



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

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

MATTER OF M-, INC.

DATE: OCT. 7, 2015

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a software business, seeks to employ the Beneficiary as a programmer analyst and classify her 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, California Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

**I. PROCEDURAL BACKGROUND**

In the Petition for a Nonimmigrant Worker (Form I-129), the Petitioner describes itself as a software business, with 23 employees, established in [REDACTED]. In order to employ the Beneficiary in what it designates as a computer systems analyst position, the Petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation.

The Director denied the petition, concluding that the Petitioner did not establish (1) that it meets the regulatory definition of a United States employer, and (2) that the proffered position qualifies as a specialty occupation. On appeal, the Petitioner asserts that the Director's bases for denial were erroneous and contends that it satisfied all evidentiary requirements.

The record of proceeding contains: (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 Notice of Appeal or Motion (Form I-290B) and supporting documentation. We reviewed the record in its entirety before issuing our decision.<sup>1</sup>

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

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<sup>1</sup> We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

## II. EMPLOYER-EMPLOYEE RELATIONSHIP

We agree with the Director's finding that the Petitioner has not established that it meets the regulatory definition of a United States employer.

### A. Legal Framework

For an H-1B petition to be granted, the Petitioner must establish that it meets the regulatory definition of a United States employer. 8 C.F.R. § 214.2(h)(4)(ii). Specifically, the Petitioner must establish that it will have "an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." *Id.*

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

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) . . . .

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).

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 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. 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.

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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.<sup>2</sup>

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.<sup>3</sup>

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"

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<sup>2</sup> 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).

<sup>3</sup> 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))).

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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).<sup>4</sup>

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.

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<sup>4</sup> 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).

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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

Applying the *Darden* and *Clackamas* tests to this matter, we find that the Petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the Beneficiary as an H-1B temporary "employee." We examined each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, and find that the Petitioner did not establish the requisite employer-employee relationship with the Beneficiary. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

For H-1B classification, the petitioner is required to submit written contracts between the petitioner and the beneficiary, or if there is no written agreement, a summary of the terms of the oral agreement under which the beneficiary will be employed. See 8 C.F.R. § 214.2(h)(4)(iv)(A) and (B). The Petitioner has not submitted an employment offer letter or written employment agreement. In the initial submission, the Petitioner states: "[w]e have a contractual agreement with the Beneficiary that he will be our employee for the entire duration of the requested employment with an annual salary of \$63606/year." In response to the Director's RFE requesting that the Petitioner submit a copy of an employment offer letter detailing the terms and conditions of employment and an employment agreement that clearly describes the nature of the employer-employee relationship, the Petitioner stated, "[w]e have a verbal agreement with the Beneficiary that he/she will be working as a programmer analyst under our direction and control." However, the Petitioner did not provide any specific details regarding the actual terms of this verbal agreement, such as information on the Beneficiary's chain of command, description of the work to be performed, details of the benefits offered (vacation, insurance, etc.), and procedure for wage payments and tax withholdings, among other things.

In the Form I-129 and on the LCA, the Petitioner stated that the Beneficiary will work at the Petitioner's office located at [REDACTED] California.<sup>5</sup> The Petitioner does assert that it will be the Beneficiary's employer according to common law principles, making declarations such as:

The Beneficiary will be working under our direction. Beneficiary will adhere to our work hours, dress code and our human resources policies. We will be instructing his work and providing overall guidance.

We will supply the necessary tools (computer, printers, workstation, fax machine, training manuals) and authorize any financial expenditures in order for him to perform her job as a programmer analyst.

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<sup>5</sup> In addition, the Petitioner answered "no" when asked on the Form I-129 whether the Beneficiary would work offsite.

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However, the information in the record does not support these assertions. 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)). Despite the specific requests from the Director in the RFE, the Petitioner has not submitted information on its organizational structure, has not provided information on the Beneficiary's position within the company, has not identified the position and location of persons in the Beneficiary's chain of command, has not detailed the process for assigning and supervising work, and has not submitted information on the company's performance review process. This information is necessary to determine whether the Petitioner is serving as the Beneficiary's U.S. employer and the absence of this information precludes us from evaluating whether the Petitioner and Beneficiary will have an employer-employee relationship. Furthermore, failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Moreover, the record contains material inconsistencies regarding the Beneficiary's place of employment. Again, the Petitioner stated in the Form I-129 and on the LCA that the Beneficiary would be working at the Petitioner's [REDACTED], California business location, and checked the box at page 4 of the petition to state that she would not be working at any offsite locations. However, in response to the Director's RFE the Petitioner states that the Beneficiary will not be employed at the Petitioner's [REDACTED] office as indicated in the petition but will instead be working at "[REDACTED] offices at [REDACTED]." The Petitioner further states that "the labor condition application for [REDACTED] CA is in the same metropolitan/geographical area and covers the intended work location."<sup>6</sup>

With the RFE response, the Petitioner also submitted a Master Services Agreement (MSA) between itself and [REDACTED] dated April 12, 2011. The Petitioner further submitted a purchase order (PO) between itself and [REDACTED] with an effective date of October 1, 2014 with a term of one year. The PO states that the Petitioner will supply personnel in the "role of Programmer Analyst/Java Test Engineer/Software Engineer." The PO further states that the "supplier will assign Consultants (multiple) under this purchase order." The purchase order does not specifically name the Beneficiary and no additional POs, Statements of Work, or similar documentation naming the Beneficiary were submitted. Given the content of the MSA and the information submitted in response to the RFE, it appears that the Beneficiary would be placed at the end-client, [REDACTED] through the middle vendor, [REDACTED]. However, the record does not contain information from [REDACTED], such as a contract between [REDACTED] and [REDACTED], or a description of the Beneficiary's intended duties from [REDACTED] that would allow USCIS to fully evaluate the employment relationship between the Beneficiary and the Petitioner. Without information on the contractual relationship between the middle-vendor and the end-client, we cannot conclude that the Petitioner would retain control over the Beneficiary's work.

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<sup>6</sup> 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).

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The Petitioner also submitted additional documentation, including information from the Internal Revenue Service and the California Employment Development Department, regarding methods to determine whether an individual would be considered an employee according to each organization's specific guidelines, which focused on the payment of wages and taxes as the determining factor. We acknowledge that the method of payment of wages can be a pertinent factor to determining the Petitioner's relationship with the Beneficiary. However, 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. Furthermore, the Petitioner has not provided documentary evidence to establish that it would in fact be the entity paying the Beneficiary's wages, social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings.

On appeal, the Petitioner claims that the designation of [REDACTED] as the end-client was a scrivener's error and asserts that the Beneficiary will actually be working for [REDACTED] as the end-client. The Petitioner also submitted a letter from [REDACTED] stating: "Our company does not have the right to assign additional projects to [the Beneficiary] without notifying the [Petitioner's] manager of the additional scope of work/project or term. Moreover, the [Petitioner] manager must coordinate, discuss, and explain any additional project terms to [the Beneficiary] in order for her to perform additional duties."

However, we note that the Petitioner named [REDACTED] as the end client twice in the RFE response and that the MSA between the Petitioner and [REDACTED] contains sections referring to the work that the Petitioner's personnel will do for [REDACTED] clients and the conditions that will be dictated by such clients. Specifically the MSA states:

3. Consultant's Responsibilities.

f. Consultant agrees to abide by all provisions that are hereby flowed down to consultant from any agreement that Company has in place with Client, for which Consultant provides under this Agreement, including non-disclosure, employee screening, and insurance requirements.

This section of the agreement indicates that the relationship between the Petitioner and [REDACTED] is one where [REDACTED] performs as a middle vender and that the Beneficiary may be assigned to work for third-party clients, rather than for [REDACTED] itself, as claimed on appeal.

Thus, the record of proceeding contains at least four competing claims regarding the nature of the Beneficiary's work: that she would work directly for the Petitioner, as indicated in the petition; that she would perform services for [REDACTED]; that she would perform services for [REDACTED]

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██████████; and that she would perform services for the clients of ██████████ pursuant to the above-referenced MSA. 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. 591-92. 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. *Id.* The Petitioner provided inconsistent information regarding the nature and scope of the Beneficiary's employment. Therefore, the key element in this matter, which is who exercises control over the Beneficiary, has not been substantiated and we cannot make an affirmative determination given the current inconsistencies in the record.

The evidence in the 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 in its letters 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 prior to adjudication did not establish that the Petitioner would act as the Beneficiary's employer in that it will hire, pay, fire, or otherwise control the work of the Beneficiary.

Furthermore, we find that the Petitioner has not established that the petition was filed for non-speculative work for the Beneficiary, for the entire period requested, that existed as of the time of the petition's filing. The instant petition requests H-1B status for the Beneficiary from October 1, 2014 until May 31, 2017. The MSA discussed above states:

The term of this agreement is from the Effective Date and shall continue until December 31, 2015 ("End Date"). The term of this agreement shall be extended in the event ██████████ seeks additional services from [the Petitioner] and is subject to the termination provisions of this Section 5.

The associated PO states that it is valid,

Beginning October 1, 2014 and for a minimum of one years ("minimum time requirement") and extendable or as otherwise provided on the agreement. Any extension of this agreement may be obtained by way of a communication over email or an additional purchase order, signed by an authorized representative of [the Petitioner] and accepted by the contractor.

The Petitioner has not submitted evidence, such as additional POs or signed correspondence from the interested parties, to indicate that the MSA has been extended beyond October 31, 2015.

Upon review, we find that there is insufficient documentary evidence in the record corroborating the availability of work for the Beneficiary for the requested period of employment and, consequently, what the Beneficiary would do, where the Beneficiary would work, as well as how this would impact the circumstances of his relationship with the Petitioner. Again, 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). Moreover, the burden of proving eligibility for the benefit sought remains entirely with the Petitioner. Section 291 of the Act. The Petitioner has not established that, at the time the petition was submitted, it had located H-1B caliber work for the Beneficiary that would entail performing the duties as described in the petition, and that was reserved for the Beneficiary for the duration of the period requested. Thus, even if it were found that the Petitioner would be the Beneficiary's United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii), the Petitioner has not demonstrated that it would maintain such an employer-employee relationship for the duration of the period requested.<sup>7</sup>

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).

### III. SPECIALTY OCCUPATION

Furthermore, we find that the record does not establish that the Beneficiary would be employed in a specialty occupation, as defined by applicable statutes and regulations, for the duration of the requested H-1B validity period.

#### A. Legal Framework

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<sup>7</sup> The agency made clear long ago that speculative employment is not permitted in the H-1B program. The H-1B classification is not intended to be utilized to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. 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).

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For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements of a specialty occupation.

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. Federal 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 aliens 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 alien, 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 nor 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.

#### B. The Proffered Position

As noted above, the Petitioner describes itself as a software business, established in 2009 with 23 employees. In the letter submitted in support of the instant petition, the Petitioner states that it is filing a petition for a programmer analyst with the following job duties:

Install, maintain and may design internal software operating systems and/or business applications. Prepare concepts for information systems solutions.  
Be responsible for project control, quality and implementation

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The Petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B. The Petitioner indicates that the proffered position corresponds to the occupational category "Computer Systems Analysts"-SOC (ONET/OES Code) 15-1121, at a Level I (entry-level) wage.

The Director reviewed the submitted position information and issued an RFE, requesting additional information from the Petitioner concerning the proposed assignment. In response to the Director's RFE, the Petitioner stated that the Beneficiary would be working at [REDACTED] and provided the following more detailed description of the duties:

Analyze the business requirement and system functionalities, code and develop Applications as per the business requirements using Java,.Net tool on oracle. Review and modify any changes to the application and increase the process workflow and run the technical and business functionality of the application through the test process either by automated testing or manual testing process..

On appeal, the Petitioner stated that the Beneficiary would be employed with [REDACTED] and submitted a letter from [REDACTED] which states that the Beneficiary will be "engaged as a Programmer Analyst Consultant whose duties essentially fit the job title of Software Engineer Analyst and that by normal industry standards these service require at least a Bachelor Degree or equivalent in a relevant technology field." The letter from [REDACTED] states that the Beneficiary's duties will include the following tasks:

- Develop full Life Cycle object oriented software system
- Gather and analyze business requirements from users and functional team
- Write technical design document for various interface, conversions, forms and reports using Functional Documents
- Design and Develop system using .Net and other web based technologies such as JQuery NHibernate
- Assist in designing Database and its Development
- Create various DB Object (Table, View, and Sequence Scripts) and writing SQL queries, Stored Procedures, Functions, Alerts and Triggers to retrieve, update and delete data from SQL Server Database
- Create Testing Fixtures and Fixing defects and builds
- Work with the team leader in devising methods to solve problems and meet user needs

### C. Analysis

We find that the evidence of record does not demonstrate that the proffered position as described by the Petitioner in fact falls within the "Computer Systems Analysts" occupational category as designated by the Petitioner on the LCA. We make this finding primarily based upon the lack of

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information and evidence regarding the specific duties of the proffered position and the inconsistencies present in the position descriptions supplied by the Petitioner.<sup>8</sup>

The initial duties provided by the Petitioner are generic in nature. The Petitioner's description is generalized and generic in that the Petitioner does not convey either the substantive nature of the work that the Beneficiary would actually perform, any particular body of highly specialized knowledge that would have to be theoretically and practically applied to perform it, or the educational level of any such knowledge that may be necessary. For example, the duties include "be responsible for project control, quality and implementation" and "prepare concepts for information systems solutions." The description provided in response to the RFE continued to describe the position in general terms and did not indicate what type of knowledge may be required to perform the duties. The responsibilities for the proffered position contain generalized functions without providing sufficient information regarding the particular work, and associated educational requirements, into which the duties would manifest themselves in their day-to-day performance. The abstract, speculative level of information regarding the proffered position and the duties comprising it is exemplified by the phrases "analyze the business requirement and system functionalities" and "develop applications as per the business requirements."

Further, the amended job description provided by [REDACTED] on appeal is inconsistent with the information previously provided.<sup>9</sup> The amended job description contains little to no overlap in the specific tasks to be performed or knowledge to be used, as was specified in the original submission.<sup>10</sup> Specifically, the initial duties consist of "install, maintain and may design internal software operating systems and/or business applications"; while the amended job description provided by [REDACTED] includes skills such as "create various DB Object (Table, View, and Sequence Scripts) and writing SQL queries, Stored Procedures, Functions, Alerts and Triggers to retrieve, update and delete data from SQL Server Database," without mention of previously how these relate to previously enumerated duties. In this matter, the record contains material inconsistencies concerning the description of the proffered position. 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. 591-92.

<sup>8</sup> We note that even if we were able to conclude that the proffered position would be that of a computer systems analyst, the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook (Handbook)* does not support the assertion that the normal minimum entry requirement to become a computer systems analyst is the attainment of a baccalaureate degree in a specific specialty, or its equivalent. Specifically, the *Handbook* states that some employers hire workers with a liberal arts degree, which does not establish that working as a computer programmer normally requires at least a bachelor's degree in a specific specialty or its equivalent for entry into the occupation. Therefore it would not be considered a specialty occupation, absent additional evidence from the Petitioner that it met one of the criteria stated at 8 C.F.R. § 214.2(h)(4)(iii)(A). We recognize the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses. The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.bls.gov/oco/>. All of our references to the *Handbook* are to the 2014 – 2015 edition available online.

<sup>9</sup> Further, and as was discussed earlier, the claim that the Beneficiary would perform services for [REDACTED] is one of numerous employment scenarios described in the petition.

<sup>10</sup> A Petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

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As discussed above, the MSA contains provisions regarding service performed for a client and the Petitioner previously stated that the Beneficiary would be performing work for a third party client. Therefore, it appears that the Beneficiary may be working for a third-party end-client, rather than for [REDACTED], as claimed on appeal.

We note that, as recognized by the court in *Defensor, supra*, 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 387-388. 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. In this case, the Petitioner provided information from [REDACTED], but did not identify or provide information concerning the proffered position from [REDACTED] client. Without such information we are unable to determine whether or not the proposed occupation would qualify as a specialty occupation.

On appeal, the Petitioner contends that as USCIS has approved other petitions for programmer analyst positions, it should likewise conclude the proffered position in this case is a specialty occupation. If a Petitioner wishes to have unpublished service center or our prior decisions considered by USCIS in its adjudication of a petition, the Petitioner is permitted to submit copies of such evidence. The Petitioner did not submit such evidence in this case.

Nevertheless, even if this evidence had been submitted and even if it had been determined that the facts in those cases were analogous to those in this proceeding, those decisions are not binding on USCIS. While 8 C.F.R. § 103.3(c) provides that our precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. Moreover, if the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approvals 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).

The Petitioner also asserts that certification of the LCA by DOL supports the assertion that the proffered position qualifies as a specialty occupation. However, 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 (emphasis added):

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.<sup>11</sup>

The certification of an LCA by the DOL does not signify that the occupation named in the LCA is a specialty occupation. Rather, as noted above, it is DHS which will make this determination.

The Petitioner must establish, with specificity, the duties of proffered position, in order to demonstrate that the proffered position is in a specialty occupation. Because the record of proceeding in this case is devoid of sufficient consistent information regarding the specific job duties to be performed by the Beneficiary, the Petitioner has not established the substantive nature of the work to be performed by the Beneficiary, which therefore precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). We note that it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a Petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4. The Petitioner, therefore, has not established that the proffered position is a specialty occupation.

#### IV. BENEFICIARY QUALIFICATIONS

We do not need to examine the issue of the Beneficiary's qualifications, because the Petitioner has not provided sufficient evidence to demonstrate that the proffered position is a specialty occupation. In other words, the Beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation.

As discussed in this decision, the Petitioner did not submit sufficient evidence regarding the proffered position to determine whether it will require a baccalaureate or higher degree in a specific specialty or its equivalent. Absent this determination that a baccalaureate or higher degree in a specific specialty or its equivalent is required to perform the duties of the proffered position, it also cannot be determined whether the Beneficiary possesses that degree or its equivalent.

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<sup>11</sup> See also 56 Fed. Reg. 61111, 61112 (Dec. 2, 1991)("An approved labor condition application is not a factor in determining whether a position is a specialty occupation.")

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V. CONCLUSION AND ORDER

As discussed, we agree with the Director's decision denying this petition. 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.<sup>12</sup>

**ORDER:** The appeal is dismissed.

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<sup>12</sup> Since the identified bases for denial are dispositive of the Petitioner's appeal, we will not address additional grounds of ineligibility we observe in the record of proceeding.