(b)(6)

U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF D-G- INC.

DATE: OCT. 4, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, an information technology company, seeks to temporarily employ the Beneficiary as a "system support 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: (1) that the Petitioner will engage the Beneficiary in an employer-employee relationship; (2) that the Petitioner has specialty occupation work for the Beneficiary for the entire requested period; and (3) that it meets the regulatory filing requirements.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and a brief, and asserts that the Director erred in her findings.

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

I. PROFFERED POSITION

In its support letter, the Petitioner submitted the following duties for the proffered position (verbatim):

- Single point of contact in operations, owning few critical applications and has extensive knowledge both in technical and functional areas
- Initiate [redacted] or [redacted] deployments (remotely) using [redacted]
- Coordinate cross-functional team located globally for the smooth handoff and maintaining the sync across team members.
- Work on Tier3 escalation issues to keep system available 24/7
- Implement and administer security policies and disaster recovery processes.

- Designing automation techniques and monitoring methods to reduce manual efforts by identifying the scope of need.
- Work with AD, SQL, IIS, SSL certificates and their deployment
- Planning and execution of
- Script using to automate processes and writing SOP's
- Perform various brainstorming, Joint Application Design sessions and Use-case scenario techniques for requirement elicitation
- Managing project forecasting, budgeting and inventory
- Effectively resolving project issues and escalations
- Managing changes in priorities, demands, timeliness and scope
- Remote execution of automated deployments via System Center Configuration Manager
- Approving project time entries, invoices and expenses
- Developing best practices and tools for project execution, management, training and support
- Follow post-deployment validation checklist shared by Microsoft to determine successful deployment
- Assisting with implementation services as necessary
- Supporting training, post-go-live, installation, documentation and process creation initiatives

On appeal, the Petitioner identifies the above listed duties as the "Work Site 1" duties and adds additional duties for "Work Site 2" as follows:

- Initiate or deployments using
- Work on Tier3 escalation issues to keep system available 24/7
- Execution of
- Implement and administer security policies and disaster recovery processes.
- Follow post-deployment validation checklist shared by to determine successful deployment
- Assisting with implementation services as necessary
- Supporting training, post-go-live, installation, documentation and process creation initiatives
- Manage project forecasting, budgeting and inventory
- Effectively resolving project issues and escalations

In another letter submitted on appeal, the Petitioner reiterates the above job duties and adds another list of job duties, as follows:

Database Administrator:

- Installation, configuration, database security, and server monitoring

- Migration and upgrade to new versions, and applying service packs
- Implementation of High Availability solutions Disaster Recovery, Database backups and Recovery strategies
- Capacity planning, performing tuning, disaster recovery, troubleshooting, backup and restore procedures
- Tuning SQL queries, improve the performance of database
- Plan disaster recovery
- Monitor server performance and windows server issues
- Prepare and document database backup and maintenance plans
- Troubleshoot, tune input/output to reduce the disk contention and enhance the database performance

According to the Petitioner, the proffered position requires at least a bachelor's degree in computer science, computer applications, computer engineering, computer information systems, computer technology, management information systems, electrical/electronic engineering, or any related field, or its equivalent.

To support the H-1B petition, the Petitioner submitted a Labor Condition Application (LCA) for a position located within the "Computer Systems Analysts" occupational category corresponding to Standard Occupational Classification (SOC) code 15-1121 at a Level I wage level.

II. 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 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 an LCA with the Secretary of Labor pursuant to section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). The intending employer is described as offering full-time or part-time "employment" to the H-1B "employee." Subsections 212(n)(1)(A)(i) and 212(n)(2)(C)(vii) of the Act, 8 U.S.C. § 1182(n)(1)(A)(i), (2)(C)(vii). Further, the regulations indicate that "United States employers" must file a 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 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) (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.[1]

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

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

definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition" or, more importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. *Cf. Darden*, 503 U.S. at 318-319.[2]

Accordingly, in the absence of an express congressional intent to impose broader definitions, both the "conventional master-servant relationship as understood by common-law agency doctrine" and the *Darden* construction test apply to the terms "employee" and "employer-employee relationship" as used in section 101(a)(15)(H)(i)(b) of the Act, section 212(n) of the Act, and 8 C.F.R. § 214.2(h).[3]

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

The factors indicating that a worker is or will be an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. *Darden*, 503 U.S. at 323-24; *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 relevant to control may affect the determination of whether an employer-employee relationship

---

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

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

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 proceedings does not contain sufficient, consistent, and credible documentation confirming and describing the projects on which the Beneficiary will work, as well as all the locations where the Beneficiary will perform his duties. 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 represented that the Beneficiary will work off-site at the address of New Jersey. The Petitioner submitted an LCA certified for this address – specifically identified as belonging to – as well as for the Petitioner's office in New Jersey.[4] In one of its initial support letters, the Petitioner stated that the Beneficiary "would be required to work from [the Petitioner's] location [in New Jersey] and/or client location NJ In response to the Director's request for evidence (RFE), the Petitioner stated that the Beneficiary "is going to work at at NJ."

[4] The LCA is certified for the Petitioner's previous address of in New Jersey. On appeal, the Petitioner states that it has relocated to in New Jersey, and submits the first and forty-fifth page of its lease. The Petitioner states that its new address is still within the same metropolitan statistical area (MSA) and therefore does not require the filing of a new LCA.

Despite the Petitioner's repeated identification of as the ultimate client and in New Jersey, as business premises, the Petitioner indicates on appeal that this address belongs to a different client: More specifically, on appeal the Petitioner identifies the address as the Beneficiary's "Work Site 2" and writes underneath this address: is implementing part of its project at Address."[5] The Petitioner also submits a letter from identifying its business location as in Washington (not in New Jersey). The Petitioner has not sufficiently explained whether the ultimate client is or and where the Beneficiary will provide his off-site services.

"[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. An inaccurate statement anywhere on the Form I-129 or in the evidence submitted in connection with the petition mandates its denial. *See* 8 C.F.R. § 214.2(h)(10)(ii); *see also id.* § 103.2(b)(1).

Assuming that the ultimate client in this matter is the Petitioner has not adequately explained and documented the terms and conditions of the Beneficiary's assignment to While the Petitioner submitted a purchase order for work on an Project," this purchase order does not specifically list the Beneficiary or an "application support analyst" as an assigned resource. Even if it did, the purchase order does not provide pertinent details regarding the Beneficiary's assignment, including the amount of time he will spend at this location, to whom he will report, and his job duties. The record does not contain any other contractual agreements with

Furthermore, the record indicates that the Beneficiary may be assigned to other clients. The record contains a statement of work between the Petitioner and (located in India) for services to an unidentified "End Customer." On appeal, the Petitioner supplements the record with three additional statements of work. Although these agreements are also made with they are for services ultimately to be provided to clients: and another unidentified client. Meanwhile, the Petitioner continues to identify the only client involved as who implements "part of its project at address." The Petitioner does not make any references to or any other clients in its appeal brief.

Again, "it is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence." *Matter of Ho*, 19 I&N Dec. at 591-92. In addition, "going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these

[5] Regarding "Work Site 1," the Petitioner explains that the Beneficiary will also work from the Petitioner's business premises to provide remote services for

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)).

However, even if we were to ignore these foundational deficiencies, 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 has not explained and documented *in detail* how it would supervise and otherwise control the Beneficiary's day-to-day activities while he performs his duties off-site at client location(s).

Here, it is important to consider the language in the Petitioner's statement of work with for its client This document states, in part, that is engaging [the Petitioner] on a Time and Materials basis to provide onsite support services." This document contains numerous other references to "onsite" work and even contains a list of 31 countries (including the United States) in which users and/or worksites are apparently located. But the Petitioner has not explained and documented exactly where all of these "onsite support services" are located, and more importantly, to which of these sites (if any) the Beneficiary will be assigned.

We also highlight the following language in this contract:

> [The Petitioner] will supplement project team for this project and provide assistance as directed by designated Program Manager, utilizing designated project methodologies and Technical Solution. Program Manager will provide direction to the overall project team and manage the onsite support schedule of which Partner will be a part. Should changes be needed to the agreed upon staffing mix, [the Petitioner] will work with the Project Manager to execute a Change Request.

Considering that the Petitioner's personnel will "supplement project team" and will "provide assistance as directed by we must question the Petitioner's claimed supervision and control over the Beneficiary's work, as well as other aspects of the employer-employee relationship.

It is also important to point out the Petitioner's inconsistent statements regarding the Beneficiary's direct supervisor. The Petitioner initially stated that the Beneficiary will be supervised by the Petitioner's director of sales and solutions. The Petitioner then stated in response to the Director's RFE that the Beneficiary will be supervised by manager of operations, whom we observe is not listed in the Petitioner's employee list or payroll information. Now on appeal the Petitioner states that the Beneficiary will be supervised by project manager. The Petitioner has not reconciled these inconsistencies with objective evidence pointing to where the truth lies. *Id.*

Finally, the Petitioner has not submitted sufficient documentation establishing that it has secured work for the Beneficiary for the entire validity period requested (October 1, 2015, through

September 19, 2018). For instance, the letter from [redacted] states that "[t]he Beneficiary is currently assigned, or will be assigned in the next six months . . . to a project at [redacted] Not only does this language suggest that [redacted] (not the Petitioner) decides what projects the Beneficiary will be assigned to, but it indicates that specific projects have not actually been assigned to the Beneficiary.

And as previously noted, none of the statements of work or purchase orders identify the Beneficiary or his title by name. Notwithstanding, the Petitioner's purchase order for the [redacted] assignment indicates that it is valid from October 15, 2014, to February 29, 2016. The statement of work for [redacted] was originally effective May 13, 2015, and is effective until June 30, 2016. The statement of work for [redacted] executed in March 2016, states that services will be provided "over an estimated 9 month's period." The statements of work for the two unidentified clients, executed on February 1, 2015, and May 12, 2015, expire on June 30, 2016, and March 8, 2017, respectively. Thus, even if the Beneficiary were included in these contracts, they do not corroborate the Petitioner's repeated statements that the Beneficiary's "services are required for this project at least till September 19, 2018," and that "[t]he majority of these projects are ongoing for a period of at least 36 months and more."

In fact, the Petitioner appears to contradict its own statements regarding the length of the Beneficiary's assignments by submitting a "deliverables overview" which lists June 30, 2016, as the "project closure" or "closeout" date. Furthermore, the Petitioner's own project "itinerary" does not list the Beneficiary or a "system support analyst" as a required resource.[6] Overall, we find that the Petitioner has not substantiated the existence of the work to be performed by the Beneficiary for the entire validity period requested.[7] 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).

---

[6] The Petitioner's project "itinerary" lists the following resources on its Microsoft project(s): Project Manager, Team Leads, Software Programmer, Software Quality Assurance Analyst, and Systems Administrator.

[7] 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 individual 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 individual 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 individual 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 individual 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,

For all of these reasons, the evidence of record does not sufficiently 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 the Beneficiary, other incidents of the relationship, e.g., who will oversee and direct the Beneficiary's work, 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. Without full disclosure of all of the relevant factors, we are unable to find that the Petitioner 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).

III. 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

Section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l), 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;

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).

(*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). 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 at 387.

B. 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 it will employ the Beneficiary in a specialty occupation.

For H-1B approval, the Petitioner must demonstrate a legitimate need for an employee exists and substantiate that it has H-1B caliber work for the Beneficiary for the entire 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.

As we discussed earlier, the evidence of the record does not support the Petitioner's assertions regarding the Beneficiary's assignments. The record contains inconsistent evidence regarding where the Beneficiary will work, and for whom. Furthermore, the record of proceedings contains insufficient evidence demonstrating that the Petitioner has secured projects for the Beneficiary for the entire period requested (October 1, 2015, through September 19, 2018). We again recall the letter from [redacted] stating that "[t]he Beneficiary is currently assigned, or will be assigned in the next six months," which suggests that specific projects have not yet been assigned. In addition, we recall that the contractual agreements between the Petitioner and [redacted] clients do not reference the Beneficiary by name or job title, and do not extend beyond March 2017 at the latest. The record of proceedings thus does not demonstrate that the Petitioner has non-speculative work for the Beneficiary for the entire period requested that existed as of the petition's filing date.

Without additional information and documentation establishing what projects have been secured, and accordingly, the specific duties the Beneficiary will perform on these projects and the knowledge required to perform these duties, we are unable to discern the substantive nature of the position and whether the position indeed qualifies as a specialty occupation. 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 INS 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. The record of proceedings does not contain such evidence here.

While the Petitioner also submitted position descriptions and requirements for the Beneficiary, these descriptions – without corroborating evidence from the ultimate client(s) involved – are insufficient to demonstrate the substantive nature of the position. *See id; Matter of Soffici*, 22 I&N Dec. at 165. But in any event, we wish to point out inconsistencies in the Petitioner's descriptions. For instance, on appeal the Petitioner submits a list of the Beneficiary's "detailed responsibilities for the Project" which includes a list of "Database Administrator" duties. However, these "Database Administrator" duties were not all included in the Petitioner's initial job descriptions, which the Petitioner supported with an LCA certified for a position falling within the "Computer Systems Analysts" occupational category (SOC code 15-1121).[8] In addition, the Petitioner listed several project management-related duties (such as "[c]oordinate cross-functional team," "[m]anaging project forecasting, budgeting and inventory," and "[a]pproving project time entries, invoices and expenses") that do not appear consistent with the Level I wage level selected on the LCA.[9] These inconsistent job descriptions further preclude us from discerning the substantive nature of the proffered position and its constituent duties.

---

[8] For positions involving duties of more than one occupational classification, the LCA should reflect the occupational classification of the most relevant, i.e., highest-paying, occupation. *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://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

A "Database Administrator" position (SOC code 15-1141) in the New Jersey MSA where the Petitioner's office is located has a higher prevailing wage ($72,550 per year) than a "Computer Systems Analysts" position in the same MSA ($68,037 per year) for the time period when the LCA was filed (7/2014-6/2015). For more information about prevailing wages, see generally http://www.flcdatacenter.com/OESWizardStart.aspx (last visited Sep. 28, 2016). Thus, if the Petitioner believed its position to be a combination of duties represented by both the "Computer Systems Analysts" and "Database Administrators" occupational categories, then it should have chosen the highest-paying occupation of "Database Administrators" on the LCA.

[9] Many of the proffered job duties – including "[a]pproving project time entries, invoices and expenses" – are listed in the Petitioner's project "itinerary" under the duties of its "Project Manager."

According to the Department of Labor's *Prevailing Wage Determination Policy Guidance*, a Level I wage rate is generally appropriate for positions for which the Petitioner expects the Beneficiary to have a basic understanding of the occupation. This wage rate indicates: (1) that the Beneficiary will be expected to perform routine tasks that require limited, if any, exercise of judgment; (2) that he will be closely supervised and his work closely monitored and reviewed for accuracy; and (3) that he will receive specific instructions on required tasks and expected results. *Id.* A prevailing wage determination starts with an entry level wage and progresses to a higher wage level after considering the experience, education, and skill requirements of the Petitioner's job opportunity. *Id.* A Level I wage should be considered for research fellows, workers in training, or internships. *Id.* The Level I wage level selected here is inconsistent with these higher-level project management duties.

Consequently, we are precluded from 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.

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

IV. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. [10] In visa petition proceedings, it is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of D-G- Inc.*, ID# 10373 (AAO Oct. 4, 2016)

[10] The Director also denied the petition for not meeting the regulatory filing requirements with regard to the $2,000 fee imposed under Public Law 111-230. As the petition must be denied and the appeal dismissed for the reasons discussed above, we will not address this issue at this time.