



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF B-I-T-S-, INC.

DATE: NOV. 3, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, a global consulting and IT services company, seeks to employ the Beneficiary as a programmer analyst and to classify her as a nonimmigrant worker in a specialty occupation. See Immigration and Nationality Act (the Act) § 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The Director, Vermont Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

The Director denied the petition, finding that the evidence of record did not establish that (1) a valid employer-employee relationship will exist for the duration of the requested validity period; and (2) the Petitioner complied with the terms and conditions of the Labor Condition Application (LCA) filed for the Beneficiary. On appeal, the Petitioner asserts that the Director's basis for denial was erroneous and contends that it satisfied all evidentiary requirements.

We reviewed the record in its entirety before issuing our decision. We conduct appellate review on a *de novo* basis. *Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542 (AAO 2015); see also 5 U.S.C. § 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”); *Dor v. INS*, 891 F.2d 997, 1002 n.9 (2d Cir. 1989). We follow the preponderance of the evidence standard as specified in *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010).

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

I. EMPLOYER-EMPLOYEE RELATIONSHIP

A. Legal Framework

We will first 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). We reviewed the record of proceeding to determine 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.” *Id.*

More specifically, section 101(a)(15)(H)(i)(b) of the Act defines an H-1B nonimmigrant in pertinent part as a foreign national:

[S]ubject 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 (emphasis added):

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

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

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

Although “United States employer” is defined in the regulations at 8 C.F.R. § 214.2(h)(4)(ii), it is noted that the terms “employee” and “employer-employee relationship” are not defined for purposes of the H-1B visa classification. Section 101(a)(15)(H)(i)(b) of the Act indicates that a foreign national coming to the United States to perform services in a specialty occupation will have an “intending employer” who will file a Labor Condition Application (LCA) with the Secretary of Labor pursuant to section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). The intending employer is described as offering full-time or part-time “employment” to the H-1B “employee.” Subsections 212(n)(1)(A)(i) and 212(n)(2)(C)(vii) of the Act, 8 U.S.C. § 1182(n)(1)(A)(i), (2)(C)(vii). Further, the regulations indicate that “United States employers” must file a Petition for a Nonimmigrant Worker (Form I-129) in order to classify foreign nationals 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) (*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) (*Clackamas*). As the common-law test contains “no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.” *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).

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

¹ While the *Darden* court considered only the definition of “employee” under the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. § 1002(6), and did not address the definition of “employer,” courts have generally refused to extend the common law agency definition to ERISA's use of employer because “the definition of ‘employer’ in ERISA, unlike the definition of ‘employee,’ clearly indicates legislative intent to extend the definition beyond the

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 318-319.²

Accordingly, in the absence of an express congressional intent to impose broader definitions, both the “conventional master-servant relationship as understood by common-law agency doctrine” and the *Darden* construction test apply to the terms “employee” and “employer-employee relationship” as used in section 101(a)(15)(H)(i)(b) of the Act, section 212(n) of the Act, and 8 C.F.R. § 214.2(h).³

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

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).

² To the extent the regulations are ambiguous with regard to the terms “employee” or “employer-employee relationship,” the agency’s interpretation of these terms should be found to be controlling unless “plainly erroneous or inconsistent with the regulation.” *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359, 109 S.Ct. 1835, 1850, 104 L.Ed.2d 351 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945)).

³ That said, there are instances in the Act where Congress may have intended a broader application of the term “employer” than what is encompassed in the conventional master-servant relationship. *See, e.g.,* section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F) (referring to “unaffiliated employers” supervising and controlling L-1B intracompany transferees having specialized knowledge); section 274A of the Act, 8 U.S.C. § 1324a (referring to the employment of unauthorized foreign nationals).

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

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

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

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).

B. The Proffered Position

In the letter of support, the Petitioner states that the Beneficiary “is being offered a temporary employment as a Programmer Analyst” for “annual salary of \$62,000.”⁴ The Petitioner also states that the Beneficiary will be responsible for the following duties:

- Gather requirements from clients and prepare the requirement document;
- Prepare design document and touch base with clients in U.S. to review;
- Create/update forms, workflows, SQL queries and system configuration based on the requirements as well as perform unit, integration and system testing;
- Support user acceptance testing and perform deployment and support post production activities;
- Conduct regular trainings for new joiners and juniors in the team;
- Support remedy administrators on their day-to-day activities and help them solve complex issues; and
- Optimize and improve system performance.

In addition, the Petitioner states that:

. . . the Beneficiary’s functions also include work out current and future IT needs by consulting with people at all levels about the current work systems and deciding how improvements could be made. [The Beneficiary] would be responsible to direct the integration of IT operations, computer hardware, operating systems, communications, software applications and data processing.

The Petitioner breaks down the duties in percentages as follows:

- Design, develop, and deploy applications that are aligned with the business and technology strategies (30%);
- Develop strong working relationships with the business and other technology team members to deliver quality technology solutions (20%);
- Hard core GWT development and broad skills in technologies (25%); and
- Develop test scripts and test new functionality/enhancement (25%).

In addition, the Petitioner stated that the proffered position requires “at least a Bachelor's degree, or the equivalent, in Engineering or a related field, for this H-1B position.”

C. Analysis

⁴ In the Form I-129 and the LCA, the Petitioner indicates that the Beneficiary will be paid \$65,000 per year. The Petitioner did not explain the discrepancy. Further, we note that \$62,000 per year is below the prevailing wage of \$63,523 per year.

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The Petitioner claims that it will have an employer-employee relationship with the Beneficiary. We have considered this assertion within the context of the record of proceeding. We examined each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence. *Matter of Chawathe*, 25 I&N Dec. at 375-376. However, as will be discussed, there is insufficient probative evidence in the record to support this assertion. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg.'l Comm'r 1972)). Applying the *Darden* and *Clackamas* tests to this matter, we find that 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."

1. Work Assignment

We find that the Petitioner has provided inconsistent information regarding the Beneficiary's work assignment. In the Form I-129, the Petitioner stated that in addition to working at its address in [REDACTED] MD, the Beneficiary would work off-site and that an itinerary was included. The itinerary indicated that "the [B]eneficiary is rendering services at [REDACTED] but provided the location as its address in [REDACTED] MD. The Petitioner also submitted a contract between itself and [REDACTED] along with a purchase order dated August 16, 2013, that lists the Petitioner as a subcontractor. This purchase order states, "[the Petitioner] shall provide services to support the requirements of the purchase order in accordance with Attachment A, Statement of Work." The Petitioner submitted Attachment H3 to the Subcontractor's Statement of Work (SOW) between the Petitioner and [REDACTED] which identifies [REDACTED] prime contractor as [REDACTED] and states that "[t]he work will be performed exclusively at [REDACTED] facilities."

The Petitioner also submitted an Offer of Employment and Employment Agreement with the Beneficiary. The Offer of Employment states that the Beneficiary's work location will be in [REDACTED] MD, but "[y]ou understand and acknowledge that your employment may require you to perform services at customer sites, and that you may be required to travel and/or relocate to perform such services." Additionally, the Employment Agreement states "[p]eriodical visits to client site are conducted to facilitate close monitoring and supervision of off-site employee."

On appeal, the Petitioner submits an affidavit from its President and CEO, which states that despite the statements made to the contrary in the contracts previously submitted, the Beneficiary will provide the services from its offices in [REDACTED] MD and not at the end client location. The Petitioner also provides a letter from the end client, [REDACTED] dated October 6, 2014, which states "[the Beneficiary] was interviewed and selected for the position of Service Developer...She will be working at [the Petitioner's] corporate office at [REDACTED] MD for this project."

⁵ The Petitioner claims that [REDACTED] is a [REDACTED] company but there is insufficient documentary evidence in the record to establish that [REDACTED] is a [REDACTED] company.

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However, for the first time on appeal, the Petitioner also submits a full Subcontract Agreement dated October 29, 2012 between the Petitioner (as the Subcontractor) and [REDACTED]. In Section D-1, it states that "the work shall be completed at [REDACTED] site in [REDACTED] Maryland."

We further note while the Petitioner claimed that the Beneficiary will be employed as a programmer analyst, the letter from [REDACTED] states that "[the Beneficiary] has been offered a position of Developer." The Petitioner did not explain the discrepancy.

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).

2. Duration of the Relationship Between the Parties

Upon review of the record, we also find that the Petitioner has not established the duration of the relationship between the parties. The Petitioner has not indicated that the Beneficiary would work on any other projects besides the one for [REDACTED] through [REDACTED]. Even if the SOW mentioned the Beneficiary by name, which it did not, the Purchase Order dated June 4, 2014 only covers work through May 7, 2015.

Although the Petitioner requested that the Beneficiary be granted H-1B classification from October 1, 2014 to September 10, 2017, there is a lack of substantive documentation regarding any work for the duration of the requested period. Rather than establish definitive, non-speculative employment for the Beneficiary for the entire period requested, the Petitioner simply asserts that the Beneficiary would be working at its own offices during the requested validity dates.

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

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

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assurance that the alien will engage in a specialty occupation upon arrival in this country.

63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998).

3. Supervision

A key element in this matter is who would have the ability to hire, fire, supervise, or otherwise control the work of the Beneficiary for the duration of the H-1B petition. The Subcontract between the Petitioner (as the Subcontractor) and [REDACTED], contains the following language:

[REDACTED] may request Subcontractor remove any employee of Subcontractor whose performance is deemed unacceptable by either [REDACTED] or the Government, and it shall be the responsibility of Subcontractor, if so directed by [REDACTED] to remove and replace that individual immediately or within the time required by [REDACTED] or the Government at no additional cost to [REDACTED] . .

If Subcontractor fails to provide qualified personnel in the time frame required by [REDACTED] shall have the right to fill the positions from sources *other* than Subcontractor. . .

The Subcontract also states:

Subcontractor personnel provided in support of this Agreement must, at a minimum, meet the labor category requirements included in Attachment H.3. Resumes for all proposed personnel must be submitted by the Subcontractor to the Program Manager, Project Manager or Technical Monitor. The Program Manager, Project Manager or Technical Monitor must have an opportunity to verify the individuals meet the qualifications of the labor category for which they are being proposed before the individual being placed on the agreement. . . In the event that the performance of assigned Subcontractor personnel or any substitute(s) is determined by [REDACTED] to be unsatisfactory at any time during the performance of any TO issued, [REDACTED] reserves the right to request and receive a satisfactory personnel replacement within ten (10) calendar days of written notification. . .

Based on this statement, it appears that [REDACTED] will review and verify the resumes of the Petitioner's employees, monitor assignment for staff positions, and, if the performance of any of the Petitioner's employees is unsatisfactory, [REDACTED] can request and receive a replacement.

Further, the Petitioner indicated that the Beneficiary will be supervised by [REDACTED]. However, the evidence in the record contains inconsistent information. The Petitioner provided two organization charts; one organizational chart lists [REDACTED] as the Executive Vice President (EVP) and Chief Technology Officer (CTO), second only to the President & CEO, and the other

chart describes his position as the EVP and Chief Operation Officer (COO). Further, according to the organizational chart, the Petitioner's programmer analysts, who presumably would include the Beneficiary, do not report directly to the EVP. and COO, but rather to either the Senior Program Manager or the SVP of Federal Business Group, neither of whom are mentioned in the Beneficiary's offer letter as being her supervisor.

Therefore, the record does not sufficiently establish who would supervise the Beneficiary on a daily basis. 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.

4. Lack of Evidence

As previously noted, when making a determination of whether the Petitioner has established that it has or will have an employer-employee relationship with the Beneficiary, we look at a number of factors, including who will provide the instrumentalities and tools required to perform the duties of the proffered position. The Director specifically noted this factor in the RFE. The Petitioner did not provide any further information on this matter. Thus, the Petitioner did not fully address or submit probative evidence on the issue.

In the RFE, the Director also asked the Petitioner to provide information regarding the Beneficiary's role in hiring and paying assistants. The Petitioner elected not to address this issue or provide any information in response to this material request for evidence. While the Petitioner was given an opportunity to clarify the Beneficiary's role in hiring and paying assistants, it chose not to submit any probative evidence on the issue. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

5. Conclusion

The evidence, 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 that the Petitioner exercises control over the Beneficiary, without evidence supporting the claim, or indeed, as is the case here, providing contradictory evidence, does not establish eligibility in this matter. 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. 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).

Moreover, there is a lack of probative evidence to support the Petitioner's assertions. It cannot be concluded, therefore, 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). Accordingly, the petition must be denied on this basis.

II. LCA NOT VALID FOR ALL WORK LOCATIONS

The next issue before us is whether the Petitioner submitted a valid LCA for all work locations and complied with the itinerary requirement at 8 C.F.R. § 214.2(h)(2)(i)(B). General requirements for filing immigration applications and petitions are set forth at 8 C.F.R. § 103.2(a)(1) in pertinent part as follows:

Every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions . . . and such instructions are incorporated into the regulations requiring its submission.

Further discussion of the filing requirements for applications and petitions is found at 8 C.F.R. § 103.2(b)(1):

Demonstrating eligibility. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request and must continue to be eligible through adjudication. Each benefit request must be properly completed and filed with all initial evidence required by applicable regulations and other USCIS instructions. Any evidence submitted in connection with a benefit request is incorporated into and considered part of the request.

The regulations require that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner obtain a certified LCA from DOL in the occupational specialty in which the H-1B worker will be employed. *See* 8 C.F.R. § 214.2(h)(4)(i)(B). The instructions that accompany the Form I-129 also specify that an H-1B petitioner must submit evidence that an LCA has been certified by DOL when submitting the Form I-129.

Additionally, the regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) provides as follows:

Service or training in more than one location. A petition that requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with USCIS as provided in the form instructions. The address that the petitioner specifies as its location on the I-129 shall be where the petitioner is located for purposes of this paragraph.

As discussed previously, the Petitioner indicated on the Form I-129 and on appeal that the

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Beneficiary would be working at its office in [REDACTED] for the duration of the H-1B employment period, i.e., October 1, 2014 to September 10, 2017. However, the Petitioner also checked the box “yes” in response to the question of whether the Beneficiary would work offsite in the Form I-129. The certified LCA submitted with the Form I-129 indicates that the Beneficiary will work only at the Petitioner’s business in [REDACTED] from September 15, 2014 to September 14, 2017. However, the documentation submitted by the Petitioner (which includes the Form I-129 that states the Beneficiary will work offsite and contracts regarding a project to which the Petitioner claims the Beneficiary will be assigned, but that do not name the Beneficiary, do not cover the duration of the petition, and state that all work will be performed at the end client location) does not demonstrate that the Beneficiary will work at the Petitioner’s office in [REDACTED] for the duration of the petition.

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the U.S. Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. The regulations state, in pertinent part:

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL-certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

20 C.F.R. § 655.705(b) (emphasis added).

In light of the above, we find that a necessary condition for approval of an H-1B visa petition is an LCA, certified on or before the filing date of the petition, with information, accurate as of the date of the petition's filing, as to where the Beneficiary would actually be employed. Furthermore, the petition must list the locations where the Beneficiary would be employed and be accompanied by an itinerary with the dates the Beneficiary will provide services at each location covering the duration of employment requested in the petition. Both conditions were not satisfied in this proceeding.

It is further noted that to ascertain the intent of a petitioner, USCIS must look to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera.

In view of the foregoing, the Petitioner has not overcome the Director’s basis for denying the petition, and it has also not met the itinerary requirement at 8 C.F.R. § 214.2(h)(2)(i)(B). For these reasons, the petition may not be approved. Accordingly, we will not disturb the Director’s denial of the petition on this ground.

III. SPECIALTY OCCUPATION

(b)(6)

Matter of B-I-T-S-, Inc.

Since the identified basis for denial is dispositive of the Petitioner's appeal, we need not address another ground of ineligibility we observe in the record of proceeding. Nevertheless, we will briefly note and summarize it here with the hope and intention that, if the Petitioner seeks again to employ the Beneficiary or another individual as an H-1B employee in the proffered position, it will submit sufficient independent objective evidence to address and overcome this additional ground in any future filing.

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 384 (5th Cir. 2000). In other words, as the employees in that case would provide services to the end-client 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.*

The letter from [REDACTED] dated October 6, 2014, states that “[the Beneficiary] was interviewed and selected for the position of Service Developer, based on the qualification and following skills”:

- Java, EJB, Web Services, SOAP, XML, WSDL, JAXB, JAX-WS
- MVC, JSP, JSF, Struts, Spring
- Oracle 9/10, JPA, Hibernate, SQL
- Weblogic Application Server, TomCat
- Eclipse, JDeveloper, Remedy ARS, Putty

In other words, the end-client does not indicate that a bachelor's degree in a specific specialty is required for the proffered position. Here, the record of proceeding in this case is similarly devoid of sufficient information regarding the specific job duties and requirements for the proffered position. 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. Therefore, the petition must be denied for this additional reason.

IV. CONCLUSION AND ORDER

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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.

Cite as *Matter of B-I-T-S-, Inc.*, ID# 12880 (AAO Nov. 3, 2015)