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

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

MATTER OF S-S-

DATE: APR. 6, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a software and computer consulting company,<sup>1</sup> seeks to temporarily employ the Beneficiary as a programmer analyst under the H-1B nonimmigrant classification for specialty occupations. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The H-1B program allows a U.S. employer to temporarily employ a qualified foreign worker in a position that requires both (a) the theoretical and practical application of a body of highly specialized knowledge and (b) the attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum prerequisite for entry into the position.

The Director, California Service Center, denied the petition. Subsequently, the Petitioner filed a combined motion to reopen and reconsider. The Director considered the motion, but affirmed its decision to deny the petition. The Director concluded that the evidence of record does not establish: (1) that the Petitioner would engage the Beneficiary in an employer-employee relationship; and (2) that the proffered position is a specialty occupation.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the Director erred in her findings.<sup>2</sup>

Upon *de novo* review, we will dismiss the appeal.

I. EMPLOYER-EMPLOYEE RELATIONSHIP

We will first address whether the evidence of record establishes that the Petitioner will be a "United States employer" having "an employer-employee relationship with respect to employees under this

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<sup>1</sup> The Petitioner is registered in New Jersey under the name [REDACTED] claims to be conducting business as [REDACTED] and filed the petition under this name. However, according to the website of the New Jersey Division of Revenue, [REDACTED] corporate status has been revoked. *See* [REDACTED] (last visited Apr. 5, 2016).

<sup>2</sup> On appeal, the Petitioner raises issues relating to [REDACTED] an H-1B petition it filed on behalf of the Beneficiary on August 3, 2011. The Director revoked the approval of this petition on March 2, 2015, and it is not the subject of the instant appeal. We therefore will not address any of the issues raised by the Petitioner relating to [REDACTED]

part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee.” 8 C.F.R. § 214.2(h)(4)(ii).

A. Legal Framework

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

[S]ubject to section 212(j)(2), who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 214(i)(1) . . . , who meets the requirements for the occupation specified in section 214(i)(2) . . . , and with respect to whom the Secretary of Labor determines and certifies to the [Secretary of Homeland Security] that the intending employer has filed with the Secretary [of Labor] an application under section 212(n)(1) . . . .

The term “United States employer” is defined in the Code of Federal Regulations at 8 C.F.R. § 214.2(h)(4)(ii) as follows:

*United States employer* means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) *Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and*
- (3) Has an Internal Revenue Service Tax identification number.

(Emphasis added); *see* Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act 56 Fed. Reg. 61,111, 61,121 (Dec. 2, 1991) (to be codified at 8 C.F.R. pt. 214).

The record is not persuasive in establishing that the Petitioner will have an employer-employee relationship with the beneficiary.

Although “United States employer” is defined in the regulations at 8 C.F.R. § 214.2(h)(4)(ii), it is noted that the terms “employee” and “employer-employee relationship” are not defined for purposes of the H-1B visa classification. Section 101(a)(15)(H)(i)(b) of the Act indicates that a foreign national coming to the United States to perform services in a specialty occupation will have an “intending employer” who will file a Labor Condition Application with the Secretary of Labor pursuant to section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1) (2012). The intending employer is described as offering full-time or part-time “employment” to the H-1B “employee.” Subsections 212(n)(1)(A)(i) and 212(n)(2)(C)(vii) of the Act, 8 U.S.C. § 1182(n)(1)(A)(i), (2)(C)(vii) (2012). Further, the regulations indicate that “United States employers” must file a Form I-129, Petition for a Nonimmigrant Worker, in order to classify

foreign nationals as H-1B temporary “employees.” 8 C.F.R. §§ 214.2(h)(1), (2)(i)(A). Finally, the definition of “United States employer” indicates in its second prong that the petitioner must have an “employer-employee relationship” with the “employees under this part,” i.e., the H-1B beneficiary, and that this relationship be evidenced by the employer’s ability to “hire, pay, fire, supervise, or otherwise control the work of any such employee.” 8 C.F.R. § 214.2(h)(4)(ii) (defining the term “United States employer”).

Neither the legacy 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.”

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

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

“United States employer” to be even more restrictive than the common law agency definition.<sup>3</sup>

Specifically, the regulatory definition of “United States employer” requires H-1B employers to have a tax identification number, to engage a person to work within the United States, and to have an “employer-employee relationship” with the H-1B “employee.” 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term “United States employer” not only requires H-1B employers and employees to have an “employer-employee relationship” as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms “employee” or “employer-employee relationship” combined with the agency’s otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond “the traditional common law definition” or, more importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. *Cf. Darden*, 503 U.S. at 318-319.<sup>4</sup>

Accordingly, in the absence of an express congressional intent to impose broader definitions, both the “conventional master-servant relationship as understood by common-law agency doctrine” and the *Darden* construction test apply to the terms “employee” and “employer-employee relationship” as used in section 101(a)(15)(H)(i)(b) of the Act, section 212(n) of the Act, and 8 C.F.R. § 214.2(h).<sup>5</sup>

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

The factors indicating that a worker is or will be an “employee” of an “employer” are clearly delineated in both the *Darden* and *Clackamas* decisions. *Darden*, 503 U.S. at 323-24; *Clackamas*, 538 U.S. at 445; *see also Restatement (Second) of Agency* § 220(2) (1958). Such indicia of control include when,

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

<sup>4</sup> To the extent the regulations are ambiguous with regard to the terms “employee” or “employer-employee relationship,” the agency’s interpretation of these terms should be found to be controlling unless “plainly erroneous or inconsistent with the regulation.” *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, (1945)).

<sup>5</sup> That said, there are instances in the Act where Congress may have intended a broader application of the term “employer” than what is encompassed in the conventional master-servant relationship. *See, e.g.,* section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F) (referring to “unaffiliated employers” supervising and controlling L-1B intracompany transferees having specialized knowledge); section 274A of the Act, 8 U.S.C. § 1324a (referring to the employment of unauthorized individuals).

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where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. *See Clackamas*, 538 U.S. at 445; *see also* EEOC Compl. Man. at § 2-III(A)(1) (adopting a materially identical test and indicating that said test was based on the *Darden* decision); *Defensor v. Meissner*, 201 F.3d 384, 388 (5th Cir. 2000) (determining that hospitals, as the recipients of beneficiaries' services, are the "true employers" of H-1B nurses under 8 C.F.R. § 214.2(h), even though a medical contract service agency is the petitioner, because the hospitals ultimately hire, pay, fire, supervise, or otherwise control the work of the beneficiaries).

It is important to note, however, that the factors listed in *Darden* and *Clackamas* are not exhaustive and must be evaluated on a case-by-case basis. Other aspects of the relationship between the parties relevant to control may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met; however, the fact finder must weigh and compare a combination of the factors in analyzing the facts of each individual case. The determination must be based on all of the circumstances in the relationship between the parties, regardless of whether the parties refer to it as an employee or as an independent contractor relationship. *See Clackamas*, 538 U.S. at 448-49; EEOC Compl. Man. at § 2-III(A)(1).

Furthermore, when examining the factors relevant to determining control, USCIS must assess and weigh each actual factor itself as it exists or will exist and not the claimed employer's right to influence or change that factor, unless specifically provided for by the common-law test. *See Darden*, 503 U.S. at 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. Analysis

Applying the *Darden* and *Clackamas* tests to this matter, we find that the evidence of record does not establish that the Petitioner will be a "United States employer" having an "employer-employee relationship" with the Beneficiary as an H-1B temporary "employee." Specifically, we find that the record of proceeding does not contain sufficient, consistent, and credible documentation confirming and describing the circumstances of the Beneficiary's claimed assignment to the Petitioner's end-client. Therefore, the key element in this matter, which is who exercises control over the Beneficiary, has not been substantiated.

On the Form I-129, the Petitioner provided a single work location where the Beneficiary would provide his services: [REDACTED] Minnesota. This address corresponds to the work location of the claimed end-client, [REDACTED] at whose

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location the Petitioner claims the Beneficiary would work pursuant to an agreement executed between the Petitioner and [REDACTED] on July 18, 2014. The Petitioner submitted an LCA certified for this single Minnesota location. The Petitioner also submitted a letter dated August 13, 2014, signed by [REDACTED] Talent Acquisition Manager at [REDACTED] in which [REDACTED] listed the duties of the proffered position, and stated that the Beneficiary “has been assigned to work as [REDACTED] consultant at [their] location [REDACTED] NM [REDACTED] (Emphasis omitted.) Similarly, in a letter dated June 15, 2015, [REDACTED], the director of talent acquisition at [REDACTED] stated that the Beneficiary has been working at the company’s Minnesota location since July 28, 2014.

However, the evidentiary weight of these documents is undermined by the Petitioner’s statement on the Form I-129 that the Beneficiary would not work off-site.<sup>6</sup> Moreover, a purchase order dated July 18, 2014, indicates that the Beneficiary would provide services not only to [REDACTED] as described above, but also to another company identified as [REDACTED]. The evidence of record makes clear neither where this additional worksite would be located nor the period of time during which the Beneficiary would work there.<sup>7</sup> The Petitioner did not explain any of these deficiencies, and they undermine the probative of the Petitioner’s assertions, as well as the documents submitted in their support, that the Beneficiary would work solely for [REDACTED] at its Minnesota address. “[I]t is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence.” *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* at 591-92. “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.

Furthermore, as noted, the letters from the end-client indicate that the Beneficiary has been performing his services for the company, uninterrupted, since July 28, 2014. However, as noted by the Director, the approval of the H-1B petition upon which the Beneficiary’s work there was based was revoked on March 2, 2015, more than three months before the final letter was written. The evidentiary value of these letters, therefore, are unclear, as it appears that either: (1) the Beneficiary was not working as claimed in the letters; or (2) the Beneficiary was working as claimed, but without H-1B authorization.

Moreover, we note that the record does not contain copies of any agreements executed between [REDACTED] or between the Petitioner and [REDACTED]. The Petitioner submits a letter, dated September 18, 2014, from [REDACTED] a manager at [REDACTED], stating that a signed agreement between [REDACTED] and its client cannot be provided due to confidentiality and non-disclosure information. [REDACTED] references a letter provided by [REDACTED] to substantiate the

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<sup>6</sup> On appeal, Counsel states that this was an error. However, the record does not contain a statement from the Petitioner stating as such. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the Petitioner’s burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)).

<sup>7</sup> The lack of information regarding [REDACTED] location also calls into question the validity of the labor condition application submitted in support of this petition.

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Beneficiary's work at the end-client, [REDACTED]. However, both the Freedom of Information Act and the Trade Secrets Act provide for the protection of a petitioner's confidential business information when it is submitted to USCIS. *See* 5 U.S.C. § 552(b)(4), 18 U.S.C. § 1905. Additionally, the Petitioner may request pre-disclosure notification pursuant to Executive Order No. 12,600, "Predisclosure Notification Procedures for Confidential Commercial Information." Exec. Order No. 12,600, 1987 WL 181359 (June 23, 1987). Therefore, we find the explanation provided by [REDACTED] regarding its inability to provide the requisite agreement it has with [REDACTED] insufficient to cure this evidentiary deficiency.

For all these reasons, we find that the Petitioner has not substantiated the existence of any work to be performed by the Beneficiary at the site of [REDACTED] the claimed end-client. Consequently, we are unable to ascertain whether the Petitioner would in fact engage the Beneficiary in an employer-employee relationship while working there.<sup>8</sup>

However, even if we were to ignore this foundational deficiency we would still find the evidence of record insufficient to establish the requisite employer-employee relationship between the Petitioner and the Beneficiary. This is because the Petitioner, which is located in New Jersey, has not explained and documented *in detail* how it would supervise and otherwise control the Beneficiary's day-to-day activities while he works for the claimed end-client in Minnesota.

We acknowledge the Petitioner's repeated claims that it will maintain control over the Beneficiary. However, the evidence of record does not establish that the Petitioner would supervise and otherwise exercise control over the Beneficiary's employment. For example, while the Petitioner claims to be a 15-employee company, it did not submit an organizational chart describing the positions these employees hold, and whether any of them would also be working for the claimed end-client in Minnesota and could therefore supervise the Beneficiary. The evidence of record provides no

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<sup>8</sup> 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.

Petitioning Requirements for the H Nonimmigrant Classification, 63 Fed. Reg. 30,419, 30,419-20 (proposed June 4, 1998) (to be codified at 8 C.F.R. pt. 214). While a petitioner is certainly permitted to change its intent with regard to non-speculative employment, e.g., a change in duties or job location, it must nonetheless document such a material change in intent through an amended or new petition in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E).

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insight into how, from a remote location, the Petitioner would control the Beneficiary's work on a daily basis. While the Petitioner states repeatedly in its letters that it would remain the Beneficiary's employer, it does not explain how it would supervise and otherwise control the Beneficiary's work. Nor did the Petitioner explain how, as the Beneficiary's employer, it would evaluate the Beneficiary's performance from New Jersey. Nor did the Petitioner identify by name or title the individual who would provide such supervision. Nor did the Petitioner explain how it would train the Beneficiary, as it claimed in would do in its letter dated February 18, 2015.

These deficiencies are also true of the itinerary, the service agreements,<sup>9</sup> the letters from [REDACTED] and [REDACTED] the purchase order, and the employment agreement. While the service agreement between the Petitioner and [REDACTED] does address the issue of the employment relationship between the Petitioner and the Beneficiary, it does so only by noting that the Petitioner will be responsible for taxes and other compensations required by law.<sup>10</sup> Beyond that, it provides no insight into the specifics of the claimed control that the Petitioner would have over the Beneficiary. In other words, the generalized assertions regarding control contained in the record of proceedings lack any degree of specificity, and they do not specifically discuss, in probative detail, the degree of supervision, direction, or control that the Beneficiary would receive from a long-distance employer. They are not sufficient to establish that the Petitioner would supervise or otherwise control the work of the Beneficiary. “[G]oing 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 Cal.*, 14 I&N Dec. 190 (Reg’l Comm’r 1972)).

For all of these reasons, the evidence of record does not demonstrate the requisite employer-employee relationship between the Petitioner and the Beneficiary. While social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are still relevant factors in determining who will control a foreign national Beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the Beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the foreign national Beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the Beneficiary's employer. Without full disclosure of all of the

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<sup>9</sup> In addition to the service agreement relevant to the Beneficiary's current assignment, the record of proceeding also contains a copy of an agreement executed between the Petitioner and [REDACTED]; an agreement and a purchase order executed between the Petitioner and [REDACTED]; an agreement executed between the Petitioner and [REDACTED]; an agreement executed between the Petitioner and [REDACTED]; and an agreement between the Petitioner and [REDACTED]. However, these documents do not cure these deficiencies.

<sup>10</sup> The Petitioner's claims that it would pay the Beneficiary's salary are noted, and the method of payment *is* a factor to be considered. However, in some instances, a petitioner's role is limited to invoicing and proper payment for the hours worked by a beneficiary. In such cases, with a petitioner's role limited to essentially the functions of a payroll administrator, a beneficiary is even paid, in the end, by the end-client. See *Defensor v. Meissner*, 201 F.3d at 388. It is necessary to weigh and compare on all of the circumstances in the relationship between the parties in analyzing the facts of each individual case.

relevant factors, we are unable to find that the requisite employer-employee relationship will exist between the Petitioner and the Beneficiary.

The evidence of record, therefore, is insufficient to establish that the Petitioner qualifies as a United States employer, as defined by 8 C.F.R. § 214.2(h)(4)(ii). Merely claiming in its letters that the Petitioner exercises complete control over the Beneficiary, without evidence supporting the claim, does not establish eligibility in this matter. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 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). Thus, we agree with the Director’s decision that the Petitioner has not demonstrated that it will have an employer-employee relationship with the Beneficiary.

## II. SPECIALTY OCCUPATION

The second issue before us is whether the evidence of record demonstrates by a preponderance of the evidence that the Petitioner will employ the Beneficiary in a specialty occupation position.

### A. Legal Framework

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

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

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

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

*Specialty occupation* means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the

attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

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

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

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

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

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regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

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

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

#### B. The Proffered Position

In its support letter, the Petitioner stated that the duties of the programmer analyst position are as follow (verbatim):

The position will involve the qualified candidate to (1) design, develop, and implement client/server and web-based applications software using current technology; (2) analyze and review system resources; (3) conduct business analysis; (4) assist in performing various types of tests including performance, stress volume and compatibility tests, (5) code assigned modules, (6) participate in team meetings, and (7) provide detailed progress reports to management.

The Petitioner also submitted a letter dated September 22, 2014, in which it stated that the Beneficiary has been assigned to [REDACTED] and his primary duties include:

- Troubleshooting of [REDACTED] configuration which includes custom configuration, Custom Workflows and Custom Business Services.
- Creation of new and modification of existing – Screens, Views, Applets, Pick Lists, Business objects, Business Component, Links and Joins using [REDACTED] Tools and [REDACTED]

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- Assist in Installation of [REDACTED] products.
- Functional and Technical Design Documentation.
- Provide expert inputs in Design discussions.
- Preparation of Training Materials.
- Train developers on [REDACTED] products[.]

However, the end-client, [REDACTED] provided the following duties for the proffered position:<sup>11</sup>

- [I]nteract with management and business analysts to determine system requirements.
- Develop functional and technical computer software designs[.]
- Develop, test and document computer software application designs[.]
- Migrate legacy computer software applications by using new technologies.
- Assist in troubleshooting production issues.
- Advise concerning maintenance of computer software system[.]

The end-client also stated that the “job requires the candidate to have at least a Bachelor’s degree in Computer Science, Engineering, MIS, or equivalent in related field.”

### C. Analysis

The Petitioner asserts that the Beneficiary will work at the end-client's location in Minnesota. As recognized in *Defensor v. Meissner*, it is necessary for the end-client to provide sufficient information regarding the proposed job duties to be performed at its location(s) in order to properly ascertain the minimum educational requirements necessary to perform those duties. *See Defensor v. Meissner*, 201 F.3d at 387-388.

Here, however, the record of proceedings, as we discussed earlier, does not establish an end-client as there is no binding contract between the parties. Although we acknowledge the letters from [REDACTED] listing the duties of the Beneficiary, the evidence of record does not support the assertions that the Beneficiary will be working at the [REDACTED] Minnesota location for the duration of the employment period requested because: (1) there is no corresponding agreement between [REDACTED] and the Petitioner or between [REDACTED] (2) the letters from [REDACTED] are of limited probative value as a result of the revocation of the approval of the prior petition;<sup>12</sup> and (3) the uncertainty over where the Beneficiary would actually work.

Furthermore, considering the totality of all of the Petitioner’s duty descriptions, as well as the duties provided by [REDACTED] we find that the evidence of record does not establish the depth, complexity, or level of specialization, or substantive aspects of the matters upon which the Petitioner claims that the Beneficiary will engage. Rather, the duties of the proffered position, and the position

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<sup>11</sup> The duties provided by the claimed end-client in its letters are essentially the same.

<sup>12</sup> Again, the evidentiary value of this letter, therefore, is unclear, as it appears that either: (1) the Beneficiary was not working as claimed in the letter; or (2) the Beneficiary was working without H-1B authorization.

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itself, are described in relatively generalized and abstract terms that do not relate substantial details about either the position or its constituent duties. For example, in its support letter, the Petitioner states that the Beneficiary will “analyze and review system resources” and that he will “conduct business analysis.” However, these statements provide no insight into the Beneficiary’s actual tasks. The abstract nature of the proposed duties is further illustrated by the Petitioner’s statement that the Beneficiary will “assist in performing various types of tests.” The Petitioner does not explain the Beneficiary’s actual tasks in “assisting,” nor does it specify the types of tests the Beneficiary will perform.

Similarly, the end-client also describes the duties in generalized and abstract terms. For example [REDACTED] the claimed end-client, states that the Beneficiary will “interact with management and business analysts.” The end-client, however, does not provide any details regarding what “interact[ing] with” involves, or the frequency of such interaction with management and business analysts. Again, the generalized nature of the duties is exemplified by the end-client’s statements that the Beneficiary will “develop” computer software designs, “assist in troubleshooting,” and “advise concerning maintenance of computer software system.” These generalized statements fail to provide any insight into the nature of proffered position and the actual tasks the Beneficiary would perform on a day-to-day basis. Notably, the Petitioner does not explain how the performance of the proffered duties, as described in the record, would require the attainment of a bachelor’s or higher degree in a specific specialty, or its equivalent.

In addition, neither the Petitioner nor the claimed end-client has provided any information with regard to the order of importance and/or frequency of occurrence with which the Beneficiary will perform the functions and tasks listed. Thus, the Petitioner and the claimed end-client did not specify which tasks were major functions of the proffered position, and they did not establish the frequency with which each of the duties would be performed (e.g., regularly, periodically or at irregular intervals). As a result, the Petitioner did not establish the primary and essential functions of the proffered position.

In the instant case, neither the Petitioner nor the claimed end-client has described the proffered position with sufficient detail to determine that the minimum requirements are a bachelor’s degree in a specialized field of study. It is incumbent on the Petitioner to provide sufficient evidence to establish that the particular position that it proffers would necessitate services at a level requiring both the theoretical and practical application of a body of highly specialized knowledge and the attainment of at least a bachelor’s degree in a specific specialty, or its equivalent. When “any person makes an application for a visa or any other document required for entry, or makes an application for admission, [. . .] the burden of proof shall be upon such person to establish that he is eligible” for such benefit. Section 291 of the Act; *see also Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg’l Comm’r 1972).

Without a meaningful job description, the record lacks evidence sufficiently concrete and informative to demonstrate that the proffered position requires a specialty occupation’s level of knowledge in a specific specialty. The tasks as described do not communicate (1) the actual work that the Beneficiary would perform, (2) the complexity, uniqueness and/or specialization of the

tasks, and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty.

The record therefore does not establish the substantive nature of the work to be performed by the Beneficiary, which therefore precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), 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 normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

For the reasons related in the preceding discussion, the Petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation.

### III. PRIOR H-1B APPROVALS

The Petitioner noted that USCIS approved other petitions that had been previously filed on behalf of the Beneficiary for a position the Petitioner claims to be the same as the proffered position. However, we are not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be “absurd to suggest that [USCIS] or any agency must treat acknowledged errors as binding precedent.” *Sussex Eng'g, Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987).

A prior approval does not compel the approval of a subsequent petition or relieve the Petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act, 55 Fed. Reg. 2,606, 2,612 (Jan. 26, 1990) (to be codified at 8 C.F.R. pt. 214). A prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of eligibility for the benefit sought. *See Tex. A&M Univ. v. Upchurch*, 99 F. App'x 556 (5th Cir. 2004). Furthermore, our authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of a beneficiary, we would not be bound to follow the contradictory decision of a service center. *See La. Philharmonic Orchestra v. INS*, 44 F. Supp. 2d 800, 803 (E.D. La. 1999).

#### IV. CONCLUSION AND ORDER

As discussed, we agree with the Director that the evidence of record does not establish: (1) that the Petitioner would engage the Beneficiary in an employer-employee relationship; and (2) that the proffered position is a specialty occupation. The appeal will therefore be dismissed.

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) (citing *Matter of Brantigan*, 11 I&N Dec. 493, 495 (BIA 1966)). Here, that burden has not been met.

**ORDER:** The appeal is dismissed.

Cite as *Matter of S-S-*, ID# 16091 (AAO Apr. 6, 2016)