the beneficiary for the requested period of employment. For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. 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. at 190).

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

Here, the record of proceeding in this case is similarly devoid of sufficient information from the end-client, [REDACTED], regarding the specific job duties to be performed by the beneficiary for that company. The petitioner has not established the substantive nature of the work to be performed by the beneficiary, which therefore precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a

degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

Based upon a complete review of the record of proceeding, we conclude that the evidence fails to establish that the position as described more likely than not constitutes a specialty occupation. The petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. For this additional reason, the appeal will be dismissed.

As the petitioner premised its specialty occupation claim on an [REDACTED] assignment for computer programmer work for [REDACTED] the record's failure to substantiate that such an assignment had been secured for the beneficiary is dispositive of the specialty occupation issue. Therefore, we need not address additional evidentiary deficiencies which we have observed in the record that would preclude recognition of the proffered position as a specialty occupation if the petitioner had established that the beneficiary would be working as a computer programmer for [REDACTED].

## VI. CONCLUSION

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

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

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

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