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

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

MATTER OF R-C-S-, LLC

DATE: JULY 19, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, an information technology solutions provider, 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) section 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, Vermont Service Center, denied the petition. The Director concluded that the evidence of record does not establish that (1) the Petitioner has specialty occupation work available for the Beneficiary; (2) the Petitioner qualifies as a United States employer with an employer-employee relationship with the Beneficiary; and (3) the labor condition application (LCA) corresponds to the petition.

The matter is now before us on appeal. In its appeal, the Petitioner asserts that the evidence in the record of proceedings was sufficient to establish eligibility for the benefit sought.

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

**I. THE PETITIONER AND THE PROFFERED POSITION**

The Petitioner is a 54-employee information technology solutions provider, located in [REDACTED] Pennsylvania. The Petitioner seeks to employ the Beneficiary as a full-time programmer analyst for a three-year period from October 1, 2015 to August 31, 2018, at an annual salary of \$60,000. The Petitioner stated on the Form I-129, the Petition for a Nonimmigrant Worker, that the Beneficiary will not work off-site at another company or organization's location. However, the Form I-129 and the LCA indicated that the Beneficiary will work at an address that is different from the Petitioner's address.

In a letter of support, the Petitioner explained that the Beneficiary will be working onsite at its sister company, [REDACTED]. The letter further stated that the Petitioner and [REDACTED] are both subsidiaries of the [REDACTED] and "share common resources when needed and are controlled

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and operated by the same management.” The Petitioner stated that the Beneficiary will utilize [REDACTED] offices, but that the Petitioner “is the employer of the beneficiary and we have the exclusive right to hire, fire, supervise, reassign and promote the beneficiary.”

The Petitioner further stated that the Beneficiary will work on two in-house projects: (1) [REDACTED] for [REDACTED] and (2) [REDACTED] with [REDACTED]

In the H-1B petition, the Petitioner stated that the Beneficiary will serve as a programmer analyst. In response to the Director’s request for evidence (RFE), the Petitioner provided the following job duties for the position:

<b>Job Duty</b>	<b>Detailed Job Duty</b>	<b>%</b>
Designing and developing of .NET based Software Applications.	For [REDACTED] Be a part of the team in developing data adapters to extract data from .NET based applications. Interacting with broad spectrum of team members including business stakeholders, business analysts, architects, application developers, and Software Validation team to gain knowledge on how and where the data is being stored on their current system and how well our adapter needs to be designed to pull the data to be fed into ‘Analyst’  For Energy: Be a part of the team in developing the interfaces and product customizations for the Customer Service Module	20%
Contribute to the planning, tasking and estimating work items.	Work with the PMs of both ([REDACTED] and [REDACTED]) teams to discuss about the milestones achieved and what is pending for the next day  Be responsible analyzing the requirements documentation to ensure all technical specifications are met while creating the adapter, thereby minimizing the time and cost of development and testing	5%
Participate in JAD sessions with Business to seek clear understanding of the application.	Participate in daily conference calls with the Chief Product Officer, SMEs and the development team to get clarity on the business requirements.  Use Microsoft Visio to document the Data mapping, process flows, and other UML diagrams	10%
Coordinating with users related to work.	Participate in daily meetings with the team to ensure deliverables are met.	10%
Troubleshooting issues related to the application.	Work on the issues reported by the UAT team and resolve them with the POC initially and the final product	10%

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	release	
Creating reports.	Work on the reporting module for Energy	8%
Performing unit testing and participate in System testing.	Work with Systems Analysts on various test scenarios. Work with the technical team to ensure that all steps of the ETL (Extraction Transformation and Loading) are done as per the requirements of 'Analyst'. This will also include testing to make sure that the data being fed into the product is 'clean'.  Extraction: Writing code for the data to be extracted from the client's current system (this will be done after the development of the adapters)  Transformation: Ensuring that the extracted data is clean and is error free so that the prediction made by 'Analyst' is accurate.  Loading: Write procedures and interfaces which will successfully load the transformed data into 'Analyst'.	10%
Japanese Translation of Technical documents and user manuals.	For [REDACTED] Work on translating the User manual and Setup guides for the [REDACTED] from English to Japanese by working with the client.	10%
Translating day to day mail communication with Japanese customers	For [REDACTED] Work with Japanese clients to interpret emails and all communication on a daily basis.	10%
Interpretation with clients.	Be involved in client meetings with the rest of the team to update the clients on the progress.	7%

## II. EMPLOYER-EMPLOYEE RELATIONSHIP

### 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).

Although “United States employer” is defined in the regulations at 8 C.F.R. § 214.2(h)(4)(ii), it is noted that the terms “employee” and “employer-employee relationship” are not defined for purposes of the H-1B visa classification. Section 101(a)(15)(H)(i)(b) of the Act indicates that an individual coming to the United States to perform services in a specialty occupation will have an “intending employer” who will file a Labor Condition Application with the Secretary of Labor pursuant to section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). The intending employer is described as offering full-time or part-time “employment” to the H-1B “employee.” Subsections 212(n)(1)(A)(i) and 212(n)(2)(C)(vii) of the Act, 8 U.S.C. § 1182(n)(1)(A)(i), (2)(C)(vii). Further, the regulations indicate that “United States employers” must file a Form I-129, Petition for a Nonimmigrant Worker, in order to classify individuals as H-1B temporary “employees.” 8 C.F.R. § 214.2(h)(1), (2)(i)(A). Finally, the definition of “United States employer” indicates in its second prong that the Petitioner must have an “employer-employee relationship” with the “employees under this part,” i.e., the H-1B beneficiary, and that this relationship be evidenced by the employer’s ability to “hire, pay, fire, supervise, or otherwise control the work of any such employee.” 8 C.F.R. § 214.2(h)(4)(ii) (defining the term “United States employer”).

Neither the former Immigration and Naturalization Service (INS) nor U.S. Citizenship and Immigration Services (USCIS) defined the terms “employee” or “employer-employee relationship” by regulation for purposes of the H-1B visa classification, even though the regulation describes H-1B beneficiaries as being “employees” who must have an “employer-employee relationship” with a “United States employer.” *Id.* Therefore, for purposes of the H-1B visa classification, these terms are undefined.

The United States Supreme Court has determined that where federal law fails to clearly define the term “employee,” courts should conclude that the term was “intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.” *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992) (quoting *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). The Supreme Court stated:

“In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party’s right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.”

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

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

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<sup>1</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).

However, in this matter, the Act does not exhibit a legislative intent to extend the definition of “employer” in section 101(a)(15)(H)(i)(b) of the Act, “employment” in section 212(n)(1)(A)(i) of the Act, or “employee” in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. Instead, in the context of the H-1B visa classification, the term “United States employer” was defined in the regulations to be even more restrictive than the common law agency definition. A federal agency’s interpretation of a statute whose administration is entrusted to it is to be accepted unless Congress has spoken directly on the issue. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844-45 (1984).

States. The lack of an express expansion of the definition regarding the terms “employee” or “employer-employee relationship” combined with the agency’s otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond “the traditional common law definition” or, more importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. *Cf. Darden*, 503 U.S. at 318-19.<sup>2</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>3</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, 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

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<sup>2</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>3</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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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 323-24. For example, while the assignment of additional projects is dependent on who has the *right to* assign them, it is the *actual* source of the instrumentalities and tools that must be examined, and not who has the *right to* provide the tools required to complete an assigned project. *See id.* at 323.

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

## B. Analysis

The Petitioner 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."

### 1. The Petitioner's Relationship with [REDACTED] and [REDACTED]

The evidence in the record of proceedings is insufficient to establish that the Petitioner is related or affiliated with [REDACTED] or any other companies; therefore, the Petitioner has not established that it will have a valid employer-employee relationship with the Beneficiary. As discussed, the Petitioner stated that the Beneficiary will be placed at [REDACTED] its sister company. The Petitioner stated it recently "merged with [REDACTED] under a holding company, [REDACTED]" The Petitioner further asserted that "[b]ased on the recent merger of the companies, the Petitioner provides development support for both their projects and products as well as [REDACTED] clients, products while [REDACTED] provides more support and off-site services." The Petitioner also stated that [REDACTED] owns another company, [REDACTED]

The Petitioner submitted a document entitled, "Exchange Agreement for Stock and Membership Interest of [REDACTED] and [the Petitioner]" (stock exchange agreement). This document was made effective on December 31, 2013. The document stated that [REDACTED] also referred to as [REDACTED] owns all issued stock and the membership interest in the Petitioner's company and [REDACTED]. Specifically, the document indicated that "[REDACTED] has formed [REDACTED] . . . to act as a holding company for the total issued and outstanding stock of [REDACTED] and the total issued and outstanding membership interest of [the Petitioner]." The document further stated that "[REDACTED] desires to exchange his stock interest in [REDACTED] and his membership interest in [the Petitioner] for one hundred

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(100) shares of voting common stock of [REDACTED] so that following the transfer, [REDACTED] will own all of the issued and outstanding shares of [REDACTED]

However, this document alone does not sufficiently demonstrate that the Petitioner is affiliated with [REDACTED] and other companies. For example, other documents in the record do not indicate that [REDACTED] owned one hundred percent shares of [REDACTED] and total membership interest in the Petitioner in 2013, when the stock exchange agreement was executed. Specifically, the tax returns for both IIS and the Petitioner indicate that other individuals owned the companies. For example, the Schedule K-1 for 2013 tax return for [REDACTED] indicates that [REDACTED] owns 100 percent of the company's stock. Likewise, the Schedule K-1 for 2013 for the Petitioner indicates the owner as [REDACTED]. Thus, the stock exchange document submitted by the Petitioner contradicts the tax returns for [REDACTED] and the Petitioner. "[I]t is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence." *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* at 591-92.

Furthermore, the Petitioner did not submit any additional corroborating evidence to indicate that the Petitioner has an affiliate relationship with [REDACTED] and other companies such as a corporate stock certificate ledger, stock certificate registry, corporate bylaws, or the minutes of relevant annual shareholder meetings that show the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. In addition, the Director noted this inconsistent evidence in his decision and the Petitioner did not discuss this issue on appeal or provide evidence to overcome the Director's concern. "[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)).

Therefore, since the Petitioner did not provide enough evidence to establish an affiliate relationship with [REDACTED] and other companies, and the Petitioner claims that the Beneficiary will be placed at [REDACTED] during the validity of the employment period, 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."

## 2. Offer of Employment Letter

For H-1B classification, the Petitioner is required to submit written contracts between the Petitioner and the Beneficiary, or if there is no written agreement, a summary of the terms of the oral agreement under which the Beneficiary will be employed. See 8 C.F.R. § 214.2(h)(4)(iv)(A) and (B).

The offer of employment letter states that the Beneficiary will be employed as a programmer analyst, but it does not provide any level of specificity as to the Beneficiary's duties and the requirements for the position. The letter further states the Beneficiary will be "required to work in our offices in [REDACTED] PA." However, as noted, the Petitioner is located in [REDACTED] PA, and the Petitioner

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has not sufficiently established its affiliation with [REDACTED] or other companies. Further, the Petitioner has not submitted sufficient explanation, corroborated by credible evidence, detailing who is the Beneficiary's supervisor, and how the Petitioner will oversee, direct, and otherwise control the in-house projects at a remote location.

While an employment agreement may provide some insights 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. "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).

3. In-House Projects

The Petitioner indicated that the two in-house projects assigned to the Beneficiary are with [REDACTED] [REDACTED] who has a contract with [REDACTED] and a project with [REDACTED]. In other words, none of the projects are under the Petitioner's name. As discussed, although the Petitioner claims that [REDACTED] and [REDACTED] are affiliates, the record of proceedings does not establish this relationship.

a. [REDACTED]

The Petitioner submitted a letter from [REDACTED] that confirms a working relationship with [REDACTED] and its subsidiaries, and lists the Petitioner as one of [REDACTED] subsidiaries. The letter also stated that it partnered with [REDACTED] to "develop various adapters for our product." The letter further stated that "[REDACTED] has agreed to utilize its personnel for this project and that their personnel will work from their offices in [REDACTED] and [REDACTED] PA under their supervision." Again, the letter indicated that [REDACTED] rather than the Petitioner, will utilize its personnel for this project. In addition, this letter does not list the Beneficiary as a personnel working on this project, or list the duties the Beneficiary would perform for this project.

The Petitioner also submitted a marketing agreement between [REDACTED] and [REDACTED] signed in 2013. Again, this contract does not mention the Petitioner in any part of the document. The contract also does not name the Beneficiary or its need for programmer analysts, specifically. The marketing agreement indicates that [REDACTED] role is to market the product, but it does not indicate that [REDACTED] will be involved in "develop[ing] various adapters for our product." In other words, the agreement does not substantiate the Petitioner's claims regarding the Beneficiary's role as a programmer analyst. In addition, the contract does not provide a project timeline. The Petitioner did not provide any documentation to establish that this agreement will still be in effect through the end of requested employment period. "[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. at 165.

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b. [REDACTED] Project

The Petitioner stated that [REDACTED] “has entered into an agreement with [REDACTED] where we are to integrate the Customer Information System (CIS), [REDACTED] with a back-office product, [REDACTED]. The Petitioner provided a consulting service agreement between [REDACTED] and [REDACTED]. As noted above, the Petitioner did not provide sufficient documentation to establish that [REDACTED] is affiliated with the Petitioner, and that the Petitioner will supervise the Beneficiary when she is working on this project. The Petitioner did not provide corroborating evidence to indicate the Beneficiary will be working on this project or describe the duties she will perform for this project. Further, there is insufficient evidence that this project is valid for the length of the employment period requested. Specifically, the project plan provides an implementation timeline, but it ends in August 2016. “[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. at 165.

We find that the Petitioner has not established that the petition was filed for non-speculative work for the Beneficiary, for the entire period requested, that existed as of the time of the petition’s filing. 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). Thus, even if it were found that the Petitioner would be the Beneficiary’s United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii), the Petitioner has not demonstrated that it would maintain such an employer-employee relationship for the duration of the period requested.<sup>4</sup>

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<sup>4</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).

#### 4. Conclusion

Upon review, there is insufficient documentary evidence in the record corroborating the availability of work for the Beneficiary for the requested period of employment and, consequently, what the Beneficiary would do, where the Beneficiary would work, as well as how this would impact the circumstances of his relationship with the Petitioner. As noted, the Petitioner claims that the Beneficiary will be placed at [REDACTED] for the duration of her employment, but the record of proceedings contains insufficient evidence to establish that the Petitioner is related or affiliated to [REDACTED] and other companies. Further, the documents in the record do not establish that the Beneficiary will be working on the claimed projects in the proffered position. Again, USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248. 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. The evidence, 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 Beneficiary is the Petitioner's employee and that the Petitioner exercises control over the Beneficiary, without sufficient, corroborating evidence to support the claim, does not establish eligibility in this matter.

### III. SPECIALTY OCCUPATION

#### A. Legal Framework

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

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

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) largely restates this statutory definition, but adds a non-exhaustive list of fields of endeavor. In addition, the regulations provide that the proffered position must meet one of the following criteria to qualify as a specialty occupation:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

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

8 C.F.R. § 214.2(h)(4)(iii)(A). U.S. Citizenship and Immigration Services (USCIS) has consistently interpreted 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 proposed 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”); *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000).

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. Analysis

The Petitioner has not established that the proffered position qualifies for classification as a specialty occupation. For H-1B approval, the Petitioner must demonstrate a legitimate need for an employee exists and to substantiate that it has H-1B caliber work for the Beneficiary for the period of employment requested in the petition. It is incumbent upon the Petitioner to demonstrate it has sufficient work to require the services of a person with at least a bachelor’s degree in a specific specialty, or its equivalent, to perform duties at a level that requires the theoretical and practical application of at least a bachelor’s degree level of a body of highly specialized knowledge in a specific specialty for the period specified in the petition.

In this matter, the Petitioner indicated that the Beneficiary will be employed in-house as a programmer analyst. However, as discussed, we find that the Petitioner did not provide sufficient, credible evidence to establish in-house employment for the Beneficiary for the validity of the requested H-1B employment period. Further, even if the Petitioner had established a valid in-house employment, the Petitioner did not submit a job description to adequately convey the substantive work to be performed by the Beneficiary.

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As reflected in the descriptions of the position as quoted above, the proffered position has been described in terms of generalized and generic functions that do not convey sufficient substantive information to establish the relative complexity, uniqueness and/or specialization of the proffered position or its duties. For example, the Petitioner stated that the Beneficiary will be responsible for “developing data adapters to extract data from .NET based applications;” “be a part of the team in developing the interfaces and product customizations for the Customer Service Module;” “participate in daily meetings with the team to ensure deliverables are met;” and, “work on the issues reported by the UAT team and resolve them with the POC initially and the final product release.” The Petitioner’s description is generalized and generic in that the Petitioner does not convey the substantive nature of the work that the Beneficiary would actually perform, or any particular body of highly specialized knowledge that would have to be theoretically and practically applied to perform it. The responsibilities for the proffered position contain generalized functions without providing sufficient information regarding the particular work, and associated educational requirements, into which the duties would manifest themselves in their day-to-day performance.

Further, the Petitioner has provided inconsistent information regarding the minimum educational requirement for the proffered position, and has not established that a bachelor’s degree in a specific specialty is required for the proffered position. For example, in the support letter, the Petitioner stated that the proffered position requires a “minimum of a Bachelor degree, or its equivalent, in Engineering, Computer Science, Computer Applications, Information Technology, or a closely related field, and knowledge/experience working in the above-referenced environment.” In response to the RFE, the Petitioner stated that it requires a bachelor’s degree in computer science, information systems, or a closely-related field plus two years of experience. Further, the letter from [REDACTED] indicated that “relevant IT educations or the equivalent would be sufficient,” without stating that at least a bachelor’s degree or its equivalent in a specific specialty would be required. No explanation for the variances was provided by the Petitioner. “[I]t is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence.” *Matter of Ho*, 19 I&N Dec. at 591. 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. With the conflicting information regarding the minimum requirements, we cannot determine whether the proffered position requires at least a bachelor’s degree in a specific specialty.

The Petitioner has not established the substantive nature of the work to be performed by the Beneficiary, which therefore precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for entry into 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.

Accordingly, as the Petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position qualifies for classification as a specialty occupation.

#### IV. BENEFICIARY'S QUALIFICATIONS

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

As discussed in this decision, the Petitioner did not submit sufficient evidence regarding the proffered position to determine whether it will require a baccalaureate or higher degree in a specific specialty or its equivalent. Absent this determination that a baccalaureate or higher degree in a specific specialty or its equivalent is required to perform the duties of the proffered position, it also cannot be determined whether the Beneficiary possesses that degree or its equivalent. Therefore, we need not and will not address the Beneficiary's qualifications further, except to note that, in any event, the Petitioner did not submit an evaluation of the Beneficiary's foreign degree or sufficient evidence to establish that her degree is equivalent to a U.S. bachelor's degree in a specific specialty. In addition, 20% of the job duties for the proffered position require the Beneficiary to be fluent in Japanese; however, the Petitioner did not submit any documentation to indicate that the Beneficiary is in fact fluent in Japanese. As such, since evidence was not presented that the Beneficiary has at least a U.S. bachelor's degree in a specific specialty, or its equivalent, or has obtained the language requirement for the position, thus, the petition could not be approved even if eligibility for the benefit sought had been otherwise established.

#### V. LCA

Further, we find that the LCA does not correspond to the petition. On the LCA, the Petitioner designated the proffered position under the occupational category "Computer Systems Analyst" corresponding to the Standard Occupational Classification code 15-1121, as Level I (entry-level). However, the wage level conflicts with the Petitioner's language requirement for Japanese.

In accordance with the guidance provided by Department of Labor, a language requirement other than English in a petitioner's job offer generally is considered a special skill for all occupations, with the exception of "Foreign Language Teachers and Instructors," "Interpreters," and "Caption Writers."<sup>5</sup> In the instant case, the Petitioner designated the proffered position under the occupational

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<sup>5</sup> See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://flcdatacenter.com/download/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://flcdatacenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf).

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category "Computer Systems Analyst" at a Level I (the lowest of four assignable wage levels), and it has not established that the foreign language requirement was reflected in the wage-level for the proffered position. We note that Level II wage for [REDACTED] PA, is \$67,912 per year, which is higher than the Petitioner's proffered wage of \$60,000 per year.<sup>6</sup> Therefore, the Petitioner did not establish that it would pay the Beneficiary an adequate salary for her work, as required under the Act, if the petition were granted.

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part (emphasis added):

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL-certified LCA attached. In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements for H-1B visa classification.

Further, the LCA was filed for a work location at [REDACTED] Pennsylvania, but as discussed, the Petitioner did not provide sufficient documentation regarding the work that will be performed by the Beneficiary or the location of that work.

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the Beneficiary. Here, the Petitioner has not submitted a valid LCA that corresponds to the wage level and location of employment.

## VI. CONCLUSION

As discussed, the evidence of record does not demonstrate that: (1) the proffered position is a specialty occupation; (2) the Petitioner has a valid employer-employee relationship with the Beneficiary; (3) the Beneficiary qualifies for the proffered position; and (4) the LCA corresponds to the petition.

The burden is on the Petitioner to show 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.

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<sup>6</sup> *See* [http://www.flcdatabase.com/OesQuickResults.aspx?code=\[REDACTED\]&year=15&source=1](http://www.flcdatabase.com/OesQuickResults.aspx?code=[REDACTED]&year=15&source=1) (last visited July 14, 2016).

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**ORDER:** The appeal is dismissed.

Cite as *Matter of R-C-S-, LLC*, ID# 17005 (AAO July 19, 2016)