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U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF B-S-S-, INC.

DATE: SEPT. 2, 2015

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a business development and informational services, seeks to employ the Beneficiary as a quality analyst and to classify her as a nonimmigrant worker in a specialty occupation. *See* Immigration and Nationality Act (the Act) § 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.

The Director reviewed the information and determined that the Petitioner had not established eligibility for the benefit sought. The Director denied the petition, finding that the Petitioner does not establish that it will be a "United States employer" having an employer-employee relationship with the Beneficiary as an H-1B temporary employee. Thereafter, the Petitioner filed a motion to reopen, which was dismissed. The matter is now before us on appeal.

The record of proceeding contains: (1) the Petitioner's Form I-129 and supporting documentation; (2) the Director's request for evidence (RFE); (3) the Petitioner's response to the RFE; (4) the Director's decision dated August 6, 2014; (5) the Notice of Appeal or Motion (Form I-290B) (6) the Director's decision dated October 15, 2014; and (7) the Form I-290B and supporting documentation. We reviewed the record in its entirety before issuing our decision.[1]

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

I. THE PROFFERED POSITION

On the Form I-129, the Petitioner indicated that it is seeking the Beneficiary's services as a quality analyst on a full-time basis. In addition, the Petitioner stated that the Beneficiary would work at

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

California In the letter of support, the Petitioner provided the following duties for the proffered position:

- Analyze the reference documents and create the test plan.
- Decide on the tools used for testing purposes.
- Create the test plan.
- Create the list of devices and browsers to be used for testing.
- Create test cases.
- Coordinate testing activities with other teams including off shore teams.
- Perform functional, performance, regression, responsive design testing.
- Create test summary reports.

The Petitioner also stated that the proffered position requires "at least a Bachelor's Degree in Computer Science field or a related quantitative technical or business discipline."[3]

In response to the RFE, the Petitioner provided a letter from the claimed end-client, dated July 16, 2014. In the letter, the end-client provided the Beneficiary's tasks in the proffered position, along with the approximate percentage of time and hours the Beneficiary will spend on these duties, as follows:[4]

Tasks	Products to be Developed or Service to be provided	Tools to Perform the Job	% of Time Spent per Week
1. Planning activities a. Writing test plan b. Writing test cases c. Defining process for defect handling	Test plan Defect lifecycle Defect handling process	Jira MS Office	15% (6 hours)
2. Testing activities	Global website	Ghostlab	60%

[2] The Petitioner has provided inconsistent information regarding the Beneficiary's work site. Specifically, in the Form I-129, the Petitioner stated that the Beneficiary would work at in California However, in the Labor Condition Application (LCA), the Petitioner indicated that the Beneficiary's places of employment would be in California ' and in California In its support letter, the Petitioner also stated that the Beneficiary would be working at the end-client's "site located in California." No explanation for this inconsistency was provided. 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). In addition, this discrepancy calls into question the validity of the LCA.

[3] The Petitioner does not indicate that the minimum academic requirement for the proffered position is a bachelor's degree in a specific specialty, or its equivalent, that directly relates to the duties and requirements of the position.

[4] Notably, the duties do not correspond to the tasks provided by the Petitioner for the proffered position in the letter of support.

a. Sanity testing b. Functional testing c. Regression testing d. Cross browser testing e. Generate test reports		Browserstack Page speed test Jira	(24 hours)
3. Defect handling a. Bug triage b. Follow up on defect fixes with other teams c. Validate the bug fixes	Global website	Jira Mingle	25% (10 hours)
Total			100% (40 hours)

On appeal, the Petitioner provided a similar letter from the end-client; however, in the letter, the end-client provided a revised job description and stated that the position requires "a Bachelor's in Computer Engineering, Computer Science or a closely related field."

II. LACK OF STANDING TO FILE THE PETITION

We will now 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 an 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) (hereinafter "*Darden*") (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). The Supreme Court stated:

> "In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party

> has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party."

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

In this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. *See generally* 136 Cong. Rec. S17106 (daily ed. Oct. 26, 1990); 136 Cong. Rec. H12358 (daily ed. Oct. 27, 1990). On the contrary, in the context of the H-1B visa classification, the regulations define the term "United States employer" to be even more restrictive than the common law agency definition.[5]

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

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[5] 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).

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.[6]

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).[7] 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

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[6] 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)).

[7] 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).

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).

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 a preliminary matter, we find that there are inconsistencies in the record of proceeding with regard to the job title of the proffered position. For instance, in the Form I-129 and LCA, the Petitioner refers to the proffered position as "Quality Analyst." However, in the offer letter, the Petitioner refers to the proffered position as "Business Systems Analyst." Further, the itinerary, submitted in response to the RFE, indicates the Beneficiary's job title as "Senior Quality Analyst." Also, as we noted earlier, the Petitioner has provided conflicting information with regard to the location at which the Beneficiary would work. No explanation for the variances was provided by the petitioner. Again, 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.

A. Duration of the Relationship between the Parties

Upon review of the record, we find that the Petitioner has not established the duration of the relationship between the parties. The record does not contain a written agreement between the petitioner and the end-client, or any other organization, establishing that H-1B caliber work exists for the Beneficiary for the duration of the requested period.

The Petitioner submitted a Consulting Services Agreement executed between itself and on June 24, 2013, which states the following:

> Contractor [the petitioner] agrees to provide programming, systems analysis, engineering, technical writing and other specialized services as an independent contractor directly to the third party user/client of the Company ('Client'), which Client has requested the Company to locate specialized professional contractors who possess particular skills, abilities, and experience required by the Client in connection with the Client's project(s).

In addition, the document states that "the Company and Contractor will execute a Work Order on the form attached as Exhibit A to this Agreement." The Petitioner provided an "Exhibit A – Work Order," dated March 20, 2014. Notably, the work order is not endorsed by the Petitioner. The work order states the following:

> The parties agree as follows:
> 1) Client Assignment – Quality Assurance
> Name of Client:
> Name of Contractor: [the beneficiary]
> Description of Services: Quality Assurance
> Start Date: 6/26/2013
> Anticipated End Date: was 3/30/14 now extended to 9/30/2014

Neither the end-client nor the position of quality analyst is listed on the document. Importantly, the document indicates that the project will end prior to the requested H-1B start date.

In addition, the Petitioner provided two letters from of In the letter dated July 8, 2014, states that the Beneficiary "has been working for our client, on a project for at CA California." Further, he states that the project is "expected to run through September 2015" and that it "should be extended for 2 years beyond September 30, 2014." Thus, it appears that the project may be completed in September 30, 2016, which is approximately one year prior to the requested H-1B end date of September 30, 2017.

The Petitioner also submitted two letters from of states that the Beneficiary "will perform the services for on a contractor basis." Upon review, we find that does not provide any specific information establishing the Beneficiary's place of employment. Further, in the March 24, 2014 letter, refers to the Beneficiary's role as "Quality Analyst"; however, in the August 29, 2014 letter, she refers to the position as "Senior Associate QA L1."[8] No explanation for the variance was provided by the Petitioner or by Notably, in the August 29, 2014 letter, states that

[8] Although identified the position as "*Senior* Associate QA L1," we note that the Petitioner submitted an LCA certified for a Level I, entry-level, position.

"[w]e anticipate that [the Beneficiary] will be engaged by [redacted] until at least September 30, 2014," which again indicates that the Beneficiary's services will end prior to the requested H-1B start date. In addition, in the August 29, 2014 letter, she states that the Beneficiary's services will be engaged by [redacted] until at least December 31, 2014, which is only two months after the requested H-1B start date. Thus, the letters do not establish that the Beneficiary will work in [redacted] California until at least September 30, 2017.

The Petitioner submitted four letters from the end-client. In the three of them, the end-client does not describe the proffered position of quality analyst but rather a "Senior Quality Analyst."[9] No explanation for the variance was provided by the Petitioner or by the end-client. The letters state that the Beneficiary's services will be required until at least September 2014 and/or December 2014. Thus, the end-client's letters also state that the Beneficiary's services will end either prior to the requested H-1B start date or approximately two months after the requested H-1B start date.

In addition, the Petitioner provided copy of a Master Contractor Staffing Agreement, dated March 12, 2010, and an Amendment and Extension to the Master Contractor Staffing Agreement, dated April 1, 2014, executed between [redacted] and [redacted] Upon review, we find that neither the Beneficiary nor the proffered position is listed in the agreements. Therefore, the agreements do not provide any specific information establishing the Beneficiary's place of employment nor the duration of the Beneficiary's work on the [redacted] project.

The Petitioner also submitted a document entitled "Contractor Extension" between [redacted] and [redacted] executed on September 30, 2014. The document states the following:

> Personnel Provided:
>
> Name [the beneficiary]
>
> Extension Agreement:
>
> Consultant [redacted] and [redacted] are parties to a Master Contractor Staffing Agreement (the 'Agreement') dated 1st April, 2010, and a Schedule A to the Agreement for the period dated 26th June, 2013 to 15th November, 2013 (the 'Schedule A') and extensions to the agreement through 16th November, 2013 to 31st March 2014; 1st April, 2104 [*sic*] through 30th September, 2014. The parties agree that Consultant's Services under the Schedule are extended from 1st October, 2014 to 31st December, 2014.

Neither the end-client nor the position of quality analyst is listed on the document. In addition, the document states that the Beneficiary's services will end on December 31, 2014, which is only two months after the requested H-1B start date.

[9] Again, the Petitioner submitted a certified LCA for a Level I, entry-level, position. The addition of the "Senior" descriptor to the title of the proffered position subsequent to the LCA's certification raises questions as to whether the LCA corresponds to the petition.

The Petitioner does not submit probative evidence establishing any additional projects or specific work for the Beneficiary. Although the Petitioner requested the Beneficiary be granted H-1B classification from October 1, 2014, to September 30, 2017, there is a lack of substantive documentation regarding any work for the duration of the requested period. Rather than establish definitive, non-speculative employment for the Beneficiary for the entire period requested, the Petitioner claims in the itinerary that the Beneficiary would be working on the project through September 30, 2017. However, the Petitioner did not submit probative evidence in support of its claim. Moreover, the Petitioner's statement is not corroborated by documentation indicating that an ongoing project exists that will generate employment for the Beneficiary's services (e.g., documentary evidence regarding the project scope, staging, time and resource requirements; supporting contract negotiations; documentation regarding the business analysis and planning for specific work; statement of work; work order). On motion, the Petitioner submitted articles regarding project; however, according to the articles, the project has been completed. Thus, the record does not contain evidence that the Beneficiary would be employed by the Petitioner in the capacity specified in the petition.

B. Pay Statements

In support of the H-1B petition, the Petitioner submitted pay statements that it issued to the Beneficiary. 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 such items such as wages, social security contributions, federal and state income tax withholdings, and other benefits are relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., where will the work be located, who will provide the instrumentalities and tools, who will oversee and direct the work of the beneficiary, 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.

C. Offer Letter and 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). With the initial petition, the Petitioner provided an unsigned offer of employment letter and an employment agreement for the Beneficiary, which was not dated. We note that the documents fail to adequately establish several critical aspects of the Beneficiary's employment. For example, the offer of employment letter and employment agreement do not provide specific information regarding where she will work. Notably, the employment agreement states that "[t]he employee agrees to be assigned in any facility/client sites as Company deems it necessary" and the "[e]mployee is required to travel or relocate to various client sites throughout the United States for both short and long term projects."

According to the agreement, the Beneficiary may be placed at various locations and not necessarily in California as indicated on the H-1B petition.[10]

The employment agreement also states that the Petitioner offers employee benefits. The Petitioner submitted a copy of its Policy and Procedural Handbook to USCIS.[11] Upon review of the handbook, we note that the vacation benefits are only available to full-time regular employees. The Petitioner did not, however, define the term "regular employees" or clarify whether the Beneficiary would be designated as a regular or temporary employee. Accordingly, a substantive determination cannot be made or inferred regarding these "benefits," as further information regarding them, including eligibility requirements, was not provided to USCIS.

Moreover, the offer of employment letter and employment agreement do not provide any level of specificity as to the Beneficiary's duties and the requirements for the position. While an offer of employment letter and employment agreement may provide some insight into the relationship of a petitioner and a beneficiary, it must be noted again that 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.

D. 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 specialty occupation. In the instant case, the Director specifically noted this factor in the RFE. Moreover, the Director provided examples of evidence for the Petitioner to submit to establish eligibility for the benefit sought, which included documentation regarding the source of the instrumentalities and tools needed to perform the job. On motion, the Petitioner states that "[d]ue to the nature of IT consulting, the tools and instrumentalities are provided by the end-client due to network and data security issues." Thus, the end-client will be providing the instrumentalities and tools for the beneficiary.

E. Supervisor

Further, a key element in this matter is who would have the ability to hire, fire, supervise, or otherwise control the work of the beneficiary for the duration of the H-1B petition. Notably, the Petitioner has provided inconsistent information regarding the Beneficiary's supervisor. With the initial petition, the Petitioner submitted a letter from Project Manager for the Petitioner. In the letter, states that he has "ultimate control and authority over [the beneficiary's] day-to-day activities." However, in response to the RFE, the Petitioner submitted a letter from Business Development Analyst for the Petitioner, which states that he will

[10] As previously noted, the petitioner has provided inconsistent information regarding the beneficiary's work site.

[11] The Policy and Procedures Handbook's table of contents page numbers do not align with those in the document. For instance, the table of contents indicates that the "Benefits" section is located on page 16; however, that section is located on page 18. Thus, we must question the accuracy and completeness of the documentation submitted to USCIS with regard to the handbook.

be the one to supervise the Beneficiary's day-to-day activities. also states that he "will work with [the Beneficiary] as Project Manager." In addition, the Petitioner submitted an itinerary and a Performance Evaluation, which identify as the Beneficiary's manager. The Petitioner did not provide an explanation for the variation in job titles. The Petitioner also submitted an organizational chart, which shows the Beneficiary reporting to the project manager. However, the project manager is not identified on the organizational chart. No explanation for the discrepancies regarding the Beneficiary's supervisor was provided.

In the RFE, the Director specifically requested that the Petitioner provide documentation to clarify its employer-employee relationship with the Beneficiary. The Director provided a list of the types of evidence to be submitted, which included a request that the Petitioner provide such documentation as a brief description of who will supervise the Beneficiary, along with the person's duties and/or other similarly probative documents. However, the Petitioner did not clarify basic aspects of the supervisor's role (e.g., the supervisor's job title, a brief description of the supervisor's job duties, or specific work location).

In addition, the Petitioner states on motion that it supervises the Beneficiary through weekly reports, which are provided to her project manager. Although the Petitioner claims that the Beneficiary has been an employee of the Petitioner and working on the project since June 2013, it did not provide any weekly reports for the Beneficiary. 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.

F. Performance Evaluation

Upon review of the Performance Evaluation for the Beneficiary, we note that although it states "Review Period: 10/1/2013," it was not signed by the Beneficiary until July 15, 2014, after the Director issued the RFE. No explanation for this discrepancy was provided by the Petitioner. Further, the record does not contain any information from the Petitioner regarding the purpose of the performance report; the methods used for accessing and evaluating the Beneficiary's performance; how work and performance standards are established; and the criteria for determining bonuses and salary adjustments. Although the Petitioner provided a Policy and Procedure Handbook, it lacks information regarding how the Petitioner determines and rates an employee on these criteria, as well as whether the Petitioner measures the details of how the work is performed or the end result.

G. Conclusion

While the Petitioner may be able to eventually locate some work for the Beneficiary, it does not establish that the petition was filed for non-speculative work for the Beneficiary that existed *as of the time of the petition's filing.*[12] There is insufficient documentary evidence in the record corroborating

[12] 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:

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 her 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. 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.

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, 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 cannot be approved, and the appeal must be dismissed.

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

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

III. BEYOND THE DECISION OF THE DIRECTOR

Since the identified basis for denial is dispositive of the Petitioner's appeal, we need not address another ground of ineligibility we observe in the record of proceeding. Nevertheless, we will briefly note and summarize it here with the hope and intention that, if the Petitioner seeks again to employ the Beneficiary or another individual as an H-1B employee in the proffered position, it will submit sufficient independent objective evidence to address and overcome this additional ground in any future filing.

Beyond the decision of the Director, we find that the Petitioner did not comply with the itinerary requirement at 8 C.F.R. § 214.2(h)(2)(i)(B).

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) states, in pertinent part:

> *Service or training in more than one location.* A petition that requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with USCIS as provided in the form instructions. The address that the petitioner specifies as its location on the Form I-129 shall be where the petitioner is located for purposes of this paragraph.

The itinerary language at 8 C.F.R. § 214.2(h)(2)(i)(B), with its use of the mandatory "must" and its inclusion in the subsection "Filing of petitions," establishes that the itinerary as there defined is a material and necessary document for an H-1B petition involving employment at multiple locations, and that such a petition may not be approved for any employment period for which there is not submitted at least the employment dates and locations. Here, there is a lack of documentary evidence sufficient to corroborate the claim that the Beneficiary would be serving as a quality analyst at facility for the period sought in the petition. Although the Petitioner requested the Beneficiary be granted H-1B classification until September 30, 2017, the Petitioner did not substantiate the proposed employment at Sony for the duration of the period requested. Thus, it appears that the Beneficiary will work at multiple locations at some point during the requested period of employment.[13] Although the Petitioner provided an itinerary with the Form I-129 petition, the itinerary did not include the dates of the Beneficiary's services at the multiple locations. Thus, the petition must also be denied on this additional basis.

IV. CONCLUSION AND ORDER

We may deny an application or petition that does not comply with the technical requirements of the law even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal.

[13] Again, we note that the "Employer-Employee Agreement" specifically states that "[e]mployee is required to travel or relocate to various client sites throughout the United States for both short and long term projects."

2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.[14]

ORDER: The appeal is dismissed.

Cite as *Matter of B-S-S-, INC.*, ID# 12592 (AAO Sept. 2, 2015)

[14] As the identified grounds for denial are dispositive of the Petitioner's continued eligibility, we need not address any additional issues in the record of proceeding.