



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

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

MATTER OF I-S-, INC

DATE: NOV. 10, 2015

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, an information technology consulting services firm, seeks to temporarily employ the Beneficiary as an “Oracle Database Administrator” 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, California Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

I. ISSUES

The issues before us are whether (1) the Petitioner has the requisite employer-employee relationship with the Beneficiary necessary to establish standing as a United States employer; and (2) the proffered position qualifies as a specialty occupation.¹

II. STANDING AS A “UNITED STATES EMPLOYER”

To file an H-1B petition, a petitioner must qualify as a “United States (U.S.) employer” in accordance with the definitional provisions at 8 C.F.R. § 214.2(h)(4)(ii). Even if the evidence of record were to establish that the particular position for which the petition was filed is a specialty occupation, that feature of the petition would have no practical effect, for a petition filed by an entity not entitled to file it as a U.S. employer cannot be approved.

Therefore, we will focus upon the first ground of the Director’s denial, that is, her determination that the evidence of record did not establish a business relationship between the Petitioner and the Beneficiary sufficient for U.S. Citizenship and Immigration Services (USCIS) to recognize that they would be in an 8 C.F.R. § 214.2(h)(4)(ii) employer-employee relationship with each other, so as to qualify the Petitioner as a “United States employer” as defined at 8 C.F.R. § 214.2(h)(4)(ii).

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).

Upon review of the entire record of proceeding, we find that the evidence of record does not overcome the Director's determination to deny the petition on the U.S. employer issue. Because our decision on this issue is dispositive of the appeal, we will not address the specialty occupation issue.

A. Legal Framework

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:

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).

Our focus is on the requirement at 8 C.F.R. § 214.2(h)(4)(ii)(2) for an employer-employee relationship between the petitioner and the beneficiary. As we shall now discuss, proof of that relationship depends upon both (1) the Petitioner presenting all of the factors indicative of the nature of the relationship between the Petitioner and the Beneficiary within the particular factual context of the petition and (2) our finding that weighing all of those factors - under the common law touchstone of "control" and without according predominant weight to any one of them - ultimately balances in favor of such a relationship.

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 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 USCIS defined the terms “employee” or “employer-employee relationship” by regulation for purposes of the H-1B visa classification, even though the regulation describes H-1B Beneficiaries as being “employees” who must have an “employer-employee relationship” with a “United States employer.” *Id.* Therefore, for purposes of the H-1B visa classification, these terms are undefined.

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

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

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

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

Specifically, the regulatory definition of “United States employer” requires H-1B employers to have a tax identification number, to engage a person to work within the United States, and to have an “employer-employee relationship” with the H-1B “employee.” 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term “United States employer” not only requires H-1B employers and employees to have an “employer-employee relationship” as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms “employee” or “employer-employee relationship” combined with the agency’s otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond “the traditional common law definition” or, more importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. *Cf. Darden*, 503 U.S. at 318-319.³

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

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

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

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

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

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

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

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

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).

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one factor being decisive.” *Id.* at 451 (quoting *Darden*, 503 U.S. at 324).

B. Analysis

As we shall now discuss, application of the *Darden* and *Clackamas* tests to this matter indicates 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.” That is to say, that the evidence of record is not sufficient for us to conclude that “weighing all of the incidents of” the relationship between the Petitioner and the Beneficiary establishes the requisite employer-employee relationship.

The petition is based upon the Beneficiary’s project-work at [REDACTED] of Michigan [REDACTED] where the Petitioner asserts that the Beneficiary would work, on assignment from the Petitioner, as an Oracle database administrator for the period October 1, 2014 to September 8, 2017.

The record reflects that two business-entities were interposed between [REDACTED] (the Petitioner) and the [REDACTED] end-user of the Beneficiary’s services. Those two entities, which are vendors providing Information Technology (IT) personnel to various clients, including [REDACTED], are (1) [REDACTED] Kentucky and (2) [REDACTED] of [REDACTED], Michigan.

1. Letters from [REDACTED]

The [REDACTED] letters dated March 26, 2014 (which have virtually the same content), attested that, as of that date, the Beneficiary was on a contract consulting assignment as an Oracle Database Administrator at [REDACTED] Michigan. The letters both stated that the Beneficiary was the Petitioner’s employee⁵ and that he was “assisting with the Benefit Configuration Project” at [REDACTED]. The letters described the contractual arrangements among the Petitioner, [REDACTED] and [REDACTED] (the ultimate user of the Beneficiary’s services) as follows: “[the Petitioner] has a contract with [REDACTED] which has a contract with [REDACTED] to provide the services of [the Beneficiary] to the end client [REDACTED].”

We see that both of the letters contain the same language with regard to the Petitioner’s relationship with the Beneficiary, which reads:

As his primary employer, [the Petitioner] is responsible at all times for his salary,

⁵ For purposes of our weighing of common-law employer-employee factors, we do not accord significant weight to either [REDACTED] or [REDACTED] identification of the Beneficiary as the Petitioner’s employee. It is not apparent from the record’s evidence that either [REDACTED] or [REDACTED] applied the balancing of indicia of control that is required for determination of a common-law employer-employee relationship required to establish a petitioner as a United States employer in accordance with the definitional requirements at 8 C.F.R. § 214.2(h)(4)(ii).

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benefits, and training needed to perform his job duties at our client's work site, in addition to any discretionary decision making, such as hiring, firing, and performance evaluations.

Significantly, in their respective letters, [REDACTED] and [REDACTED] state that it is the Petitioner who "supervises and evaluates the work product and is otherwise responsible for how [the Petitioner's] employee work is completed in accordance with their contractual obligations."

Neither letter directly addresses the authority and role that [REDACTED] would exercise with regard to the Beneficiary and his work on what is [REDACTED] own project, which is being performed at [REDACTED], and on [REDACTED] own systems.

On the motion before the Director, the Petitioner submitted an October 27, 2014 employment-verification letter from [REDACTED]. The letter identifies the Petitioner as the Beneficiary's "primary employer" who, as such, "is responsible at all times, for his salary, benefits, and training needed to perform his job duties at our client's worksite, in addition to any discretionary decision making such as hiring, firing, and performance evaluations."

The letter is accompanied by copies of sections 18 and 19 of the Master Service Agreement ("MSA") that [REDACTED] describes as a standard part of the MSAs that [REDACTED] enters with all vendors providing persons who work on [REDACTED] projects. These MSA sections merit particular attention for what they reveal about (1) the relationship between [REDACTED] and its Vendors (of which [REDACTED] is one), (2) [REDACTED] relationship with its vendors' subcontractors (of which the Petitioner is one), (3) the extent of control that [REDACTED] vendors would have over persons that it assigns to [REDACTED] under the umbrella of the MSA (which persons, described as "Contingent Labor," would include the Beneficiary), and (4) the extent of control that [REDACTED] would exercise over the Beneficiary's day-to-day work.⁶

Provisions at section 18 place upon Vendor the responsibility for all taxes, social security withholdings and reports, and required contributions of any kind associated with the Beneficiary's employment. This section also allows the Vendor "sufficient authority as to maintain a right of direction of control over the Continent Labor" that it assigns to [REDACTED] locations, including "sole authority to hire, terminate, discipline, and reassign" such persons. However, as obvious in the following excerpt from paragraph 18.2, control over the nature, timing, supervision, and evaluation of the assigned person's project work will reside exclusively with [REDACTED]. That paragraph includes the following language:

⁶ In the absence of evidence to the contrary, and given the facts that the other evidence of record indicates no direct relationship, contractual or otherwise, between the Petitioner and [REDACTED] and that [REDACTED] has identified itself as [REDACTED] prime vendor, we interpret [REDACTED] as the document's "Vendor" and the document's "subcontractor" references as applying to the Petitioner.

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██████████ shall, however, retain sufficient direction and control over the Contingent Labor as is necessary to conduct ██████████ business without which ██████████ would be unable to conduct its business, discharge any fiduciary responsibility that it may have or comply with any applicable licensure, regulatory, or statutory requirement of ██████████. Such authority maintained by ██████████ shall include the right to accept or cancel the assignment of any Contingent Labor. Additionally, ██████████ shall have sole and exclusive control over the day-to-day job duties of all Contingent Labor and Vendor shall have responsibilities with regard to the Contingent Labor[']s performance of such day-to-day job duties. Furthermore, Vendor shall have no control over the job site at which, or from which, the Contingent Labor shall perform their Services. Control over the day-to-day job duties of the Contingent Labor and over the job site at which, or from which, Contingent Labor perform their heir services is solely and exclusively assigned to ██████████. Vendor assumes the responsibility for the payment of wages to the Contingent Labor without regard to payments by ██████████ and Vendor assumes full responsibility for the payroll taxes and collections of taxes form payroll on Contingent Labor.

We note that paragraph 18.4 vests the responsibility of all employment-related “administrative and personnel matters for their Contingent Labor,” some of which matters are specified in the paragraph.

Section 19, Use of Subcontractors, does not vest in any subcontractor any authority or latitude of action beyond that allowed the Vendor in section 18. An additional indication of the Petitioner’s inability to influence the day-to-day terms and conditions by which ██████████ would control the Beneficiary in the performance of his project work is the clause at paragraph 19.1 stating, “There is no relationship between ██████████ and subcontractor.”

The submissions on appeal include an additional contract-employment verification letter from ██████████, which is dated after the Director’s decision. According to the letter, pursuant to a preferred-vendor contract with ██████████ to provide ██████████ with resources for ██████████ projects, ██████████ contracted with ██████████ (*not* with the Petitioner) for the Beneficiary’s assignment to ██████████ on what ██████████ describes as a long-term special project.⁷

We note that Arrow’s letter states that the Petitioner “has the exclusive right to supervise, hire, fire, and otherwise oversee [the Beneficiary’s] day-to-day duties at the end-client site and is otherwise responsible for his work under its **contractual obligation**.” The letter also refers to a Master Service Agreement (“MSA”) between ██████████ and ██████████ for ██████████ to “provide certain resources,” which, the letter states “in no way interferes with [the Beneficiary’s] employer-employee relationship with [the Petitioner]. The letter attempts to lessen the import of the portions of the MSA which ██████████ had previously submitted into the record with its October 27, 2014 letter. ██████████ letter on appeal states, without supporting explanation, that the MSA language should

⁷ We note that the letter also acknowledges that, at some unspecified date after the petition’s filing, ██████████ terminated its contractual relationship with ██████████ but kept the Beneficiary in place at ██████████.

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not be seen as superseding “the actual relationship” between the Petitioner and the Beneficiary.

2. Documents Executed by Both the Petitioner and the Beneficiary

There are two such documents, each of which was signed in March 2014.

The first is an offer/acceptance letter by which the Beneficiary agreed to take “the position of Oracle Database Administrator with [the Petitioner]” for “compensation” of \$58,000 per year. The document specifies a start date (October 1, 2014) but neither the end-date nor time period for which the job was to be performed. It also does not specify any particular project, client, or work location.

The second document signed by the Petitioner and the Beneficiary consists of nine paragraphs which enumerate aspects of the Petitioner’s relationship which both parties acknowledge as showing the Petitioner’s “right of control over” the Beneficiary.

According to the first three paragraphs of the second document, the Beneficiary “will work under the supervision and control of [the Petitioner] throughout the time he is employed by [the Petitioner]”; “will telephone or otherwise communicate directly with [the Petitioner] no less than once a week regarding his progress on the assigned work”; and will make his reports to [the Petitioner’s] supervisor named at paragraph 3. While the record contains emails in the nature of progress reports by the Petitioner, we find no evidence in the record to corroborate that the Beneficiary has been making such reports or that the Petitioner had used the progress reports, or had authority to use them, to influence the course of the Beneficiary’s day-to-day work for [REDACTED]. Therefore, we accord little weight to these as evidence that the Petitioner maintained control over the matter and means of the Beneficiary’s day-to-day work assignments at [REDACTED] or that the Petitioner exercised supervisory control of the Beneficiary and the particular assignments to be performed by him at [REDACTED].

In the fourth paragraph of the second document, the Petitioner and the Beneficiary agree that, although he may be called upon to assist other companies’ employees, “only [the Petitioner] has the right to control the work of [the Beneficiary] on a day-to-day basis.” We accord little weight to this declaration, not only because it is not binding upon [REDACTED] – which the totality of the evidence shows to be the entity that will decide precisely what the Beneficiary will do on assignment to it – but also because the evidence of record indicates that the declaration is not accurate. In that regard, we direct the Petitioner to the terms of sections 18 and 19 of the Petitioner/[REDACTED] discussed above.

Because the evidence of record substantiates their accuracy, the following points specified at the fifth paragraph of the second document weigh in the Petitioner’s favor on the employer-employee issue. That is, the Petitioner “has hired, will pay, and will have the ability to fire” the Beneficiary. However, these factors are counterbalanced by the facts that, as indicated by the evidence of record, the very foundation of the Beneficiary’s H-1B employment would depend upon [REDACTED] satisfaction with the Beneficiary’s work, and with whatever period of time [REDACTED] may deem it

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necessary to use the Beneficiary's services.

We find that the evidence of record (in particular, a copy of a Petitioner's performance review of the Beneficiary) indicates that the declaration at paragraph six of the second document weighs in the Petitioner's favor to the extent that it states the Beneficiary would be subject to the Petitioner's "regular progress/performance reviews." However, the weight of this factor is substantially devalued by the facts that the evidence of record does not establish that [REDACTED] considers or is bound or even influenced by the Petitioner's progress/performance reviews. Thus, the reviews indicate that the Petitioner maintains some administrative control over the Beneficiary as one of its staffing assets, but not that the Petitioner has the right to assign and modify tasks to the Beneficiary, supervise the Beneficiary during performance of those tasks, evaluate the quality and efficiency of the Beneficiary's work as it is being performed, or determine whether the Beneficiary's performance merits payment by [REDACTED].

We see little significance in the seventh paragraph's statement that the Petitioner will provide all instrumentalities and tools needed for the position, in that there is no evidence that the Petitioner has provided any such tools or instrumentalities.

There is no evidence in the record of proceeding that the end-user, [REDACTED], has assented to the Petitioner/Beneficiary agreement at the eighth paragraph of the second document that the Petitioner "will retain the full right to assign additional duties to [the Beneficiary] at all times." In fact, that aspect of the Petitioner/Beneficiary agreement conflicts with the terms of sections 18 and 19 of the Petitioner, [REDACTED].

Likewise, the Petitioner has not provided documentary evidence indicating that the full scope of the Petitioner/Beneficiary agreement at the ninth paragraph of the second document would be operative with regard to the Beneficiary's assignment to [REDACTED] that is, by allowing the Petitioner to retain full discretion over when and how long the Beneficiary would work at [REDACTED] and to retain full discretion to hire and pay assistants that the Beneficiary may require. We therefore accord little weight to those aspects of paragraph nine. We do find, however, that the evidence of record does establish that the Petitioner would administer the Beneficiary's pay and benefits, in accord with the ninth paragraph – and this aspect we also weigh in the Petitioner's favor.

3. Contractual Documents to Which the Petitioner and [REDACTED] are Parties

The record includes a "Supplier Agreement," accompanied by an "Addendum" to that agreement, effective February 20, 2014, signed by [REDACTED] as Vendor and by the Petitioner as Supplier. This document is basically an umbrella agreement that contains some terms and conditions that would be automatically incorporated into any follow-on contractual commitment between the two parties. According to the Agreement the petitioner would provide a supplementation worker for [REDACTED] in turn to provide to a client to supplement its workers.

It is noteworthy that the document describes [REDACTED] business as "locating technical services

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personnel for various clients” and indicates that the Petitioner’s role would be to supply [REDACTED] with such personnel to perform technical services for the [REDACTED] client that would be identified in a Purchase Order executed by the [REDACTED] and the petitioner. Such a Purchase Order would obligate the Petitioner to “provide technical services to Client according to the Client’s specifications.” This document is crafted so as to disavow that [REDACTED] was acting in an employer role. However, we also find that this document indicates that the Client - which here would be [REDACTED] – would ultimately decide the billable hours for which it would pay for the Beneficiary’s services. Moreover, we find that the tenor of the documents is that the Petitioner would basically perform a staffing function, by providing capable persons for [REDACTED] to funnel to clients to meet their temporary staffing needs as they see them. This aspect of the [REDACTED] documents suggests that the Petitioner would have little control over the Beneficiary and his day-to-day work on assignment to [REDACTED]

We weigh in the Petitioner’s favor the facts that the document places with the Petitioner the major administrative burdens related to the Beneficiary’s employment, such as salary payments to the Beneficiary, payment/withholding of taxes incidental to the Beneficiary’s employment, and insurance premiums, and that Petitioner retains a right to fire, discipline, establish codes of conduct, and monitor (but not direct or supervise) the Beneficiary’s work. However, with regard to task assignments, the Supplier Agreement limits the Petitioner to a pre-project-acceptance opportunity to discuss task requirements and working conditions, thus indicating that, after project acceptance, control over the Beneficiary’s project work would reside solely with [REDACTED] – a factor weighing against the Petitioner’s claim to the requisite employer-employee relationship with the Beneficiary.

4. Contractual Documents to Which the Petitioner and [REDACTED] are Parties

The record contains a copy of a “Subcontract Tier-II Agreement” dated June 4, 2014, which, like the Petitioner, [REDACTED] Supplier Agreement, contains terms and conditions that would be automatically incorporated into any follow-on contractual commitment between the two parties. This document identifies [REDACTED] as the “Tier-I Administrative [S]upplier” for “the end purchaser” [REDACTED] and indicates that, in that supplier capacity, [REDACTED] would provide “contract placement services,” that is, “Supplementation Workers,” to [REDACTED]. This document indicates that the Petitioner would handle salary payments to the Beneficiary and other administrative aspects of the Beneficiary’s employment, such as necessary tax withholding and payments, liability insurance and premium payments. However, as with the [REDACTED] Supplier Agreement the terms of this document are not indicative of the Petitioner having the authority to exercise any control over the Beneficiary’s day-to-day performance of the [REDACTED] project-work for which the petition was filed. Rather, as with the [REDACTED] Supplier Agreement, the terms suggest a staffing-supply role for the Petitioner which does not include day-to-day control over the Beneficiary’s [REDACTED] project activities or over the methods and means that the Beneficiary would perform his duties.

5. Three Pages of the “Master Agreement for Contingent Labor Services” Executed Between [REDACTED] and [REDACTED]

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As part of Exhibit 8 of its RFE-reply the Petitioner submitted pages 1, 2, and 131 of this document to show that [REDACTED] and [REDACTED] have an agreement authorizing [REDACTED] to obtain persons to work as “IT Contingent Labor” for [REDACTED] on a temporary basis.

6. Purchase Order from [REDACTED]

This document engages [REDACTED] to provide the Beneficiary to perform services as “Database Administrator Senior,” with a “Due Date” of February 24, 2014. This document neither includes any particular work-specifications, any duration period, nor any of the terms and conditions that would govern the Beneficiary’s work. The document nowhere mentions the Petitioner, and it reflects that [REDACTED] – the end-client and ultimate user of the Beneficiary’s services – sees the client as an [REDACTED]-provided asset.

7. The Beneficiary’s Identification Card

The photocopy of the identification card that [REDACTED] issued to Beneficiary to access its facilities identifies the Beneficiary as an [REDACTED] contractor, further indicating that [REDACTED] recognizes the Beneficiary as an [REDACTED]-provided asset.

8. Internal [REDACTED] Email Traffic

We find that the copies of the internal [REDACTED] emails that include the Beneficiary as sender or receiver weigh against the Petitioner’s claim of the requisite employer-employee relationship with the Beneficiary. The documents’ content (reflecting the Beneficiary’s supervision by and reporting to [REDACTED] personnel), the lack of any apparent inclusion of the Petitioner in the email chain, and the Beneficiary’s signature block identifying him as a member of [REDACTED] Data Services indicate that the Beneficiary is functioning at [REDACTED] as if he were an integrated member of [REDACTED] regular staff operating independent of any day-to-day control by the Petitioner over project tasks.

9. The Beneficiary’s Email Reports to the Petitioner

The record’s copies of weekly status reports indicate that the Beneficiary is updating the Petitioner on the work that he performed in the previous week. However, the reports contain only after-action content and, as such, do not reflect any role for the Petitioner in directing the Beneficiary’s work activities as they unfold day-to-day at [REDACTED]

10. The Petitioner’s Performance Evaluations

The record’s copies of the Petitioner’s formal evaluations of the Beneficiary’s performance establish that the Petitioner does maintain administrative accountability of the Beneficiary as a human resources asset. However, the evidence of record does not establish that [REDACTED] control over the Beneficiary and his work is in any way influenced by those evaluations.

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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 the 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 Beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the Beneficiary's employer.

Upon examining each item of documentary evidence for whatever indicia it may contain with regard to the Beneficiary's relationships with the Petitioner and with the other entities involved in his assignment to [REDACTED], upon evaluating each such identifiable factor for both its bearing and weight on determining the employer-employee issue within the common law context that we have discussed, and upon balancing the weight of all of those factors, we find that the evidence of record does not establish that the Beneficiary and the Petitioner would more likely than not be engaged in an employer-employee relationship as defined at 8 C.F.R. § 214.2(h)(4)(ii).

The evidence does establish that the Petitioner would handle all of the administrative and personnel issues related to keeping the Beneficiary on its payroll. However, as reflected in our discussion of the documentary evidence, it appears that within the circumstances of this petition the Petitioner would function not as the Beneficiary's employer in the common law sense but rather as supplier of capable personnel to temporarily augment the staff of organizations, like [REDACTED] here, under those organizations' exclusive control of content, means, and methods of work. In that regard, we also note that it appears that [REDACTED] would not only determine and assign the Beneficiary's day-to-day work, but that it would also control the Beneficiary's access to the systems without which his work could not be done. Further, the evidence of record indicates that the Petitioner has no contractual relationship with the Beneficiary, and, therefore, does not have any contractual power to influence [REDACTED] use of the Beneficiary while on assignment by [REDACTED].

For the reasons set forth above, we agree with the Director's conclusion that the evidence of record does not demonstrate that the Petitioner would engage the Beneficiary in the employer-employee relationship that the provision 8 C.F.R. § 214.2(h)(4)(ii)(2) requires for status as United States employer. Accordingly, the appeal will be dismissed, and the petition will be denied.

III. BEYOND THE DECISION OF THE DIRECTOR

Beyond the decision of the Director, we find also that approval of the petition for the period specified in the petition is precluded by the fact that the documentary evidence does not establish that, by the time of the petition's filing, the Petitioner had secured the claimed [REDACTED] project work for that entire period.

As we earlier noted, since our decision on the "United States employer" issue 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

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that, if the Petitioner seeks again to have the Beneficiary or another person classified as an H-1B nonimmigrant, it will submit sufficient independent objective evidence to address and overcome this additional ground in any future filing.

We refer the Petitioner not only to the documentary evidence that it submitted, and, in particular, to the October 24, 2014, letter from [REDACTED] Tier Administrator, submitted on the motion to the Director, for its statement that the Beneficiary was working pursuant “to an extendable contract which I fully expect to be renewed most likely on a yearly basis, as is normal in our industry.” Such a claim of anticipated extensions – without any confirmation from [REDACTED] – is an insufficient factual basis for approving the petition for the period sought in the petition. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg’l Comm’r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm’r 1971).

IV. CONCLUSION AND ORDER

We may deny an application or petition that does not comply with the technical requirements of the law 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 at 145 (noting that we conduct appellate review on a *de novo* basis).

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

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

ORDER: The appeal is dismissed.

Cite as *Matter of I-S-, Inc*, ID# 12887 (AAO Nov. 10, 2015)