



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

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

MATTER OF C- LLC

DATE: OCT. 8, 2015

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

PETITION: I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, an IT consulting company, seeks to employ the Beneficiary as an identity management specialist and to classify him as a nonimmigrant worker in a specialty occupation. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The Director, California Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

The Director denied the petition, finding that the evidence of record did not establish that (1) a valid employer-employee relationship will exist for the duration of the requested validity period; and (2) the proffered position is a specialty occupation. On appeal, the Petitioner asserts that the Director's basis for denial was erroneous and contends that it satisfied all evidentiary requirements.

We reviewed the record in its entirety before issuing our decision. We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). We follow the preponderance of the evidence standard as specified in the *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010). For reasons that will be discussed below, we agree with the Director that the Petitioner has not established eligibility for the benefit sought.

I. EMPLOYER-EMPLOYEE RELATIONSHIP

A. Legal Framework

We will first address whether the Petitioner has established that it meets the regulatory definition of a “United States employer” as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii). We reviewed the record of proceeding to determine whether the Petitioner has established 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.*

More specifically, section 101(a)(15)(H)(i)(b) of the Act defines an H-1B nonimmigrant in pertinent part as an alien:

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 (emphasis added):

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.

8 C.F.R. § 214.2(h)(4)(ii); *see also* 56 Fed. Reg. 61111, 61121 (Dec. 2, 1991). In the instant case, 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 alien coming to the United States to perform services in a specialty occupation will have an “intending employer” who will file a Labor Condition Application (LCA) 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 Petition for a Nonimmigrant Worker (Form I-129) in order to classify aliens as H-1B temporary “employees.” 8 C.F.R. § 214.2(h)(1), (2)(i)(A). Finally, the definition of “United States employer” indicates in its second prong that the petitioner must have an “employer-employee relationship” with the “employees under this part,” i.e., the H-1B beneficiary, and that this relationship be evidenced by the employer’s ability to “hire, pay, fire, supervise, or otherwise control the work of any such employee.” 8 C.F.R. § 214.2(h)(4)(ii) (defining the term “United States employer”).

Neither the 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) (*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) (*Clackamas*). As the common-law test contains “no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.” *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).

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

¹ 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

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 318-319.²

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).³

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

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).

² 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)).

³ 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).

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, not who has the *right to* provide the tools required to complete an assigned project. *See id.* at 323.

Lastly, the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450. "Rather, . . . the answer to whether [an individual] is an employee depends on 'all of the incidents of the relationship . . . with no one factor being decisive.'" *Id.* at 451 (quoting *Darden*, 503 U.S. at 324).

B. The Proffered Position

In the letter dated March 31, 2014, the Petitioner stated that it is offering the Beneficiary the position of identity management specialist. The Petitioner also stated that the Beneficiary would be responsible for the following duties:

- Design, develop, install, integrate, test and monitor performance of identity and access management systems, software products and applications;
- Develop applications software products and solutions, focusing on identity and security software for businesses; and

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- Analyze and recommend modifications and new software and then develop software according to client needs.

The Petitioner stated that the Beneficiary would work directly at its offices in [REDACTED] CA, and enclosed photos of the building and the workspace. However, the Petitioner also stated that:

[w]e anticipate that [the Beneficiary] will visit the offices of our client, [REDACTED]. [in] [REDACTED] California. [The Beneficiary] will visit [REDACTED] to oversee the implementation of the management system that he designs; and provide some client training and product support.

We have determined that the visits described above to the client's location in [REDACTED] will occur for only short periods. [The Beneficiary] will not spend more than 30 days, over the course of a year, at the client site. The bulk of his duties will involve designing identity and access management systems, software products and applications, and will occur in our main office...in [REDACTED] California.

The Director issued an RFE, providing the Petitioner with an opportunity to provide additional documentation regarding employer-employee relationship and whether the proffered position is a specialty occupation. In response to the RFE, the Petitioner stated:

As part of his responsibilities, [the Beneficiary] will design, develop, create, modify and utilize custom software applications that are related to [REDACTED] (or [REDACTED]). [REDACTED] is a framework for business processes that facilitates the management of electronic identities. In other words, the type of software that manages on-line user I.D.'s and passwords, in this case for an "enterprise" (i.e., used at a business by their employers and/or customers).

He will be responsible for analyzing [REDACTED] Security Systems and designing [REDACTED] Security Applications, pursuant to guidelines set by [the Petitioner]. Specifically, guidelines set by...the managing director at [the Petitioner] and acting supervisor for [the Beneficiary]. In other words, [the Beneficiary] will develop software products for [the Petitioner]. Initially, the products will be [the Petitioner's] software products...and [the Petitioner] anticipates developing additional software products over the next several years.

[The Beneficiary] will develop and direct software system testing and validation procedures, programming and documentation. Specifically, his job duties will include:

- Complete the testing process and ensure that successful implementation and user of the [REDACTED].
- Programming (Advanced Java, J2EE, Hibernate) in an individual capacity. He will continue to be involved in systems integration, troubleshooting,

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network installation, [REDACTED] security and provisioning services design, development and implementation.

- Maintaining thorough and accurate documentation on all security application systems and adhere to established programming and documentation standards.

[The Beneficiary] will confer with his supervisor to obtain information on project limitations and capabilities, performance requirements and interfaces, which will allow him to collect the information he needs to design the software. He will analyze [the Petitioner's] needs (as defined by his supervisor) to determine the feasibility of the design within time and cost constraints. He will formulate plans outlining steps required to develop programs, using structured analysis and design, and submit plans to management for approval and implementation. He will prepare Design document with Class and sequence diagrams to illustrate the design, steps and flow to describe the logical operation involved. He will prepare Manuals and undertake necessary write-ups to describe installation and operating procedures.

[The Beneficiary] will also modify existing software to correct errors and/or improve performance. He will debug and troubleshoot existing systems to evaluate effectiveness and develop new systems to improve efficiency and workflows.

He will also provide training and support in installation and utilization of operation control for [REDACTED] product suites, and also offer solutions for various software problems and compatibility of various systems.

He will research and evaluate user request for new or modified programs (upgrades) in varied areas and will be responsible for meeting client business requirements and make recommendations for modifications. Furthermore, [the Beneficiary] will keep himself updated with the latest developments in the field of Information Security, specifically [REDACTED] by reading technical manuals, attending [REDACTED] conferences.

He will be responsible for update existing software product suite and updating management on new releases and changes.

The Position is professional in nature and requires detailed knowledge of [REDACTED] domain. More specifically, [the Beneficiary] will be working with Oracle Identity and Access Management Product suite that includes:

- Oracle Identity Manager
- Oracle Access Manager
- Oracle Entitlement Server
- Oracle Database Server

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To be clear, [the Beneficiary] will utilize the Oracle technologies as tools in order to develop [the Petitioner's] software products... [The Beneficiary]'s duties related to Oracle technologies will be:

- Design, implement, configure, troubleshoot and tune Oracle [REDACTED] products like OIM, OID, OAM
- Work closely with Application Integration Architect, Fusion Middleware Admin and Client Security teams to architect Oracle [REDACTED] suite of products for scalability and maintainability.
- Troubleshoot issues as when they arise.
- Administer the Oracle [REDACTED] Suite.
- Validates that the Security solutions and Security architecture designs utilize the security components, appropriately to meet Enterprise needs.
- Integrate [the Petitioner's] ... product with clients Oracle [REDACTED] implementation for high availability and health analysis.
- Design and Extend the framework for Oracle and IBM Application servers for monitoring, availability and health analysis
- Extend [the Petitioner's] Integral product for more generic and extensible model to represent a System and Service events
 - Root Cause Analysis & Orchestration
 - Orchestration Functionality to be designed and implemented
 - User Interaction enhancements

When [the Beneficiary] has completed a software product to the point where [the Petitioner] determines that the product may be sold, [the Beneficiary] will implement the installation of the software (if/when it is sold) to the client.

Schedule of Work that may be completed on the premises of [the Petitioner]'s client:

[The Beneficiary] may be on the premises of a client on the following limited schedule (as will be determined by his supervisor...at [the Petitioner]):

Three (3) days: to meet with client to gather business requirements and to discuss their expectations for the software

Two days (2): to meet with client to discuss the project at the mid-point to ensure that the software will meet the client's expectations

Twenty (20) business days: once the software is completed, [the Beneficiary] may spend up to 20 business days working on the premises of the client to coordinate software installation, train the client on the use of the software, and ensure that client expectations are met

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Five (5) days: at his supervisor's discretion, [the Beneficiary] may need to spend up to five days on the site of the client in order to make any necessary corrections or changes to the software if the client requests it.

It is anticipated that [the Beneficiary] may spend time, as outlined above, on the premises of [the Petitioner's] client [redacted] over the course of the next year, although sales negotiations related to the software are not finalized.

Aside from the time outlined above, [the Beneficiary] will work at [the Petitioner] and will not be sent to work at the site of any clients.

[The Petitioner] does anticipate product development for three years or more with feature upgrades and integration. After the first year, the schedule above may be repeated in the second and third years, depending on the sales generated.

(Emphasis in original).

C. Analysis

The Petitioner claims that it will have an employer-employee relationship with the Beneficiary. We have considered this assertion within the context of the record of proceeding. We examined each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence. *Matter of Chawathe*, 25 I&N Dec. at 375-376. However, as will be discussed, there is insufficient probative evidence in the record to support this assertion. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Applying the *Darden* and *Clackamas* tests to this matter, we find that the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee."

As will be discussed, we observe there are numerous inconsistencies and discrepancies in the petition and supporting documents, which undermine the Petitioner's credibility with regard to several aspects of the Beneficiary's claimed employment. It is incumbent upon the Petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the Petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

1. The Beneficiary's Work Location

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We find that the Petitioner has provided inconsistent information regarding the Beneficiary's work location. For instance, in the Form I-129 (page 4), the Petitioner indicated that the Beneficiary will work at its office in [REDACTED] CA. On the same page, the Petitioner provided the following information:

Will the beneficiary work off-site? No Yes

However, the Petitioner stated in Part 9 of Form I-129 that the Beneficiary will visit the offices of its client, [REDACTED] in [REDACTED] CA. The petitioner explained that:

We have determined that the visits described above to the client's location in [REDACTED] will occur for only short periods. [The Beneficiary] will not spend more than 30 days, over the course of a year, at the client site. The bulk of his duties will involve designing identity and access management systems, software products and applications, and will occur in our main office...in [REDACTED] California. This we do not consider his employment to occur "offsite" and have answered Part 5, Question 5 as "no."

Despite this statement, on the LCA, the Petitioner provided its address in [REDACTED] CA, and its client, [REDACTED] address in [REDACTED] CA, as the place of employment for the Beneficiary.

Furthermore, on appeal, the Petitioner indicated that it moved to a new address in [REDACTED] CA. On appeal, the Petitioner submitted copies of the evidence previously submitted in support of the petition and the RFE, including the photographs of its office space in [REDACTED] CA. However, it appears that documentation regarding the Petitioner's prior office space in [REDACTED] CA is no longer probative as the Petitioner has now moved to [REDACTED] CA. Therefore, the Petitioner has not submitted sufficient evidence that it has enough work space for the Beneficiary to perform his duties at its location.

2. The Beneficiary's Work Assignment

The Petitioner also provided inconsistent information regarding its in-house project and its relationship with clients. In response to the RFE, the Petitioner indicated that it "anticipate[s] product development for three years or more with feature upgrades and integration." However, in the same document, the Petitioner indicated that it "anticipates that [the Beneficiary] may spend time, as outlined above, on the premises of [its] client [REDACTED] over the course of the next year, although sales negotiation related to the software are not finalized." As mentioned, the Petitioner had claimed that the beneficiary "will visit [REDACTED] office in [REDACTED] to oversee the implementation of the management system that he designs, and provide some client training and product support."

However, on appeal, the Petitioner claims that it is "still in the development stages with the software" and "do not, and could not, have contracts, work orders, or service agreements from end-clients." The Petitioner does not explain how it anticipates the Beneficiary to spend time at [REDACTED]

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when the product is still in development stage, and the product development period is expected to be for three years or more. Further, the record does not contain a written agreement between the Petitioner and [REDACTED] or any other organization, establishing that H-1B caliber work exists for the Beneficiary for the duration of the requested period. Moreover, while the Petitioner claims that it will develop its own software, the Petitioner has not sufficiently conveyed the particular scope of the project, any persuasive indications of actual milestones that would be involved, indications that project staging and planning had taken place to any serious extent, or assignments of labor and responsibility. 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.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92.

3. Employment Agreement

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). Despite being given an opportunity to provide such documentation in response to the Director's RFE, the Petitioner did not provide a written agreement or a summary of the terms of an oral agreement with the Beneficiary, even though its employee handbook states that all employees are provided with an employment contract in writing.

On appeal, the Petitioner claims that there is no existing employment agreement with the Beneficiary nor an offer letter since it cannot issue these without first obtaining an H-1B approval. However, the Petitioner does not sufficiently explain why it cannot provide a conditional offer or a summary of the terms of the oral agreement under which the Beneficiary will be employed.

4. Instrumentalities and Tools

As previously noted, when making a determination of whether the Petitioner has established that it has or will, have an employer-employee relationship with the Beneficiary, we look at a number of factors, including who will provide the instrumentalities and tools required to perform the duties of the proffered position. The Director specifically noted this factor in the RFE. In response to the RFE, the Petitioner noted that the Beneficiary "will utilize the Oracle technologies in order to develop [the Petitioner]'s software products. However, the Petitioner did not provide further information on this matter, and did not fully address or submit probative evidence on this issue.

5. Conclusion

The Petitioner asserts that it is developing its own product and that its work will be performed in-house. However, without evidence of the Petitioner's current premises being a suitable place for the

Beneficiary to work, an employment contract (or oral summary of one) between the Petitioner and the Beneficiary as required both in the regulation and in the Petitioner's employee handbook; a work product or on-going project; and any client contracts of any type, the Petitioner has not established that the petition was filed for non-speculative work for the Beneficiary that existed *as of the time of the petition's filing*.⁴ 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. 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. at 248. Moreover, the burden of proving eligibility for the benefit sought remains entirely with the Petitioner. Section 291 of the Act. The Petitioner did not establish 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.

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). Merely claiming that the Petitioner exercises 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. 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).

⁴ The agency made clear long ago that speculative employment is not permitted in the H-1B program. For example, a 1998 proposed rule documented this position as follows:

Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. See section 214(i) of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998). While a petitioner is certainly permitted to change its intent with regard to non-speculative employment, e.g., a change in duties or job location, it must nonetheless document such a material change in intent through an amended or new petition in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E).

Moreover, there is a lack of probative evidence to support the Petitioner's assertions. It cannot be concluded, therefore, that the Petitioner has satisfied its burden and established that it qualifies as a United States employer with standing to file the instant petition in this matter. *See* section 214(c)(1) of the Act (requiring an "Importing Employer"); 8 C.F.R. § 214.2(h)(2)(i)(A) (stating that the "United States employer . . . must file" the petition); 56 Fed. Reg. 61111, 61112 (Dec. 2, 1991) (explaining that only "United States employers can file an H-1B petition" and adding the definition of that term at 8 C.F.R. § 214.2(h)(4)(ii) as clarification). Accordingly, the petition must be denied on this basis.

II. SPECIALTY OCCUPATION

We will now address the Director's finding that the Petitioner did not establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions.

A. Legal Framework

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one 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 term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires [(1)] 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 requires [(2)] 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, the 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), 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 rely simply upon a proffered position's title. The specific duties of the 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 beneficiary, and determine whether the position qualifies as a specialty occupation. *See generally* *Defensor v. Meissner*, 201 F. 3d at 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. Analysis

We find that the record of proceeding lacks documentation regarding the Petitioner's business activities and the actual work that the Beneficiary will perform to sufficiently substantiate the claim that the Petitioner has H-1B caliber work for the Beneficiary for the period of employment requested in the petition. In other words, the record does not include sufficient work product or other documentary evidence to confirm that the Petitioner has ongoing in-house projects to which the Beneficiary will be assigned. As discussed, the documentation submitted on appeal indicates that the Petitioner's office location changed, making obsolete the evidence previously submitted to establish that the Petitioner has sufficient space for the Beneficiary to perform the proposed duties. Further, without an employee agreement or a summary of oral agreement under which the Beneficiary would be employed, the Petitioner has not submitted corroborating evidence to support its claim that the Beneficiary has been offered a position in a specialty occupation.

Further, there are inconsistencies in the record that undermine the Petitioner's credibility regarding several aspects of the proffered position. For example, the Petitioner stated that, "[t]his position is one for which [the Petitioner] consistently applies, at a minimum, the following educational requirement: a bachelor's degree in Computer Science, Engineering, Information Systems or related field. Significant experience in the field is also required." However, despite the Petitioner's statement that a bachelor's degree plus significant experience is required for the position, the LCA submitted in support of the petition was for a "Software Developer, Systems Software" at a Level I (entry) wage.⁵ The Level I wage rate indicates that the Beneficiary is only required to have a basic

⁵ The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is described as follows:

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

understanding of the occupation and carries expectations that the Beneficiary will perform routine tasks that require limited, if any, exercise of judgement; that he would be closely supervised; that his work would be closely monitored and reviewed for accuracy; and that he would receive specific instructions on required tasks and expected results. This contradicts the Petitioner's claim that the proffered position requires significant experience in addition to a bachelor's degree.

Further, some of the duties as described by the Petitioner also appear inconsistent with the wage level selected for the proffered position. While the Petitioner designated the proffered position on the LCA as a Level I (entry) position, the Petitioner indicates that the Beneficiary will "design, develop, install, integrate, test and monitor performance of identity and access management systems, software products and applications." The Petitioner further stated that the Beneficiary will visit client site to "oversee the implementation of the management system that he designs; and provide some client training and product support."⁶ The Petitioner's designation of the proffered position as a Level I, entry-level position appears to contradict the level of knowledge, judgement, and supervision required for the position.

The Petitioner has provided inconsistent information regarding the substantive nature of the work to be performed by the Beneficiary, which 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 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's 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.

We therefore affirm the Director's finding that the Petitioner has not established that the proposed position qualifies for classification as a specialty occupation.

⁶ The issue here is that the Petitioner's designation of this position as a Level I, entry-level position contradicts its description of the duties that appear more complex, specialized, or unique compared to other positions *within the same occupation*. Nevertheless, it is important to note that a Level I wage-designation does not preclude a proffered position from classification as a specialty occupation. In certain occupations (doctors or lawyers, for example), an entry-level position would still require a minimum of a bachelor's degree in a specific specialty, or its equivalent, for entry. Similarly, however, a Level IV wage-designation would not reflect that an occupation qualifies as a specialty occupation if that higher-level position does not have an entry requirement of at least a bachelor's degree in a specific specialty or its equivalent. That is, a position's wage level designation may be a consideration but is not a substitute for a determination of whether a proffered position meets the requirements of section 214(i)(1) of the Act.

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III. CONCLUSION AND ORDER

In visa petition proceedings, it is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of C- LLC*, ID# 13810 (AAO Oct. 8, 2015)