



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

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

MATTER OF D-N-S-, INC.

DATE: NOV. 10, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, an IT Consulting company, seeks to employ the Beneficiary as a Collidus/Acutate Developer and to extend his classification as a nonimmigrant worker in a specialty occupation. *See* 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, Vermont Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

The Director denied the petition, concluding that the evidence of record did not establish that the Petitioner would be a “United States employer” having an “employer-employee relationship” with the Beneficiary.

The record of proceeding before us contains the following: (1) the Form I-129 and supporting documentation; (2) the Director’s request for additional evidence (RFE); (3) the Petitioner’s response to the RFE; (4) the Director’s letter denying the petition; and (5) the Form I-290B, Notice of Appeal or Motion, and supporting documentation.

Upon review of the entire record of proceeding, we find that the evidence of record does not overcome the Director’s basis for denying this petition.¹ Accordingly, the appeal will be dismissed.

I. EMPLOYER-EMPLOYEE RELATIONSHIP

We will now address the Director’s determination that the evidence of record does not establish that the Petitioner will be a “United States employer” having “an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee.” 8 C.F.R. § 214.2(h)(4)(ii).

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

¹ The “preponderance of the evidence” standard requires that the evidence demonstrate that the applicant’s claim is “probably true,” where the determination of “truth” is made based on the factual circumstances of each individual case. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (citing *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm’r 1989)).

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)

“United States employer” is defined at 8 C.F.R. § 214.2(h)(4)(ii) as follows:

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

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

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

The record is not persuasive in establishing that the Petitioner will have 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 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 legacy 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. at 440 (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

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).

“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

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

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, 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).

(b)(6)

Matter of D-N-S-, Inc.

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).

Applying the *Darden* and *Clackamas* tests to this matter, we find that the evidence of record does not establish that the Petitioner will be a "United States employer" having an "employer-employee relationship" with the Beneficiary as an H-1B temporary "employee."

The Petitioner claims that the Beneficiary would provide his services to its offsite client, [REDACTED] in Kansas. However, on the Form I-129 and in the LCA, the Petitioner stated that the Beneficiary would work in [REDACTED] Texas.⁵ The Petitioner provided no explanation for the inconsistency. 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). Doubt cast on any aspect of the Petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591.

Again, the Petitioner claims that the Beneficiary will work for its end-client, [REDACTED] and submits a master service agreement executed between itself and [REDACTED] on March 6, 2010, along with a

⁵ The record, therefore, lacks an LCA certified for the location of intended employment, which alone mandates denial of this petition.

(b)(6)

Matter of D-N-S-, Inc.

statement of work (SOW) dated February 24, 2010, issued pursuant to it. The record also contains a document entitled “Scope Change Order No 4 to Statement of Work No 2008-2092.” The SOW was not assigned a number. Therefore, it is unclear whether the “change order” is related to the original SOW submitted by the Petitioner. Furthermore, the SOW and the change order do not contain signatures of the parties. Therefore, it has not been established that the SOW and the change order are legally binding on either party. In addition, the Petitioner has not explained the relevance of the SOW as the SOW states that the term of the SOW ends on September 30, 2010, which is prior to the filing of the petition.⁶

For these reasons alone, the evidence of record does not establish that the Petitioner will be a “United States employer” having an “employer-employee relationship” with the Beneficiary as an H-1B temporary “employee.”

However, even if these evidentiary deficiencies were not present, we would still find that the evidence of record does not demonstrate the existence of an employer-employee relationship between the Petitioner and the Beneficiary, as the remaining documents do not establish the Petitioner’s claim.

For example, the record contains, among others, a copy of a master agreement executed between the Petitioner and [REDACTED]; a purchase order dated June 18, 2010 for [REDACTED] a master agreement between the Petitioner and [REDACTED] agreements with [REDACTED] an agreement with [REDACTED] and, an agreement among the Petitioner, [REDACTED]. As the Petitioner does not explain the relevance of these agreements to the Beneficiary’s claimed assignment at [REDACTED], we will not discuss them further.

The record also contains two SOWs executed between the Petitioner and [REDACTED] [REDACTED] dated March 3, 2014 and May 22, 2014. The SOWs state that they were executed pursuant to a Subcontractor Master Services Agreement dated March 3, 2014. According to these SOWs, the Beneficiary would provide services virtually, at a home office, and at the client’s project location in [REDACTED] Texas. Although the project location coincides with the work location provided on the Form I-129 and in the LCA, the Petitioner did not identify [REDACTED] as its client at whose location the Beneficiary would work. Thus, any suggestion that the Beneficiary would work pursuant to these agreements conflicts with the Petitioner’s prior statements. Furthermore, March 3, 2014, statement of work was not properly

⁶ The record, therefore, does not establish that the Petitioner had secured a work for the Beneficiary to perform prior to filing of the petition.

⁷ [REDACTED] is located in [REDACTED] Texas; [REDACTED] is located in [REDACTED] Pennsylvania; [REDACTED] is located in [REDACTED] Maryland; [REDACTED] is located in [REDACTED] California; [REDACTED] is located in [REDACTED] Indiana; [REDACTED] is in [REDACTED] North Carolina; and [REDACTED] is located in [REDACTED] Massachusetts. The Petitioner does not claim that the Beneficiary would work for any of these companies. Furthermore, the agreement with [REDACTED] is not properly executed as [REDACTED] representative did not sign the agreement. Therefore, we do not consider this agreement to be probative evidence toward establishing an employer-employee relationship between the Petitioner and the Beneficiary. Again, as the relevance of these agreements is unclear, we will not discuss them further.

(b)(6)

Matter of D-N-S-, Inc.

executed as it was not signed by [REDACTED]. Nor does the record contain a copy of the agreement between the Petitioner and [REDACTED] pursuant to which the SOWs were issued. It has therefore not been established that the SOWs are legally binding on either party. For all of these reasons, we find the SOWs insufficient to demonstrate employer-employee relationship between the Petitioner and the Beneficiary.

Counsel's claims that the Petitioner would control the Beneficiary's work are noted. For example, on appeal counsel states that the Beneficiary is supervised by [REDACTED] the project manager, and draws our attention to the time reports authorized by [REDACTED]. Counsel further states that the Petitioner determines which tasks would be assigned to the Beneficiary. Again, counsel draws our attention to the time reports authorized by [REDACTED]. Counsel also states that the Petitioner evaluates the work product of the Beneficiary and that weekly time reports are presented to the Petitioner and are authorized by [REDACTED].

We find the time reports insufficient to demonstrate that the Petitioner has control over the Beneficiary's work at [REDACTED]. First, as noted, the Petitioner has not made clear where the Beneficiary is working, and these time reports do not specify any particular end-client. Furthermore, the time reports do not indicate that anyone from the Petitioner's company would be assigned to the Beneficiary's worksite to assign his daily tasks (or any of his tasks, for that matter) or otherwise supervise his work. The Petitioner did not explain how the time reports would provide any insight into the methods for assigning the Beneficiary's work, and assessing and evaluating the Beneficiary's performance. Similarly, the annual performance review of the Beneficiary by [REDACTED] provides no information regarding how the Petitioner observed the Beneficiary and made a determination regarding his performance. While we acknowledge counsel's assertion that the Petitioner evaluates the work product of the Beneficiary, counsel's assertion alone is not sufficient to meet the Petitioner's burden of proof. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the Petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Nor does the employment agreement establish the requisite control. The July 11, 2008, agreement does not discuss the scope of the Petitioner's control over the Beneficiary's work, other than to note that the Petitioner will pay his salary.⁸ Furthermore, the agreement is not signed by the Petitioner, which diminishes its evidentiary value.

⁸ The Petitioner's claims that it would pay the Beneficiary's salary are noted, and the method of payment *is* a factor to be considered. However, in some instances, a petitioner's role is limited to invoicing and proper payment for the hours worked by a beneficiary. In such cases, with a petitioner's role limited to essentially the functions of a payroll administrator, a beneficiary is even paid, in the end, by the end-client. *See Defensor v. Meissner*, 201 F.3d at 388. It is necessary to weigh and compare on all of the circumstances in the relationship between the parties in analyzing the facts of each individual case.

(b)(6)

Matter of D-N-S-, Inc.

We acknowledge that the MSA executed between [REDACTED] and the Petitioner states that “[t]he Supplier Project Manager [(the Petitioner’s project manager)] will provide overall management direction to Supplier Personnel for the applicable Order.” However, this statement is insufficient to establish the Petitioner’s control over the Beneficiary’s work at the end-client’s location. First, as discussed earlier, the Petitioner did not establish who the end-client would actually be, as it provided inconsistent information regarding the end-client’s work location. Therefore, the [REDACTED] master service agreement is insufficient to demonstrate that [REDACTED] is the end-client. Second, the statement above references an “applicable Order.” The Petitioner did not submit a specific work order identifying the Beneficiary, and providing specifics of the work to be performed by him. Finally, although the statement above suggests that the Petitioner would provide overall management direction to its personnel, it provides no details as to what the phrase “management direction” entails. Without more, the language of the master service agreement provides no insight to specifics of the control the Petitioner would have over the Beneficiary.

The evidence of record does not establish that the Petitioner would exercise control over the Beneficiary’s employment. The generalized assertions regarding control contained in the record of proceeding lack any degree of specificity, and they do not specifically discuss, in probative detail, the degree of supervision, direction, or control that she would receive. They are not sufficient to establish that the Petitioner would supervise or otherwise control the work of the Beneficiary. Simply 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)).

For all of these reasons, the evidence of record does not demonstrate the requisite employer-employee relationship between the Petitioner and the Beneficiary. While social security contributions, worker’s compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are still relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the Beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the Beneficiary’s employer. 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.

The evidence of record, therefore, is insufficient to establish that the Petitioner qualifies as a United States employer, as defined by 8 C.F.R. § 214.2(h)(4)(ii). Merely claiming that the Petitioner exercises complete control over the Beneficiary, without evidence supporting the claim, 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. The evidence of record does not establish that the Petitioner would be involved in assigning work for this beneficiary, would substantially control the Beneficiary in his day-to-day work, would determine the specifications and requirements of that work, and would gauge the

(b)(6)

Matter of D-N-S-, Inc.

quality of the Beneficiary's performance and hence, ultimately, the Beneficiary's acceptability for continued assignment.

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). Thus, we agree with the Director's decision that the Petitioner has failed to demonstrate that it will have an employer-employee relationship with the Beneficiary.

II. THE LCA AND THE INTENDED EMPLOYMENT LOCATION

As discussed earlier, the Petitioner stated in the Form I-129 that the Beneficiary would work in [REDACTED] Texas and submitted an LCA certified for that location. However, in its support letter, the Petitioner stated that the Beneficiary would work at its client's [REDACTED], Kansas location. In his RFE response letter, counsel stated that the work for the clients must be performed at [REDACTED] building." The Master Services Agreement between [REDACTED] and the Petitioner states that [REDACTED] is a "Kansas corporation." Therefore, the Petitioner did not submit a certified LCA for the Beneficiary's intended employment location.

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. *See* 20 C.F.R. § 655.705(b), which states, 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.

(emphasis added).

As 20 C.F.R. § 655.705(b) requires that USCIS ensure that an H-1B petition is filed with a "DOL-certified LCA attached" that actually supports and corresponds with the petition on the petition's filing, this regulation inherently necessitates the filing of an amended H-1B petition to permit USCIS to perform its regulatory duty to ensure that a certified LCA actually supports and corresponds with an H-1B petition as of the date of that petition's filing. In addition, as 8 C.F.R. § 103.2(b)(1) requires eligibility to be established at the time of filing, it is factually impossible for an LCA certified by DOL after the filing of an initial H-1B petition to establish eligibility at the time the initial petition was filed. Therefore, in order for a petitioner to comply with 8 C.F.R. § 103.2(b)(1) and USCIS to perform its regulatory duties under 20 C.F.R. § 655.705(b), a petitioner must file an

amended or new petition, with fee, whenever a beneficiary's job location changes such that a new LCA is required to be filed with DOL.

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. Both conditions were not satisfied in this proceeding. Again, a petitioner must establish eligibility at the time of filing a nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the Petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978).

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. If a petitioner's intent changes with regard to a material term and condition of employment or the Beneficiary's eligibility, an amended or new petition must be filed. To allow a petition to be amended in any other way would be contrary to the regulations. Taken to the extreme, a petitioner could then simply claim to offer what is essentially speculative employment when filing the petition only to "change its intent" after the fact, either before or after the H-1B petition has been adjudicated. 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). 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).

III. PRIOR H-1B APPROVALS

Finally, it is noted that the Beneficiary was previously approved for H-1B status for a position the Petitioner claims to have been the same as the proffered position. However, we are not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. If any of the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, they would constitute material and gross error on the part of the Director. We are not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). A prior approval does not compel the approval of a subsequent petition or relieve the Petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). A prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of eligibility for the benefit sought. *See Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Furthermore, our authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved nonimmigrant petitions on behalf of a beneficiary, we would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

IV. CONCLUSION AND ORDER

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

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

Matter of D-N-S-, Inc.

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.⁹

ORDER: The appeal is dismissed.

Cite as *Matter of D-N-S-, Inc.*, ID# 11948 (AAO Nov. 10, 2015)

⁹ As the grounds discussed above are dispositive of the Petitioner's eligibility for the benefit sought in this matter, we will not address and will instead reserve our determination on the additional issues and deficiencies that we observe in the record of proceeding with regard to the approval of the H-1B petition.