



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

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

MATTER OF N-E-S-, LLC

DATE: NOV. 23, 2015

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, an information technology services firm, seeks to temporarily employ the Beneficiary as a "Computer Systems Analyst" 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, initially approved the nonimmigrant visa petition. Upon subsequent review of the record, the Director issued a notice of intent to revoke (NOIR), and ultimately did revoke the approval of the petition. The matter is now before us on appeal. The appeal will be dismissed.

The record of proceeding before us contains: (1) the Petitioner's Form I-129 and the supporting documentation filed with it; (2) the NOIR; (3) the Petitioner's response to the NOIR; (4) the Director's decision revoking approval of the visa petition; and (5) the Notice of Appeal or Motion (Form I-290B) and the Petitioner's submissions on appeal. We reviewed the record in its entirety before issuing our decision.¹

I. THE PROFFERED POSITION

The Petitioner claims in the LCA submitted to support the visa petition that the proffered position corresponds to Standard Occupational Classification (SOC) code and title 15-1121, Computer Systems Analysts, from the Occupational Information Network (O*NET). The Petitioner also stated that the proffered position is a wage Level I position.

In a letter dated March 31, 2014, the Petitioner stated the following about the proffered position:

The position analyzes the data processing requirements to determine the computer software which will best serve those needs, then works on the design of a computer system / application using that software which will process the data in the most timely and inexpensive manner and works on the implementation of that design.

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).

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In the same letter, the Petitioner further stated that the Beneficiary would:

- Interact with management to determine system requirements;
- Analyze software requirements to determine design feasibility;
- Evaluate interface between hardware & software and performance requirements of overall system;
- Design software system, using design tools to predict outcome;
- Develop software systems programming, including documentation and testing procedures;
- Advise concerning maintenance of system; [and]
- Coordinate installation of software system.

As to the educational requirements of the proffered position, the Petitioner stated:

This position in our company is professional in nature, as the position involves determining computer system development needs and developing a satisfactory solution, under the direction and control of the employer. The position requires an individual with analytical ability. Such a background can only be obtained through one of several limited means, which include a Bachelor's degree or its equivalent in education and experience in Engineering, Computer Science, Computer Information Systems, Business with a specialization in Information Systems, or a closely related field. We have never placed an individual in the above position who holds less than a Bachelor's degree in one of the above disciplines, or its equivalent in education and experience. This is a position that normally requires a minimum of a Bachelor's degree, or its equivalent, for entry into the field. Employer would normally require a an individual with a Bachelor's degree or its equivalent for this position.

As to the projects on which the Beneficiary would work, the Petitioner stated:

[The Petitioner] is currently engaged in multiple projects for support services. Some of the projects that [the Beneficiary] will assist on, in [the Beneficiary's] role as a Computer Systems Analyst are [redacted] through vendor [redacted] through vendor [redacted] through vendor [redacted] and [redacted] through vendor [redacted]

II. REVOCATION ON NOTICE

A. Legal Framework

U.S. Citizenship and Immigration Services (USCIS) may revoke the approval of an H-1B petition pursuant to 8 C.F.R. § 214.2(h)(11)(iii), which states the following with respect to revocation on notice:

(A) *Grounds for revocation.* The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:

- (1) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition . . . ; or
- (2) The statement of facts contained in the petition . . . was not true and correct, inaccurate, fraudulent, or misrepresented a material fact; or
- (3) The petitioner violated terms and conditions of the approved petition; or
- (4) The petitioner violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of this section; or
- (5) The approval of the petition violated paragraph (h) of this section or involved gross error.

(B) *Notice and decision.* The notice of intent to revoke shall contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal. The petitioner may submit evidence in rebuttal within 30 days of receipt of the notice. The director shall consider all relevant evidence presented in deciding whether to revoke the petition in whole or in part

B. Grounds for Revocation

On December 29, 2014, the Director issued the NOIR in this case. The Director cited 8 C.F.R. § 214.2(h)(11)(iii)(A)(2) for the proposition that approval may be revoked in cases where the statement of facts on the petition was not true and correct. The Director found that the evidence in the record does not demonstrate that (1) the proffered position is a specialty occupation position and the claimed work will be available through the duration of the requested validity period, (2) the Petitioner would have an employer-employee relationship with the Beneficiary, and (3) the LCA corresponds to the visa petition.

In response, the Petitioner provided a letter, dated January 20, 2015, in which it asserted that the Petitioner will not be providing the Beneficiary to other companies, but, rather, the Beneficiary will work at the Petitioner's location and the Petitioner will assign duties to the Beneficiary. In support of that proposition, the Petitioner provided evidence from other companies.

The Director revoked the approval of the petition on March 2, 2015, on the grounds that the Petitioner had not demonstrated that (1) the duties to be performed by the Beneficiary are those of a specialty occupation and the claimed specialty occupation work will be available for the Beneficiary

through the duration of the requested validity period, and (2) the Petitioner will have an employer-employee relationship with the Beneficiary for the duration of the intended employment.

III. SPECIALTY OCCUPATION

We will first address the specialty occupation issue. The issue is whether the evidence of record establishes that the Petitioner will employ the Beneficiary in a specialty occupation position.

A. Legal Framework

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term “specialty occupation” as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

Specialty occupation means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the attainment of a bachelor’s degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or

- (4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Fed. Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing “a degree requirement in a specific specialty” as “one that relates directly to the duties and responsibilities of a particular position”). Applying this standard, USCIS regularly approves H-1B petitions for qualified individuals who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position’s title. The specific duties of the proffered position, combined with the nature of the petitioning entity’s business operations, are factors to be considered. USCIS must examine the ultimate employment of the individual, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position or an employer’s self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

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We note that, as recognized by the court in *Defensor*, 201 F.3d at 387-88, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. See *Defensor v. Meissner*, 201 F.3d at 387-88. The court held that the former Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. *Id.* at 384. Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work.

B. Analysis

The Petitioner has stated that the Beneficiary will work at the Petitioner's own location and will not work elsewhere. The Petitioner's assertion that the Beneficiary would work in a specialty occupation position and will have sufficient specialty occupation work to perform throughout the period of requested employment rests, therefore, on its claim that the Petitioner has sufficient specialty occupation work for the Beneficiary to perform throughout the period of requested employment at the Petitioner's address at [REDACTED] California.

As evidence of specific work available for the Beneficiary to perform, the Petitioner provided the following:

- Work Order 1, executed by the Petitioner and [REDACTED] for up to 240 hours of database administration assistance to be performed by [REDACTED] at [REDACTED] in [REDACTED] California, beginning on November 20, 2008;
- Work Order 2, executed by the Petitioner and [REDACTED], for up to 800 hours of database administration assistance to be performed by [REDACTED] at [REDACTED] in [REDACTED] California, beginning on March 16, 2009;
- Work Order 3, executed by the Petitioner and [REDACTED] for up to 240 hours of database administration assistance to be performed by [REDACTED] at [REDACTED] in [REDACTED] California, beginning on June 8, 2009;
- Work Order 4, executed by the Petitioner and [REDACTED] for up to 2,390 hours of database administration assistance to be performed by [REDACTED] at [REDACTED] [REDACTED] California, beginning on July 1, 2011; and
- Work Order 5, executed by the Petitioner and [REDACTED] for up to 2,880 hours of database administration assistance to be performed by [REDACTED] [REDACTED] California, beginning on July 1, 2013. We observe that this is the Petitioner's address.

The Petitioner also submitted a letter, dated July 21, 2014, from [REDACTED] and a Subcontractor Services Vendor Agreement between the Petitioner and [REDACTED] dated November 10, 2008. The vendor agreement sets out the general terms pursuant to which [REDACTED] might subsequently order work to be evidenced by work orders. The July 21,

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2014, letter indicates that [REDACTED] was then working on a project for [REDACTED] and describes [REDACTED] duties. It does not indicate that anyone else was working on that project or might work on that project in the future.

The record also contains a Professional Services Agreement executed by an officer of [REDACTED] and by [REDACTED] for the Petitioner. It sets out general terms pursuant to which [REDACTED] might commission work from the Petitioner by means of work orders to be issued later. That agreement states that it will continue through July 17, 2014, unless terminated earlier. That agreement appears to have terminated, according to its terms, prior to the commencement of the period of intended employment in this case. A time sheet in the record shows that [REDACTED] worked for 40 hours from June 1, 2014, to June 7, 2014, for [REDACTED]

The record contains an Independent Contractor Agreement executed by [REDACTED] and the Petitioner on May 30, 2013. It sets out general terms pursuant to which [REDACTED] might subsequently order work from the Petitioner, to be evidenced by Work Memos to be issued later. No such Work Memos are in the record.

The Petitioner asserted that although the evidence purports to be for work to be performed by [REDACTED] and does not identify the employee or employees who would perform the work, it is actually for work to be performed, at least in part, by the Beneficiary. The Petitioner further asserts that although some of the work orders state that they are for work to be performed at remote locations and some do not identify the location or locations where the work would be performed, that work would be performed at the Petitioner's own location.²

The evidence submitted, however, does not support these assertions. Although the statements by the Petitioner are relevant and have been taken into consideration, little weight can be accorded them in the absence of supporting evidence. While the evidence indicates that the Petitioner had work for [REDACTED] to perform, the evidence does not sufficiently demonstrate that the Petitioner has work available for the Beneficiary to perform throughout the validity period. “[G]oing on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings.” *In re Soffici*, 22 I&N Dec. 158, 165 (Comm’r 1998) (citing *Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190 (Reg’l Comm’r 1972)).

Because the Petitioner has not demonstrated that it has sufficient specialty occupation work for the Beneficiary to perform, the substantive nature of the work the Beneficiary would perform, if any, if the visa petition were approved, has not been demonstrated. That the Petitioner did not establish the substantive nature of the work to be performed by the Beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree

² The Petitioner submitted evidence of office space that it has leased from [REDACTED]

requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

For the reasons explained above, the Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation position and the claimed specialty occupation work will be available for the Beneficiary throughout the duration of the requested validity period. Therefore, the Director properly revoked the approval of the petition, and the appeal must be dismissed for this reason.

IV. EMPLOYER-EMPLOYEE

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:

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 *Cnty. 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.³

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 318-19.⁴

³ 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).

⁴ 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)).

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).⁵

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 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

⁵ 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).

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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. 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 as required by *Matter of Chawathe*, 25 I&N Dec. 375-376. However, there is insufficient probative evidence in the record to support the Petitioner’s assertion. “[G]oing on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings.” *In re Soffici*, 22 I&N Dec. 158, 165 (Comm’r 1998) (citing *Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190 (Reg’l Comm’r 1972)). Applying the *Darden* and *Clackamas* tests to this matter, the Petitioner has not established that it will be a “United States employer” having an “employer-employee relationship” with the beneficiary as an H-1B temporary “employee.”

The Petitioner’s assertion that it would have an employer-employee relationship with the Beneficiary rests on the axiom that it has shown that the Beneficiary would work at the Petitioner’s location under its supervision. However, all of the work orders from [REDACTED] indicate that [REDACTED] will perform the work described, and all but one indicate that the work will not be performed at the Petitioner’s location. As was noted above, the Petitioner asserted that although the work orders provided either identify [REDACTED] as the person who will work pursuant to them or, in some cases, do not identify the person who would perform the required work, they are actually evidence that the Petitioner has sufficient work to which it can assign *the Beneficiary* throughout the period of requested employment. Further, although some of those work orders do not identify the locations where would be performed and others state that the work would be performed at remote locations, the Petitioner asserted that they are actually evidence of work to be performed at the Petitioner’s location. Those assertions by the Petitioner, as explained above, are insufficient pursuant to *In re Soffici, supra*, to sustain the burden of proof in this matter. The Petitioner has not demonstrated that it has sufficient work to which it could assign the Beneficiary throughout the validity period.

Furthermore, 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 support letter, February 3, 2014, employment letter, and document

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titled “Statement of Work / Project Description,” the Petitioner states that the Beneficiary will report directly to [REDACTED]. However, in an “unsworn declaration,” the CEO and President of the Petitioner states the following: “I am the CEO and President of [the Petitioner]. As such, I will be responsible for supervising the day-to-day activities of [the Beneficiary].” The CEO and President further states the following: “In addition, to supervising [the Beneficiary’s] work, I will act as his primary point of contact and appraise his work performance.” No explanation for this inconsistency was provided by the Petitioner. “[I]t is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence.” *Matter of Ho*, 19 I&N 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.

The Petitioner has not demonstrated that it has sufficient work for the Beneficiary to perform. The evidence of record does not demonstrate where the claimed work would be performed, who would assign the Beneficiary’s duties, or who would supervise the Beneficiary’s work. Without disclosure of the circumstances of the Beneficiary’s perspective employment, we are unable to find that the Petitioner would have an employer-employee relationship with the Beneficiary in performing that unspecified work.

Upon complete review of the record of proceeding, we find that the evidence in this matter 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). 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). Therefore, the Director properly revoked the approval of the petition for this additional reason.

V. CONCLUSION

For the foregoing reasons, the visa petition was revocable pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A). The appeal will be dismissed and approval of the visa petition will remain revoked.

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 N-E-S-, LLC*, ID# 14545 (AAO Nov. 23, 2015)