



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

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

MATTER OF E-C- INC

DATE: NOV. 10, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, an IT staffing firm, seeks to temporarily employ the Beneficiary as a “software developer applications” under the H-1B nonimmigrant classification. *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.

I. ISSUE

The issue before us is whether the Petitioner meets the regulatory definition of a “United States employer” in accordance with the applicable statutory and regulatory provisions.¹

II. EMPLOYER-EMPLOYEE RELATIONSHIP

A. Legal Framework

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

[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:

¹ 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).

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* Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act 56 Fed. Reg. 61,111, 61,121 (Dec. 2, 1991) (to be codified at 8 C.F.R. pt. 214).

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 an individual 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). 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 Form I-129, Petition for a Nonimmigrant Worker, in order to classify individuals 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 Mut. Ins.*

Co. v. Darden, 503 U.S. 318, 322-23 (1992) (quoting *Cmty. 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.”

Id.; see also *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 445 (2003) (quoting *Darden*, 503 U.S. at 323). 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 Am.*, 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

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).

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 Res. Def. Council, Inc.*, 467 U.S. 837, 844-45 (1984).

“employer-employee relationship” with the H-1B “employee.” 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term “United States employer” not only requires H-1B employers and employees to have an “employer-employee relationship” as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms “employee” or “employer-employee relationship” combined with the agency’s otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond “the traditional common law definition” or, more importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. *Cf. Darden*, 503 U.S. at 318-19.³

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

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 323-24; *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* EEOC Compl. Man. at § 2-III(A)(1) (adopting a materially identical test and indicating that said test was based on the *Darden* decision); *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

³ To the extent the regulations are ambiguous with regard to the terms “employee” or “employer-employee relationship,” the agency’s interpretation of these terms should be found to be controlling unless “plainly erroneous or inconsistent with the regulation.” *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (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 individuals).

agency is the 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 448-49; EEOC Compl. Man. 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 323-24. 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).

B. The Proffered Position

In the Form I-129 and the Labor Condition Application (LCA), the Petitioner indicates that the proffered position is titled "Software Developer Applications." However, in the letter of support dated March 31, 2014, the Petitioner states that the Beneficiary will be employed "in the professional occupation of Software Developer, Applications," and also refers to the position title as "Computer Software Engineer, Applications."

The Petitioner also states that the Beneficiary will be responsible for the following duties: "the development and maintenance of required system documentation, reports, system tables, and process flows within assigned areas of primary responsibility and serve as a support/backup resource for other areas as assigned within specified departments." Further, the Petitioner indicated that the Beneficiary may also be assigned to perform the following duties (with percentages of time spent on each):

- Developing and programming computer software applications using various software and interface with the technical staff in the complex programming needs and document modification concerning the systems software; - 30%

- Responsible for improvements in software computer utilization and determine necessity for modifications; - 10%
- Reviewing software programs for compliance with company standards and requirements and assisting in identifying deficiencies of computer runs and perform specialized programming assignments; - 5%
- Developing and enhancing the software systems for wider applications and customize it for specific requirements; - 5%
- Using RDBMS to log system change orders and analyze, develop and implement new applications with GUI and analyze software requirements to determine feasibility of design within time and cost constraints; - 15%
- Identifying deficiencies, troubleshooting problems and supporting user needs with professional knowledge for test planning, defect tracing and provide assistance in use of RDBMS; - 10%
- Analysis and Design of system which includes Preparation of Process Flow Diagrams, Entity Relationship Diagrams, File design, Program Specification and Design Document; - 10%
- Database and application analysis/ design logical and physical database; - 5%
- Interacting with other technical staff in researching and interpreting technical data; -5%
- Assisting as part of the team to resolve technical problems requiring good judgment and creativity in developing solutions.- 5%

In addition, the Petitioner states that the position requires “an advanced theoretical knowledge and practical expertise gained through either a Bachelor’s or a Master’s degree in Computer Science, Information Systems, Management Information Systems, Electrical/Electronics Engineering, Physics, or a closely related field”

C. Analysis

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. 369, 376 (AAO 2010). 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

(b)(6)

Matter of E-C- Inc

We find that the Petitioner has provided inconsistent information regarding the Beneficiary's work assignment. For example, the Petitioner provided inconsistent job title for the proffered position. As mentioned, although the Petitioner stated in the Form I-129 and LCA that the Beneficiary would work as a "Software Developer Applications," the Petitioner alternated between the titles "Software Developer Applications" and "Computer Software Engineer, Applications" in the support letter. Further, in response to the Director's Notice of Intent to Deny, the Petitioner submitted a letter from its client, [REDACTED] which stated that the Beneficiary would work as a "Business Systems Analyst." The Petitioner also submitted a letter from the end client, [REDACTED] which stated that the Beneficiary would work as a "Business Analyst."

Moreover, the Petitioner submitted job descriptions from multiple parties that vary from its job description provided in the support letter. For example, [REDACTED] letter stated that the Beneficiary would work "with [its] client, [REDACTED] via [REDACTED] performing the following duties:

- Understanding and documenting business processes and workflows.
- Defining use cases to articulate functional software needs and the roles of classes of application user.
- Analyzing the impact of change requests.
- Supporting traceability from requirements through to QA.
- Assisting in the definition of test plans and testing strategies and in the creation of test cases.
- Coach and mentor team members.

The letter from the end client, [REDACTED] stated that the Beneficiary would work as a "Business Analyst," performing the following duties:

- Understanding and documenting the business requirements, processes and workflows. Ensuring the requirements meet the current business needs.
- Documenting use cases and change requests to articulate project needs as per the application workflows
- Liaison between Business team and IT teams in delivering the stake holder's requirements.
- Supporting writing user stories.
- Supporting QA in traceability and mapping the requirements to Test plan and test cases.
- Assisting in the definition of test plans and testing strategies and in the creation of test plan.

These duties differ significantly from the duties provided by the Petitioner in the support letter, which include developing and programming computer software applications (30%), responsible for improvements in software utilization (10%), and using RDBMS to log system change orders and analyze, develop and implement new applications with GUI (15%). "[I]t is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence." *Matter of Ho*, 19 I&N

(b)(6)

Matter of E-C- Inc

Dec. 582, 591 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* at 591-92. Without further information, we are not able to determine the nature of the Beneficiary's assignment and her actual duties.

2. 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. Upon review, we find that the Petitioner has provided inconsistent information regarding the Beneficiary's supervisor. For instance, in the offer letter, the Petitioner stated that the Beneficiary will be "reporting to the Director, Consulting Services of the Company." The record does not identify this individual. However, in another document titled "[the Petitioner]'s Right of Control over [the Beneficiary]," it stated that "[the Petitioner]'s supervisor, to whom [the Beneficiary] will report, is named [REDACTED]." Notably, [REDACTED] position is described as "President and CEO" in other documents. No explanation for this inconsistency was provided by the Petitioner. 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. at 592.

3. Relationship Between the Parties and Duration of the Project

Upon review of the record, we also find that the Petitioner has not established the relationship and duration of the relationship between the parties. Specifically, the letter from [REDACTED] stated that "[the Petitioner]. . . has assigned [the Beneficiary] to work as a Business Systems Analyst with [REDACTED] client [REDACTED]"⁵ However, the record does not contain any information or documents regarding [REDACTED]. The Petitioner has not indicated that the Beneficiary would work on any other projects besides the one for [REDACTED]. Because the Petitioner did not provide copies of the contracts with [REDACTED] or [REDACTED] we cannot determine the contractual relationship between these parties and if the Beneficiary's services would be required for the duration of the requested H-1B validity period. Moreover, the letter from [REDACTED] stated, "[The Petitioner] reserves the right to the assignment of their employee, [the Beneficiary], to any other project or employer. . . . By this letter, [REDACTED] makes no representation of guaranteed employment or compensation through any particular date." Therefore, there is no supporting evidence for the Petitioner's claim that the project would last through the duration of the requested H-1B validity period.

⁵ Notably, in another letter dated January 6, 2014, [REDACTED] stated that it employed the Beneficiary "on a contract basis as a Quality Assurance/Business Systems Analyst with [REDACTED] client [REDACTED]." Therefore, it appears that [REDACTED] is a party to its contractual relationship with [REDACTED].

(b)(6)

Matter of E-C- Inc

Although the Petitioner requested that the Beneficiary be granted H-1B classification from October 1, 2014 to September 12, 2017, there is a lack of consistent documentation to substantiate work for the duration of the requested period. Rather than providing evidentiary documentation to establish definitive, non-speculative employment for the Beneficiary for the entire period requested, the Petitioner asserts that the Beneficiary would be work at [REDACTED] during the requested validity dates.

Therefore, we find that the Petitioner has not established that the petition was filed for non-speculative work for the Beneficiary, for the entire period requested, that existed at the time of the petition's filing. 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). Merely claiming that the Beneficiary would be assigned to [REDACTED] for the duration of requested employment period, without sufficient corroborating evidence supporting the claim, such as copies of the client contracts, does not establish eligibility in this matter. 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, 249 (Reg'l Comm'r 1978). Thus, even if it were found that the Petitioner would be the Beneficiary's United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii), the Petitioner has not demonstrated that it would maintain such an employer-employee relationship for the duration of the period requested.⁶

4. Lack of Evidence

As previously noted, when making a determination of whether the Petitioner has established that it 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; whether the Petitioner has the right to assign additional work to the Beneficiary; the method of payment of

⁶ 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 assurance that the alien will engage in a specialty occupation upon arrival in this country.

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

the Beneficiary's salary; whether the specialty occupation work is part of the Petitioner's regular business; and whether the Petitioner actually supervises the Beneficiary's work. In the instant case, the Director specifically noted these factors in the NOID and requested that the Petitioner provide a number of documents, including copies of contracts it may have with end clients. Thus, while the Petitioner was given an opportunity to clarify the source of instrumentalities and tools and who actually supervises the Beneficiary's work, it did not provide sufficient information. 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). Without full disclosure of all of the relevant factors, we are unable to find that the requisite employer-employee relationship will exist between the Petitioner and the Beneficiary.

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, while 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.

III. CONCLUSION AND ORDER

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.⁷

⁷ As the identified ground of ineligibility is dispositive of the appeal, we will not discuss any additional deficiencies we observe in the record of proceeding.

However, we will briefly note that 8 C.F.R. § 214.2(h)(2)(i)(G) states, "[a]n employer may not file, in the same fiscal year, more than one H-1B petition on behalf of the same alien if the alien is subject to the numerical limitations of

Matter of E-C- Inc

ORDER: The appeal is dismissed.

Cite as *Matter of E-C- Inc*, ID# 14285 (AAO Nov. 10, 2015)

section 214(g)(1)(A) of the Act or is exempt from those limitations under section 214(g)(5)(C) of the Act.” (Emphasis added). Therefore, the determination of whether the present petition should be denied under 8 C.F.R. §214.2(h)(2)(i)(G) is relevant only when the Petitioner 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 the instant case, the record of proceeding does not establish that the Petitioner will have an employer-employee relationship with the Beneficiary; therefore, so we do not need to consider whether or not the petition should be denied under 8 C.F.R. §214.2(h)(2)(i)(G).