



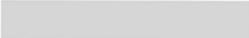
U.S. Citizenship
and Immigration
Services

(b)(6)



MAY 15 2015

DATE:

PETITION RECEIPT #: 

IN RE:

Petitioner:

Beneficiary:



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

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

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

I. FACTUAL AND PROCEDURAL HISTORY

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the Vermont Service Center on April 2, 2014. On the Form I-129 visa petition, the petitioner describes itself as a company providing quality assurance solutions, testing services and IT development, with 152 employees, established in [REDACTED]. In order to employ the beneficiary in what it designates as a test coordinator, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on August 20, 2014, concluding that the evidence of record does not demonstrate that: (1) the petitioner qualifies as an U.S. employer having an employer-employee relationship with the beneficiary; and (2) the position proffered qualifies as a specialty occupation. On appeal, counsel asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements.

The record of proceeding before us contains: (1) the 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 notice of decision; (5) the Notice of Appeal or Motion (Form I-290B) and supporting documentation. We reviewed the record in its entirety before issuing our decision.¹

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

II. PROFFERED POSITION

On the Form I-129, the petitioner indicates that it is seeking the beneficiary's services as a test coordinator on a full-time basis at the rate of pay of \$60,000 per year. In the March 26, 2014 letter of support, the petitioner provided a description for the proffered position of test coordinator as follows:

- Manage Projects and coordinate with our clients ([REDACTED]) [.]
- Manage employees we have on multiple projects across clients.
- Provide technical assistance on Projects as needed[.]
- Work with clients on status/performance.

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

- Act as a Liaison with clients and employees[.]
- Produce technical, business and economic feasibility studies for project ideas[.]
- Prepare required documentation of requirements, business processes and recommendations[.]
- Work with software technologies like Web Services, XML, SOAP, SQL, UNIX for projects.

The petitioner further indicated that the position requires "at least a bachelor's degree and less than 1 year experience."

The petitioner also submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The petitioner indicated that the occupational classification for the proffered position is "Computer Occupations, All Other" – SOC (ONET/OES Code) 15-1199. The petitioner indicated that the beneficiary will be employed at its location at [REDACTED] Massachusetts [REDACTED] and also at [REDACTED] Maine [REDACTED]

III. Employer-Employee Relationship

We will address whether the petitioner has established that it meets the regulatory definition of a United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii). In this context, the petitioner must establish that it will have "an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." *Id.*

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

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

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

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

8 C.F.R. § 214.2(h)(4)(ii) (emphasis added); *see also* 56 Fed. Reg. 61111, 61121 (Dec. 2, 1991). We reviewed the record of proceeding in its entirety and finds that it is not persuasive in establishing that the petitioner will have an employer-employee relationship with the beneficiary.

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

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

The United States Supreme Court has determined that where federal law fails to clearly define the term "employee," courts should conclude that the term was "intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (hereinafter "*Darden*") (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). The Supreme Court stated:

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

party."

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

In this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. See generally 136 Cong. Rec. S17106 (daily ed. Oct. 26, 1990); 136 Cong. Rec. H12358 (daily ed. Oct. 27, 1990). On the contrary, in the context of the H-1B visa classification, the regulations define the term "United States employer" to be even more restrictive than the common law agency definition.² Specifically, the regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to engage a person to work within the United States, and to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee" or "employer-employee relationship" combined with the agency's otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition" or, more importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. Cf. *Darden*, 503 U.S. at 318-319.³

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

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

³ To the extent the regulations are ambiguous with regard to the terms "employee" or "employer-employee relationship," the agency's interpretation of these terms should be found to be controlling unless "plainly

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

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

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

erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359, 109 S.Ct. 1835, 1850, 104 L.Ed.2d 351 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945))).

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

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, 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."

A. Itinerary

In the LCA, the petitioner indicated that the beneficiary will be employed at its location in [REDACTED] MA, and also at [REDACTED] located at [REDACTED] Maine [REDACTED]. In an itinerary dated March 26, 2014 provided for the beneficiary, the petitioner stated that it "handle[s] testing services for various clients on-site in its location in [REDACTED]." The petitioner did not identify additional work locations. It also provided a job description consistent with its support letter dated March 26, 2014. The petitioner further stated that the position "would require a prior experience of same nature of job" and the incumbent "should be capable of [w]orking with major operating [s]ystems, [s]oftware, databases and network programming basic languages." The petitioner indicated that the "[c]urrent itinerary of services for [the beneficiary] [is] scheduled until September 2017."

In response to the RFE, the petitioner provided another itinerary dated July 10, 2014. The petitioner identified the client location as [REDACTED] Maine, but also identified its address for [REDACTED], and [REDACTED] projects. While the petitioner again indicated that the "[c]urrent itinerary of services for [the beneficiary] [is] scheduled until September 2017," the petitioner did not provide contracts or service agreements for [REDACTED] and [REDACTED] to establish that the petitioner has in-house projects available. Further, as will be discussed later, while the petitioner provided a consulting agreement and sample schedules for [REDACTED] the petitioner did not establish existence of on-going project valid for the duration of the beneficiary's employment at [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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). Therefore, the record of proceeding does not establish availability of continued, non-speculative employment for the beneficiary.

Further, the itinerary dated July 10, 2014 provided a job description that differs from the job description provided in the support letter dated March 26, 2014. The new job description states the following:

- Coordinate Testing activities of QA Engineers for multiple IT projects using cutting edge technologies
- Design test plans, scenarios, scripts, or procedures
- Develop testing programs that address areas such as database impacts, software scenarios, regression testing, negative testing, error or bug retests, or usability
- Design, analyze and develop business process applications on Windows and UNIX scripts
- Writing Test Plans, Test cases and developing Test scripts using HP Quality Center and HP Loadrunner
- Creation and review of Test Plans, test Strategies with Development Lead and Project Managers
- Coordinate communication within areas of the enterprise regarding IT projects, including aspects impacting the scope, budget, risk, and resources of the work effort
- Responsible for coding using SQL, PL/SQL, Java, ASP.NET, Procedures/Functions, Triggers and Packages
- Provide input to the Project Manager, Program Manager, and Program leader regarding team member performance.

The petitioner also added that "minimum of Bachelor degree in computers or related field is required." We note that the 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). Further, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

B. Consulting Agreement

As mentioned, the petitioner also submitted a copy of a document entitled "Consulting Agreement," entered into as of December 2009, between the petitioner and [REDACTED]. This agreement states "from time to time upon request by [REDACTED] [the petitioner] shall perform consulting and/or development services," described in "schedules" to be "mutually agreed upon and signed by both parties."

The record of proceeding contains several samples of schedules for other employees that are working on a project with [REDACTED]. The sample schedules indicate a general overview of work, deadlines and deliverables, personnel assigned, fees and payment terms, and period of performance. Each schedule is signed by the petitioner and [REDACTED]. Notably, all but one schedule have expired prior to the beneficiary's requested start date of October 1, 2014. The only valid schedule expires

January 2, 2015, but does not cover the requested employment dates for the beneficiary from October 1, 2014 to September 4, 2017.

On appeal, the petitioner provided additional schedules for other employees with [REDACTED]. However, we note that the schedules submitted on appeal expire on March 31, 2015, and the record of proceeding does not contain additional evidence to establish availability of continued, non-speculative employment for the beneficiary for the duration of the requested employment.

C. Letter From [REDACTED]

The petitioner submitted a letter dated July 30, 2014 from the [REDACTED], Manager of Quality Assurance at [REDACTED]. Mr. [REDACTED] also stated that the petitioner currently has a "SOW for 14 QA Analysts/Testers in our testing team and we have requested to add 1 more Tester who can do that test scripting, coordination and performance testing for the projects immediately." Notably, the proffered position as a "test coordinator" was not mentioned.

Mr. [REDACTED] further indicated that the work is done at [REDACTED] office located in "[REDACTED] Maine [REDACTED]" Mr. [REDACTED] claimed that it "consistently used Quality Matrix Services for our testing needs and we have some upcoming needs in October, 2014 as well." However, he did not provide any specific information regarding dates of its needs or with regard to the beneficiary (e.g., identify the beneficiary, state his role, or stipulate the duration that his services will be used).⁵

⁵ The agency made clear long ago that speculative employment is not permitted in the H-1B program. A 1998 proposed rule documented this position as follows:

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

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

Mr. [REDACTED] also stated that the petitioner will "always have right to control their employees working at [REDACTED] and has the right to control the work, benefits, salaries, performance reviews and assignments." However, Mr. [REDACTED] did not provide information on how the petitioner supervises its workers at the [REDACTED] location.

The letter provides a brief job description of the duties to be performed on site as follows:

- Understand the functional and business requirements.
- Design test plans, scenarios, scripts, or procedures.
- Develop testing programs that address areas such as database impacts, software scenarios, regression testing, negative testing, error or bug retests or usability.
- Document software defects, using a bug tracking system, and report defects to software developers.
- Writing Test Plans, Test cases and developing Test scripts using HP Quality Center/ALM and HP Loadrunner.
- Good knowledge in testing backend functionality.
- Creation and review of Test Plans/test Strategies with Development Lead and Project Managers.
- Responsible for Coding using SQL, PL/SQL, Java, ASP.NET, Procedures/Functions, Triggers and Packages.
- Design, analyze and develop business process applications on Windows and UNIX environment.
- Utilize Oracle and MS-Access as a relational database management system (RDBMS).
- Good understanding of MS office tools including Excel, Word and PowerPoint.
- Bachelor[']s in computers or related field is required.

Notably, the job duties differ from the job description provided by the petitioner in its support letter. Again, 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. 591-92.

D. Letter from Mr. [REDACTED]

In response to the RFE, the petitioner provided a statement of declaration from Mr. [REDACTED] Vice President for Projects. Mr. [REDACTED] stated the beneficiary is "needed to perform test coordination services at [REDACTED] and [REDACTED] Projects pursuant to a series of business contracts between [the petitioner] and [REDACTED]." Mr. [REDACTED] also stated that the beneficiary "will be assigned to the [REDACTED] location" and "his work will take place at [REDACTED] office location." Mr. [REDACTED] did not indicate that the beneficiary will also be working in-house and if he will supervise the beneficiary in-house. Mr. [REDACTED] also stated that he currently has 15 consultants working in the same group at [REDACTED] and "as a supervisor, I keep track of activities [of the beneficiary] and provide him with technical guidance and process." Mr. [REDACTED] also stated that he conducts daily scrum meetings which are "quick 10 minute conference meeting[s]" and the team members are required to send him a weekly status report. However, the record of proceeding does not contain samples of weekly status report from its current employees.

Notably, the record of proceeding contains Form W-2, Wage and Tax Statement 2013 for Mr. [REDACTED]. It lists Mr. [REDACTED] address as [REDACTED] MA, which is approximately 120 miles from [REDACTED]. Further, while the petitioner claims that Mr. [REDACTED] is employed as a vice-president and supervises the beneficiary, he was paid \$41,425 in 2013, which is lower than the beneficiary's salary of \$60,000 per year. There is no other corroborating evidence that Mr. [REDACTED] is employed by the petitioner as a vice president or that he supervises the beneficiary. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

E. Organization Chart

The petitioner also submitted an organization chart. Notably, the chart is divided into "external teams" and "internal teams." Mr. [REDACTED] is listed next to "Claims Processing" under "internal teams" and the beneficiary's name is handwritten next to it. The petitioner does not explain the terms "internal teams" and "claims processing" and how they relate to the beneficiary's job duties as a test coordinator.

On appeal, the petitioner submitted a new organization chart that lists Mr. [REDACTED] as a supervisor for the beneficiary. However, as discussed, there are inconsistencies in the record and the petitioner did not provide further documentary evidence to establish the beneficiary is supervised by Mr. [REDACTED].

F. Employer-Employee Agreement

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). With the Form I-129 petition, the petitioner submitted an employer-employee agreement letter

dated March 24, 2014. The agreement indicated that the beneficiary will be hired as a "test coordinator," but did not provide any level of specificity as to the beneficiary's duties and the requirements for the position. The agreement also stated that the employee will "agree to be assigned in any facility/client sites as Company deems it necessary" and the employee "is required to travel or relocate to various client sites throughout the United States for both short and long term projects." However, the agreement did not identify facility/client sites. The agreement further stated that it "supervises the activities of employee at the office by means of a project manager employed by the Company." However, this individual was not identified.

The agreement referenced "benefits" including health insurance and direct deposit, but did provide any further description of the benefits, or eligibility requirements to obtain them. Accordingly, a substantive determination cannot be made or inferred regarding any "benefits" that may or may not be available to the beneficiary, as information regarding them, including eligibility requirements, was not submitted. 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.

G. Conclusion

Upon review, there is insufficient documentary evidence in the record corroborating the availability of work for the beneficiary for the requested period of employment and, consequently, what the beneficiary would do, where the beneficiary would work, as well as how this would impact the circumstances of his relationship with the petitioner. 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). Moreover, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act. The petitioner has failed to establish that, at the time the petition was submitted, it had located 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.

Notwithstanding the lack of non-speculative work for the beneficiary for the requested employment period, we assessed and weighed the available relevant factors as they exist or will exist, and the evidence does not support the petitioner's assertion that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." *See* 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer"). The petitioner claims that the beneficiary will be employed at its location and [REDACTED]. It appears that he will use the tools and instrumentalities of the client. There is a lack of evidence establishing the petitioner's right to control or actual control in the instant case, as well as the beneficiary's role (if any) in hiring and paying assistants. Furthermore, as discussed, a substantive determination cannot be made or inferred with regard to the provision of benefits.

Upon review of the record of proceeding, 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). 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).

IV. Specialty Occupation

Further, we find that the petitioner did not establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. 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 384, 387 (5th Cir. 2000). 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 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty

occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

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

As recognized by the court in *Defensor, supra*, where the work is to be performed for entities other than the petitioner, evidence of the end client's job requirements is critical. *See Defensor v. Meissner*, 201 F.3d at 387-388. That is, it is necessary for the end-client to provide sufficient information regarding the proposed job duties to be performed at its location in order to properly ascertain the minimum educational requirements necessary to perform those duties. *Id* at 387-388. The court held that the former INS had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. *Id.* at 384. Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work.

As discussed, the petitioner provided inconsistent minimum requirements for the proffered position. In the support letter dated March 26, 2014, the petitioner initially stated that the position requires "at least a bachelor's degree and less than 1 year of experience." In the itinerary dated March 26, 2014, the petitioner indicated that the requirement is "a prior experience of same nature of job" and should also be "capable of [w]orking with major operating [s]ystem, software, databases, and network programming basic languages." Thus, based on the petitioner's own standards or lack thereof, it cannot be found that the position requires both (1) the theoretical and practical application of a body of highly specialized knowledge and (2) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) in accordance with section 214(i)(1) of the Act. However, in response to the RFE, the petitioner provided a letter from [REDACTED] and also another itinerary which states that the requirement for the position is a "Bachelor's in computers or related field." As noted, the petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. at 176.

Further, the record of proceeding contains varied versions of the job duties that have been stated in generic terms that fail to convey the actual tasks the beneficiary will perform on a day-to-day basis.

For example, the abstract level of information provided about the proffered position and its constituent duties is exemplified by Mr. [REDACTED] letter dated June 30, 2014 that the beneficiary's duties include "understanding the functional and business requirements" or "[d]esign test plans, scenarios, scripts, or procedures." On the other hand, the petitioner indicated in its support letter dated March 26, 2014 that the beneficiary will "manage projects and coordinate with our clients" and "manage employees we have on multiple projects across clients." The statements – as so generally described – do not illuminate the substantive application of knowledge involved or any particular educational attainment associated with such application.

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary, therefore, precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree, or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

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

V. CONCLUSION

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

Moreover, when we deny a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that we abused its discretion with respect to all of our 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 will be dismissed for the above stated reasons, with each considered as an independent and alternate 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.