



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

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

MATTER OF S-, LLP

DATE: MAY 31, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, an information technology business, seeks to temporarily employ the Beneficiary as a "programmer analyst" under the H-1B nonimmigrant classification. *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, California Service Center, denied the petition. The Director concluded that the proffered position is not a specialty occupation and that the Petitioner did not establish that it would have an employer-employee relationship with the Beneficiary.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the proffered position is a specialty occupation and that it is the Beneficiary's actual employer.

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

## I. SPECIALTY OCCUPATION

### A. Legal Framework

To meet its burden of proof, the Petitioner must establish that the employment it is offering to the Beneficiary meets the following 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)(6)

*Matter of S-, LLP*

- (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).

#### B. The Proffered Position

The Petitioner identified the proffered position as a “programmer analyst” on the H-1B petition, and attested on the required labor condition application (LCA) that the occupational classification for the position is “Computer Programmers” (corresponding to Standard Occupational Classification code 15-1131). The Petitioner requested the Beneficiary’s employment beginning October 1, 2015, and continuing to September 13, 2018.

In its support letter, the Petitioner stated that the Beneficiary “will be deployed to an outside client, [REDACTED] located in [REDACTED] IL.” In response to the Director’s request for evidence (RFE), the Petitioner submitted a “Position Profile” which provided the following list of job duties along with the percentage of time spent on each duty:

- Participate in all phases of the software development cycle, which involves requirements gathering, requirements analysis, design, development, implementation, testing, and enhancement (10%);
- Build relationships with business clients (10%);
- Collaborate with business partners, vendor/consulting organizations, and peer level professionals from other IT disciplines in all aspects of software development (10%);
- Interact with business systems analysts, engineers, programmers and others to design system and to obtain information on project limitations and capabilities, performance requirements, and interfaces (10%);
- Prepare high-level design artifacts (5%);
- Participate in Application Development using Java/J2EE technology (5%);
- Architect, design, develop, implement, and support large scale software solutions, using Java/J2EE (jdk1.4 through 1.7) (5%);
- Provide technology solutions and manage software quality assurance and delivery (5%);
- Develop scalable applications and code optimization (5%);
- Develop complex, high-volume and performance sensitive web services (5%);
- Prepare unit test cases for various component layers and perform unit testing (5%);
- Review work product and test plans (5%);
- Deploy application components and set up the test environment for system testing (5%);
- Deploy code to the test and production environment (5%);
- Support the production environment and fix the defects (4%);
- Change request handling and perform impact analysis of change requests (3%); and
- Implement various languages and technologies, including C, C++, Java, JavaScript, J2DD, XML, HTML, HTML5, CSS and CSS3 (3%).

Also in response to the RFE, the Petitioner stated that the minimum educational requirement for this position is at least a bachelor's degree in "Engineering, Computer Science, Information Systems, or a closely related field."

The Petitioner also submitted a letter from its vice president summarizing the duties of the proffered position and the allocation of time for each duty, as follows:

- Providing technology solutions and Managing Software Quality Assurance and Delivery. 8 hours/week - 20%
- Developing Scalable applications and code optimization. 6 hours/week - 15%
- Developing complex, High Volume and Performance sensitive Web Services[.] 4 hours/week - 15%

- Preparing Unit Test cases for various component layers and perform Unit Testing. 6 hours/week – 20%
- Reviewing work products and test plans. 6 hours/week – 15%
- Quickly master and enjoy learning new technologies, methodologies, and responsibilities. 6 hours/week – 15%

In the same letter, the Petitioner's vice president adds that its programmer analyst "among other things, is responsible for developing/testing code and webpages, employing Model View Controllers, writing use cases, working in an agile development process, and interacting with business users and analysts" and that "[t]hese are significantly more advanced tasks that require an extensive knowledge of development/testing skills." The vice president attests that the proffered position requires "at least a Bachelor's degree in a related subject [to] Engineering, Computer Science, Business Administration, Information Systems, or Mathematics."

On appeal, the Petitioner paraphrases the previous descriptions of duties submitted and adds the technical tools, operating systems, methodologies and databases the Beneficiary will use.

### C. Analysis

Upon review of the record in its totality and for the reasons set out below, we determine that the Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation.<sup>1</sup> Specifically, the record (1) does not describe the position's duties with sufficient detail; and (2) does not establish that the job duties require an educational background, or its equivalent, commensurate with a specialty occupation.<sup>2</sup>

#### 1. The Petitioner Has Not Sufficiently Described The Beneficiary's Employment

The record in this matter includes generic and inconsistent descriptions of the proffered position's duties. It is not possible to ascertain from these descriptions what specific job duties the Beneficiary will perform and the amount of time spent on each distinct duty.

For example, the Petitioner vaguely states that the Beneficiary will "[p]articipate in all phases of the software development cycle, which involves requirements gathering, requirements analysis, design, development, implementation, testing, and enhancement." Similarly, the Petitioner states that the Beneficiary will "[c]ollaborate with business partners, vendor/consulting organizations, and peer level professionals from other IT disciplines in all aspects of software development." The Petitioner indicates that the Beneficiary will spend 10 percent of his time on each set of job duties. However, the Petitioner does not specifically explain what tasks the Beneficiary will perform in "all phases" or

---

<sup>1</sup> Although some aspects of the regulatory criteria may overlap, we will address each of the criteria individually.

<sup>2</sup> The Petitioner submitted documentation to support the H-1B petition, including evidence regarding the proffered position and its business operations. While we may not discuss every document submitted, we have reviewed and considered each one.

(b)(6)

*Matter of S-, LLP*

“all aspects” of the software development cycle, and how much time will be spent on each distinct job duty (e.g., what portion of the 10 percent of time will be spent on programming duties, as opposed to systems analysis duties, software development duties, and other non-programming duties).<sup>3</sup>

The record includes additional, inconsistent descriptions regarding the allocations of time the Beneficiary will spend on his job duties. For example, the letter from the Petitioner’s vice president indicates that 6 hours of the Beneficiary’s work week is equivalent to 15 percent of his time. Yet in the same letter, he also indicates that 4 hours of the Beneficiary’s work week is equivalent to 15 percent of his time. This letter also provides different allocations of the Beneficiary’s time to the same duties described in the “Position Profile” document. To illustrate, the Petitioner’s vice president states that the Beneficiary will spend 20 percent of his time providing technology solutions and managing software quality assurance delivery, while the “Position Profile” indicates that he will spend only 5 percent of his time performing the same duty. The vice president’s letter portrays quality assurance duties as constituting a substantial portion of the Beneficiary’s duties, whereas the “Position Profile” allocates substantial portions of time to other software development activities.

Accordingly, based on the broadly described duties and the different allocations of the Beneficiary’s time to perform these duties, it is not possible to determine what the Beneficiary will be doing in the proffered position. Although we recognize that certain information technology positions may include overlapping duties, we must ensure that the duties of the proffered position correspond to the duties of the occupation attested to on the LCA. This safeguards the requirement that the Petitioner’s payment of wages is commensurate with the highest paying occupation.<sup>4</sup> We note that even though the proffered position encompasses duties of the “Computer Systems Analysts” and “Software Developers” occupations, among others, the prevailing wages for these occupations are higher than the wage listed on the Petitioner’s LCA.<sup>5</sup> If the Beneficiary will be performing the duties of a computer systems analyst and a software developer, the Petitioner’s LCA for a position

<sup>3</sup> For an overview of the occupations of a computer systems analyst and a software developer, applications, see U.S. Dep’t of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2016-17 ed., “Computer Systems Analysts,” <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-2>, (last visited May 24, 2016) and “Software Development, Applications,” <http://www.bls.gov/ooh/computer-and-information-technology/software-developers.htm#tab-2>, (last visited May 24, 2016). The information contained in the *Occupational Outlook Handbook’s* report on these occupations includes a portion of the same or similar duties as the descriptions provided by the Petitioner for its position of a “Programmer Analyst” which it attested to as a Level II “Computer Programmer” on the LCA.

<sup>4</sup> See generally 8 C.F.R. § 214.2(h); U.S. Dep’t of Labor, Emp’t & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

<sup>5</sup> For information on the prevailing wage for “Computer Systems Analysts” and “Software Developers, Applications” in Illinois, see the All Industries Database for 7/2014 - 6/2015 at the Foreign Labor Certification Data Center’s (FLC) Online Wage Library. The FLC lists the Level II wage for “Computer Systems Analysts” as \$70,595, <http://www.flcdatacenter.com/OesQuickResults.aspx?code=15-1121&&year=15&source=1>, and the Level II wage for “Software Developers, Applications” as \$62,795, <http://www.flcdatacenter.com/OesQuickResults.aspx?code=15-1132&&year=15&source=1> (last visited May 24, 2016). Both of these wages are higher than the wage attested to on the Petitioner’s LCA.

(b)(6)

*Matter of S-, LLP*

under the "Computer Programmers" occupational classification would not correspond to and support the instant petition.<sup>6</sup>

Further, the record does not include probative evidence from the end-client for whom the Beneficiary will perform work. 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. The court held that the former Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring a 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.

Here, the Petitioner submits a letter purportedly from the end-client, [REDACTED]. This letter is not on company letterhead and does not include a signature. The letter also includes a verbatim project and position description as found elsewhere in the record. It is not apparent that this letter was prepared by an authorized representative of [REDACTED] and should be entitled to probative weight.

Although the Petitioner asserts that the Beneficiary will perform duties associated with the end-client's [REDACTED] the record does not include corroborating information from the end-client regarding the project or detailing the Beneficiary's actual day-to-day duties for that project. The Petitioner's submission of various position descriptions from the claimed mid-vendor is insufficient to establish the nature of the position to be performed at the end-client's workplace. The Petitioner has not submitted work orders or other documents from the end-client, and has submitted insufficient and inconsistent evidence regarding what the Beneficiary will do and the availability of work for the Beneficiary for the entire requested period of employment. "[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)).

The Petitioner also relies on an advisory opinion from [REDACTED] chair of the software engineering program at [REDACTED] as evidence of the proffered position's duties and requirements. However, [REDACTED] bases his opinions upon the Petitioner's descriptions of the proffered position, not the end-client's actual job duties and requirements. We again specifically note the record's absence of probative documents from the end-client that endorse any of the claims made about either the work to be performed for it by the Beneficiary or the educational requirements for such work. We therefore decline to regard [REDACTED] letter as probative evidence. We may, in our discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, we are not

---

<sup>6</sup> If the Petitioner here is seeking to employ the Beneficiary in two or more distinct occupations rather than a combination of occupation, then it should have filed separate petitions requesting concurrent employment for each occupation.

required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988).

Upon review of the totality of the record, 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. 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), we cannot find that the proffered position qualifies for classification as a specialty occupation.

## 2. The Petitioner Does Not Require a Bachelor's Degree in a Specific Specialty

We further cannot find that the proffered position qualifies as a specialty occupation, as the Petitioner has not established that the duties of the proffered position require the attainment of at least a bachelor's degree in a specific specialty, or its equivalent.

Again, 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. The Petitioner has not submitted documentation from the end-client which specifies the minimum educational requirement for the proffered position.

We also observe that the Petitioner presents different minimum educational requirements for the proffered position. The Petitioner's vice president clearly stated initially and in response to the Director's RFE that "at least a Bachelor's degree in Engineering, Computer Science, Business Administration, Information Systems or a related field and relevant work experience" is required to perform the duties of the proffered position. The Petitioner's human resources manager attested in response to the Director's RFE that the position requires "a minimum of a Bachelor's degree in Engineering, Computer Science, Information Systems or a closely related field or its foreign equivalent and relevant work experience." The Petitioner does not explain why the vice president of the company believes that the proffered position could be performed by someone with a business administration degree, while the human resources manager does not include this field of study in his description of the educational requirement for the proffered position. "[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.

In the Petitioner's vice president's estimation, a bachelor's degree in business administration is sufficient to perform the duties of the proffered position. However, even if established by the evidence of record, the requirement of a bachelor's degree in business administration is inadequate to establish that a position qualifies as a specialty occupation.<sup>7</sup> A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d at 147 (recognizing a business administration degree as a general-purpose degree); cf. *Matter of Michael Hertz Assocs.*, 19 I&N Dec. 558, 560 (Comm'r 1988) (the mere requirement of a degree, without further specification, does not establish the position as a specialty occupation). The Petitioner has not demonstrated that the job duties require an educational background, or its equivalent, commensurate with a specialty occupation.

For all of the above reasons, the Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation. Accordingly, the Director's decision is affirmed and the appeal dismissed.

## II. EMPLOYER-EMPLOYEE RELATIONSHIP

We will now address the issue of whether or not the Petitioner qualifies as an H-1B employer.

### 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:

---

<sup>7</sup> A general degree requirement does not necessarily preclude a proffered position from qualifying as a specialty occupation. For example, an entry requirement of a bachelor's or higher degree in business administration with a concentration in a specific field, or a bachelor's or higher degree in business administration combined with relevant education, training, and/or experience may, in certain instances, qualify the proffered position as a specialty occupation. In either case, it must be demonstrated that the entry requirement is equivalent to a bachelor's or higher degree in a specific specialty that is directly related to the proffered position. See *Royal Siam Corp. v. Chertoff*, 484 F.3d at 147.

*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 United States Supreme Court 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)).

As such, 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 the 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 Beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the Beneficiary’s employer.

(b)(6)

*Matter of S-, LLP*

## B. Analysis

The Petitioner, located in New Jersey, indicates that the Beneficiary will be working for the end-client, located in Illinois, for the duration of the requested employment period. However, the evidence in the record of proceedings does not support its claims. The record contains inconsistent and misleading information that undermine the Petitioner's claims regarding the terms and conditions of the Beneficiary's assignment at the end-client's premises.

The initial record in this matter included a signed master service agreement between the Petitioner and a mid-vendor, [REDACTED]. The initial record also included a work order and verification letter specifically confirming the Beneficiary's assignment to the end-client, [REDACTED]. However, the work order and verification letter were issued by another mid-vendor, [REDACTED] and did not match the submitted master service agreement.

In response to the RFE, the Petitioner submitted a copy of a staffing services supplier agreement with [REDACTED] to provide staffing services to [REDACTED] "client," [REDACTED]. The Petitioner explained that it and [REDACTED] now utilize [REDACTED] as "their mutual managed service provider." However, the Petitioner did not provide copies of any contracts that may exist between [REDACTED] and [REDACTED]. We note that this staffing agreement and its exhibits are signed on behalf of the Petitioner by [REDACTED] Operations Manager. The Petitioner's organizational charts do not identify an operations manager position, nor do they identify [REDACTED] as an employee.

And as previously highlighted, the record does not include any probative evidence directly from the end-client, such as a signed letter on official [REDACTED] letterhead or a contract signed by the end-client's authorized representative. To establish the employer-employee relationship, we must review the evidence to determine whether the Petitioner retains the right to control the Beneficiary's work, supervise and direct the Beneficiary's work, and most importantly, require that the work remain within the context of the occupation as described in the H-1B petition. As there is no probative evidence from the end-client, it is not possible to ascertain the end-client's restrictions, if any, for personnel working on its projects. Without more, we are unable to properly assess whether the Petitioner has retained the right to control the Beneficiary's work.

The record in this matter does not include probative evidence establishing the Petitioner's mechanism to control and direct the Beneficiary's work while offsite. We have reviewed the Petitioner's offer letter and employment agreement with the Beneficiary, as well as blank templates for monthly status reports and yearly performance reviews. However, these documents do not sufficiently explain the manner through which the Petitioner will control and direct the Beneficiary's offsite work. In fact, the record does not consistently identify which of the Petitioner's employees, if any, will directly supervise the Beneficiary. For instance, [REDACTED] letter and other documents state that [REDACTED] the Petitioner's "HR manager," will supervise the Beneficiary. None of the Petitioner's organizational charts depicts [REDACTED] or a human resources manager as directly

*Matter of S-, LLP*

supervising the Beneficiary and thus controlling the Beneficiary's work.<sup>8</sup> Further, the Petitioner stated in its initial support letter, and again on appeal, that the Beneficiary will be supervised by an unidentified "Project Manager." The Petitioner has not explained whether this "Project Manager" is the same person as the "HR manager," and if so, whether a human resources manager would have the technical expertise to serve as a project manager and substantively control the Beneficiary's work. These factors cast doubt on whether the Petitioner has or will have the ability to actually control and direct the Beneficiary's work so that it would remain within the context of the occupation approved for H-1B classification.

Also casting doubt on the Petitioner's employer-employee relationship with the Beneficiary is the evidence in the record indicating that the mid-vendor, [REDACTED] will have the ability to control the Beneficiary's work. According to the statement of work between the Petitioner and [REDACTED] responsibilities include designating a project management "who will be the focal point for [the Petitioner's] communications relative to the project," and providing the Petitioner with "workspace, computing and office facilities for onsite resource(s) with appropriate access rights." According to the staffing services supplier agreement between the Petitioner and [REDACTED] "[the Petitioner] will assign certain employees ('CLRs') with the skills Client requests, to perform Client's work." Importantly, the Exhibit A (accompanying the staffing agreement) defines the term "CLR" as referring to "individuals [who] provide Contingent Labor Services on a temporary basis for [REDACTED] . . . and take day to day direct instruction from their [REDACTED] manager." The Exhibit A-7 (also accompanying the staffing agreement) similarly states that "CLRs shall work under the direct supervision and control of a project manager, as designated by [REDACTED] in the Purchase Order." It also states that "CLRs may be required to work in any of the cities listed in the Purchase Order," and "[w]hen a CLR is working under a Purchase Order, the [REDACTED] project manager identified in the Purchase Order shall take delivery of the Deliverables of that Purchase Order." From this evidence, it appears that the mid-vendor will supervise the Beneficiary's work on a day-to-day basis.

We find that the Petitioner has not provided sufficient evidence establishing how the Petitioner remotely controls the manner and means by which the Beneficiary's services are provided. We cannot conclude, therefore, that the Petitioner has satisfied its burden and established that it qualifies as a United States employer with standing to file the instant petition in this matter. *See* section 214(c)(1) of the Act (requiring an "Importing Employer"); 8 C.F.R. § 214.2(h)(2)(i)(A) (stating that the "United States employer . . . must file" the petition); 56 Fed. Reg. 61111, 61112 (Dec. 2, 1991) (explaining that only "United States employers can file an H-1B petition" and adding the definition of that term at 8 C.F.R. § 214.2(h)(4)(ii) as clarification). The Director's decision is affirmed and the appeal is dismissed for this additional reason.

---

<sup>8</sup> The Petitioner's first organizational chart does not depict [REDACTED] as an employee, nor does it depict a human resources manager position. The Petitioner must establish eligibility at the time of filing the nonimmigrant visa petition and must continue to be eligible for the benefit through adjudication. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the Petitioner or Beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978).

*Matter of S-, LLP*

### III. CONCLUSION

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.<sup>9</sup>

**ORDER:** The appeal is dismissed.

Cite as *Matter of S-, LLP*, ID# 17000 (AAO May 31, 2016)

---

<sup>9</sup> Since the identified bases for denial are dispositive of the Petitioner's appeal, we will not address any additional grounds of ineligibility we observe in the record of proceedings, including whether the Petitioner has complied with the LCA requirements.