



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **AUG 08 2014**

Office: VERMONT SERVICE CENTER

File: [REDACTED]

IN RE: Petitioner:
Beneficiary: [REDACTED]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

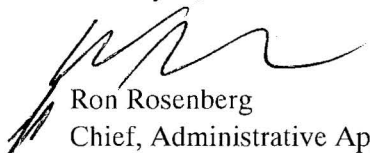
ON BEHALF OF PETITIONER:
[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the Vermont Service Center on April 1, 2013. On the Form I-129 visa petition, the petitioner states that it is an "information technology solutions" business with 13 employees. In order to employ the beneficiary in a position to which it assigned the job title "Organizational Analyst," the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on November 14, 2013, finding that the evidence contained in the record does not support the petitioner's claim that the beneficiary would be performing the duties of an industrial-organizational psychologist. The director also noted that the petitioner changed the job duties from the initial filing to the response to the request for evidence (RFE). The director concluded that the record does not establish the availability of specialty occupation work as an industrial-organizational psychologist at the time the petition was filed. On appeal, counsel for the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner has satisfied all evidentiary requirements.

The record of proceeding before us contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's RFE; (3) counsel's response to the RFE; (4) the director's denial letter; and (5) the petitioner's Notice of Appeal or Motion (Form I-290B) and supporting documentation. We reviewed the record in its entirety before issuing our decision.

Upon review of the entire record of proceeding, we find that the petitioner has failed to overcome the director's grounds for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

We will also address three additional, independent grounds, not fully identified by the director's decision, which preclude approval of this petition. Specifically, beyond the decision of the director, the evidence in the record of proceeding does not establish that: the petitioner will have a valid employer-employee relationship with the beneficiary; the position proffered here is a specialty occupation; and the Labor Condition Application (LCA) submitted with the petition is for an occupational title that is consistent with the position offered.¹ For these additional reasons, the petition may not be approved.

I. FACTUAL AND PROCEDURAL HISTORY

In this matter, the petitioner indicated in the Form I-129 and supporting documentation that it seeks the beneficiary's services in a position that it designates as an Organizational Analyst to

¹ We conduct appellate review on a *de novo* basis (*See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)), and it was in the course of this review that we identified these additional grounds for denial.

work on a full-time basis at a salary of \$71,115 per year. In addition, the petitioner indicated that the beneficiary will be employed at [REDACTED] located at [REDACTED], [REDACTED]. The petitioner stated that the dates of intended employment are from October 1, 2013 until September 13, 2016.

The petitioner submitted an LCA in support of the instant H-1B petition. The LCA designation selected by the petitioner for the Organizational Analyst position corresponds to the occupational classification "Industrial-Organizational Psychologists" - SOC (ONET/OES) Code 19-3032 at a Level I (entry level) wage. It states the place of employment as [REDACTED]

Among the documents submitted with the Form I-129 is the petitioner's March 27, 2013 letter of support. In the letter of support, the petitioner explained that "we provide advanced software development solutions and information technology consultative knowledge to a wide array of businesses and industries including E-commerce, Banking, and Financial Services, Health Care, Insurance and Mobile and Communications." The petitioner also provided the following explanation of the duties to be performed in the proffered position:

Beneficiary will be responsible for working with [REDACTED]'s team to organize and develop the code mapping and analysis project. She will be responsible for analyzing and identifying inefficient areas of the business process and recommend improvements and/or enhancements. She will be responsible for strategic planning, assessing resources allocations, and coordination of resources within the organization. She will support project organization and development initiatives and conduct analysis of system processing and functionality. Beneficiary will gather information from various SME'S to identify impacted areas in the systems. She will conduct sessions to gather requirements from SME's to produce recommendations for design and development plans. She will identify risks, issues, gaps and dependencies. She will prioritize work streams to lay out an implementation plan and develop roadmaps for planned (*sic*).

Beneficiary will conduct comprehensive systems requirements reviews with business experts and technology teams and be responsible. She will perform functional and change impact analysis for existing business processes and develop recommendations for improvements and enhancements. She will use various documentation techniques including textual templates, use case diagrams and scenarios, workflow diagrams and prototyping. Beneficiary will work with business and technical teams to make organizational solution recommendations which may include system changes, new software, procedural or workflow changes in order to satisfy business needs.

In addition, the petitioner submitted a document entitled, "Itinerary of Service Covering H-1B employment of [the beneficiary]," which lists the petitioner as the employer; the addresses of the petitioner and HP; the period of employment; job title and job duties. The itinerary identified the position as an organizational analyst and described the job duties as:

Analyze, design and develop business and organizational system. Create reports, troubleshoot and maintain existing systems as outlined in the attached Employer Letter.

The document titled "Summary of Terms of Agreement under which Beneficiary will be Employed," signed by the petitioner and beneficiary is the only "Employer Letter" in the record. This document lists the terms of the employment but does not include a description of the duties the beneficiary is expected to perform.

The initial record also included a letter from [REDACTED] Account Service Executive of [REDACTED], dated March 11, 2013, certifying that the beneficiary is "employed as an agency contractor with [REDACTED] MA and has been working as a Technical Senior Analyst since January 23, 2013." Ms. [REDACTED] noted that the beneficiary's employment is in support of a contract with the Massachusetts Executive Office of Health and Human Services.

The petitioner also submitted a copy of a Master Services Agreement (MSA) between [REDACTED] and the petitioner, effective on November 22, 2011. The MSA sets out the agreement between [REDACTED] and the petitioner and provides the framework for the common terms and conditions applicable to each "order."² The record included an order prepared by [REDACTED] pursuant to the November 22, 2011 MSA. The January 18, 2013 order: identified the beneficiary; identified [REDACTED] customer as [REDACTED]; [REDACTED] identified the location of the order assignment as Quincy, Massachusetts; set out the title of the position as business systems analyst; and indicated the start date as January 22, 2013 and the end date as June 28, 2013.

The petitioner also submitted its organizational chart which identified the beneficiary's position as a Business Analyst. The initial record also included a copy of a sample project status report and performance appraisal.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on May 31, 2013. The RFE requested, in part, that the petitioner submit additional documentation to demonstrate that the proffered position is in the field of industrial organizational psychology, or provide a new LCA with the appropriate occupation code. The director provided a list of some of the types of specific evidence that could be submitted.

In the letter in response to the director's RFE, dated August 23, 2013, counsel for the petitioner explained that the beneficiary will work as an Organizational Analyst and "she will apply concepts and principles of industrial/organizational psychology to research and analyze data to discover the impact of change on organizational processes, business and technology, and to identify efforts needed to implement organizational and process changes." Counsel further asserted that the beneficiary will be assigned to a project with HP where "she will utilize her

² The MSA indicates that each separate engagement of the petitioner by [REDACTED] is an "Order" and that the MSA was created to eliminate the necessity of negotiating all of the terms and conditions for each of these separate engagements and to provide a framework for the common terms and conditions applicable to each Order.

knowledge of industrial/organizational psychology to assist the enterprise service team by conducting an IT impact assessment of the project." Counsel further stated that "this is not a computer related position, but involves research and analysis of the impact of a computer systems change on an organization."

In the response to the RFE, counsel for the petitioner provided an expanded description of the duties to be performed by the beneficiary. We find, however, that this expanded description of the duties of the proffered position is not probative evidence as the description was provided by counsel, not the petitioner. Counsel's response to the RFE was not endorsed by the petitioner and the record of proceeding does not indicate the source of the duties and responsibilities that counsel attributes to the proffered position. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In response to the RFE, the petitioner submitted, among other things, the following additional evidence: an opinion letter from [REDACTED], Stern School of Business Administration, [REDACTED], dated August 5, 2013, which will be discussed in detail, later in this decision; and a second letter from [REDACTED] Account Service Executive, [REDACTED], dated June 24, 2013. Ms. [REDACTED] June 24, 2013 letter provided a broad overview of the beneficiary's current duties as a technical senior analyst in support of a contract with the Massachusetts Executive Office of Health and Human Services. Ms. [REDACTED] also asserted that the "position is a professional one and would require the services of an individual with the minimum of a Bachelor's degree in a related field and relevant experience."

The director reviewed the documentation and found it insufficient to establish eligibility for the benefit sought. The director denied the petition on November 14, 2013. Counsel for the petitioner submitted an appeal of the denial of the H-1B petition and supporting documentation.

II. LAW AND ANALYSIS

A. Standard of Review

In light of counsel's references to the requirement that U.S. Citizenship and Immigration Services (USCIS) apply the "preponderance of the evidence" standard, we affirm that, in the exercise of our appellate review in this matter, as in all matters that come within our purview, we follow the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010). In pertinent part, that decision states the following:

Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.

The "preponderance of the evidence" of "truth" is made based on the factual circumstances of each individual case.

* * *

Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. *See INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Id.

As footnoted above, we conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In doing so, we apply the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon our review of the present matter pursuant to that standard, however, we find that the evidence in the record of proceeding does not support counsel's contentions that the evidence of record requires that the petition at issue be approved. Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, we find that the director's determinations in this matter were correct. Upon our review of the entire record of proceeding, and with close attention and due regard to all of the evidence, separately and in the aggregate, submitted in support of this petition, we find that the petitioner has not established that its claims are "more likely than not" or "probably" true. As the evidentiary analysis of this decision will reflect, the petitioner has not submitted relevant, probative, and credible evidence that leads us to believe that the petitioner's claims are "more likely than not" or "probably" true.

B. The Petitioner Fails to Establish the Proffered Position as an Organizational Analyst

In this matter, the petitioner indicated in the Form I-129 and supporting documentation that it seeks the beneficiary's services in a position that it designates as an "Organizational Analyst" to work on a full-time basis at a salary of \$71,115 per year. In addition, the petitioner indicated that the beneficiary will be employed at [REDACTED]. The petitioner also submitted the requisite LCA in support of the instant H-1B petition in which the petitioner designated the position as an "Organizational Analyst" position corresponding to the

occupational classification "Industrial-Organizational Psychologists" - SOC (ONET/OES) Code 19-3032 at a Level I (entry level) wage.

Upon review of the record, the petitioner has not provided a consistent description of the beneficiary's proposed duties, the end client, or evidence that it currently has specialty occupation work available for the beneficiary to perform. For example, the petitioner submitted two letters from the claimed end client, [REDACTED] that state the beneficiary has been working with [REDACTED] as a Technical Senior Analyst. However, the petitioner does not have an agreement with [REDACTED]. The only agreement providing a business relationship between the petitioner and a third party is the petitioner's MSA with [REDACTED]. However, the Order attached to the MSA with [REDACTED] is not for the beneficiary's assignment to work at [REDACTED] but rather to work at Eclaro International. Accordingly, it is not possible to discern from the record where and for whom the petitioner plans for the beneficiary to work, what duties she will be expected to perform, and whether the duties actually comprise the duties of an organizational analyst or any position that comprises the duties of a specialty occupation. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Not only does the record include inconsistent information regarding the actual end client, the record includes different titles for the proffered position, such as Business Analyst on the petitioner's organizational chart, technical senior analyst in [REDACTED] letter, business systems analyst on the order attached to the petitioner's MSA with [REDACTED] as well as the petitioner's designation of the position as an organizational analyst. We acknowledge that titles are not definitive, however, here the record also includes different duties for the proffered position. The difference in the descriptions of job duties is most notable in counsel's table of duties submitted on appeal wherein he lists four general duties found in the initial description that he alleges correspond to the O*NET's job description for an industrial-organizational psychologist and an additional nine duties that he provided in response to the RFE that he alleges correspond to the same job description found in the O*NET report. As found above, counsel does not identify the source of these additional duties and they do not correspond to the initially described duties. It appears the addition of these duties is an attempt to make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. However, 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); see also *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

Moreover, in response to the RFE, counsel claimed that the beneficiary "will utilize her knowledge of industrial/organizational psychology to assist the enterprise services team by conducting an IT impact assessment of the project" and that "this is not a computer related position, but involves research and analysis of the impact of a computer systems change on an organization." It thus appears that counsel and the petitioner in its initial letter in support are relying on the beneficiary's background to establish that the position is a specialty occupation. However, USCIS cannot determine if a particular job is a specialty occupation based on the qualifications of the beneficiary. A beneficiary's credentials to perform a particular job are relevant only when the job is first found to qualify as a specialty occupation. USCIS is required

to follow long-standing legal standards and determine first, whether the proffered position qualifies as a specialty occupation, and second, whether an alien beneficiary was qualified for the position at the time the nonimmigrant visa petition was filed. *Cf. Matter of Michael Hertz Assoc.*, 19 I&N Dec. 558, 560 (Comm'r 1988) ("The facts of a beneficiary's background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation].").

Further, counsel claims that the proffered position is closely aligned to the position of "Psychologist" as described in the Department of Labor's *Occupational Outlook Handbook* (*Handbook*). Upon review of the petitioner's submitted job duties, we do not find a description of duties that includes "apply psychology to the workplace by using psychological principles and research methods to solve problems and improve the quality of work life;" "study issues such as workplace productivity, management or employee working styles, and employee morale;" "work with management on matters such as policy planning, employee screening or training, and organizational development." The job description provided by the petitioner does not describe any psychological principles that will be utilized by the beneficiary, or studies that will be performed by the beneficiary. The duties of the proffered position vary greatly from the duties listed in the *Handbook* for Industrial-Organizational Psychologists.

We agree with the director that the job duties of the position offered to the beneficiary do not fall within the occupational category "Industrial Organizational Psychologist." Moreover, the record does not include sufficient consistent evidence regarding the proffered position in order to make an assessment of whether the proffered position qualifies as a specialty occupation. Again, it is not sufficiently clear what the beneficiary will be doing and for whom she will work. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

C. Lack of Standing to File the Petition as a United States Employer

Applying the preponderance of the evidence standard, we conclude that the petitioner has not established that it meets the regulatory definition of a United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii). Beyond the decision of the director, we will now review on a *de novo* basis the record of proceeding to determine whether the petitioner has established that it will have "an employer-employee relationship with respect to the beneficiary 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).

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

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

intending employer has filed with the Secretary [of Labor] an application under section 212(n)(1)

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

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 also* 56 Fed. Reg. 61111, 61121 (Dec. 2, 1991).

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

Although "United States employer" is defined in the regulations at 8 C.F.R. § 214.2(h)(4)(ii), it is noted that the terms "employee" and "employer-employee relationship" are not defined for purposes of the H-1B visa classification. Section 101(a)(15)(H)(i)(b) of the Act indicates that an alien coming to the United States to perform services in a specialty occupation will have an "intending employer" who will file a Labor Condition Application with the Secretary of Labor pursuant to section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1) (2012). The intending employer is described as offering full-time or part-time "employment" to the H-1B "employee." Subsections 212(n)(1)(A)(i) and 212(n)(2)(C)(vii) of the Act, 8 U.S.C. § 1182(n)(1)(A)(i), (2)(C)(vii) (2012). Further, the regulations indicate that "United States employers" must file a Petition for a Nonimmigrant Worker (Form I-129) in order to classify aliens as H-1B temporary "employees." 8 C.F.R. § 214.2(h)(1), (2)(i)(A). Finally, the definition of "United States employer" indicates in its second prong that the petitioner must have an "employer-employee relationship" with the "employees under this part," i.e., the H-1B beneficiary, and that this relationship be evidenced by the employer's ability to "hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer").

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

The United States Supreme Court has determined that where federal law fails to clearly define the

term "employee," courts should conclude that the term was "intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (hereinafter "*Darden*") (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). The Supreme Court stated:

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

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

In this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. See generally 136 Cong. Rec. S17106 (daily ed. Oct. 26, 1990); 136 Cong. Rec. H12358 (daily ed. Oct. 27, 1990). On the contrary, in the context of the H-1B visa classification, the regulations define the term "United States employer" to be even more restrictive than the common law agency definition.³

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

³ While the *Darden* court considered only the definition of "employee" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(6), and did not address the definition of "employer," courts have generally refused to extend the common law agency definition to ERISA's use of employer because "the definition of 'employer' in ERISA, unlike the definition of 'employee,' clearly indicates legislative intent to extend the definition beyond the traditional common law definition." See, e.g., *Bowers v. Andrew Weir Shipping, Ltd.*, 810 F. Supp. 522 (S.D.N.Y. 1992), *aff'd*, 27 F.3d 800 (2nd Cir.), *cert. denied*, 513 U.S. 1000 (1994).

definition regarding the terms "employee" or "employer-employee relationship" combined with the agency's otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition" or, more importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. *Cf. Darden*, 503 U.S. at 318-319.⁴

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).⁵

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

The factors indicating that a worker is or will be an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. *Darden*, 503 U.S. at 323-324; *Clackamas*, 538 U.S. at 445; *see also* *Restatement (Second) of Agency* § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. *See Clackamas*, 538 U.S. at 445; *see also* *New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1) (adopting a materially identical test and indicating that said test was based on the *Darden* decision); *see also* *Defensor v. Meissner*, 201 F.3d 384, 388 (5th Cir. 2000) (determining that hospitals, as the recipients of beneficiaries' services, are the "true employers" of H-1B nurses under 8 C.F.R. § 214.2(h), even though a medical contract service agency is the actual petitioner, because the hospitals ultimately hire, pay, fire, supervise, or otherwise control the work of the beneficiaries). It is important to note, however, that the factors listed in *Darden* and *Clackamas* are not exhaustive

⁴ To the extent the regulations are ambiguous with regard to the terms "employee" or "employer-employee relationship," the agency's interpretation of these terms should be found to be controlling unless "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359, 109 S.Ct. 1835, 1850, 104 L.Ed.2d 351 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945))).

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

and must be evaluated on a case-by-case basis. Other aspects of the relationship between the parties relevant to control may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met; however, the fact finder must weigh and compare a combination of the factors in analyzing the facts of each individual case. The determination must be based on all of the circumstances in the relationship between the parties, regardless of whether the parties refer to it as an employee or as an independent contractor relationship. See *Clackamas*, 538 U.S. at 448-449; *New Compliance Manual* at § 2-III(A)(1).

Furthermore, when examining the factors relevant to determining control, USCIS must assess and weigh each actual factor itself as it exists or will exist and not the claimed employer's right to influence or change that factor, unless specifically provided for by the common-law test. See *Darden*, 503 U.S. at 323-324. For example, while the assignment of additional projects is dependent on who has the *right to* assign them, it is the *actual* source of the instrumentalities and tools that must be examined, 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).

Applying the *Darden* and *Clackamas* tests to this matter, 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."

The petitioner claims that it will have an employer-employee relationship with the beneficiary and that the beneficiary will work at the end-client, [REDACTED]

As previously noted, the petitioner submitted a copy of an MSA between itself and [REDACTED], effective November 22, 2011. It is not clear who [REDACTED] is and how they are connected to the claimed end client, [REDACTED]. As the petitioner did not provide a consulting agreement with [REDACTED], it is not possible to ascertain the relationship between the petitioner and the claimed end client, [REDACTED] and any restrictions or conditions [REDACTED] has placed on the petitioner's right to hire, fire, and otherwise control the beneficiary. Without a consulting agreement, and accompanying purchase order or statement of work, it is not possible to determine the scope of services, the length of time the services are requested, and the day-to-day control over the beneficiary. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

We have reviewed the two letters from [REDACTED] Account Service Executive, [REDACTED] confirming that the beneficiary is employed as an "agency contractor" and has been working as a "Technical Senior Analyst" since January 23, 2013. However, these letters provide only an overview of the proposed duties the beneficiary was performing for [REDACTED]. While the letter confirmed that the beneficiary has been assigned to [REDACTED] the letter does not

include specific dates to indicate that [REDACTED] will continue to use the beneficiary's services through September 13, 2016. In addition, there is no information regarding who will directly supervise the beneficiary in the day-to-day performance of her work. Further, the letters do not reference an MSA, or other document that connects the petitioner to [REDACTED]. Finally, the letters do not detail any agreement with the petitioner that defines the terms and conditions of the business relationship, including the right to hire, pay, fire, supervise, or otherwise control the work of the beneficiary.

Although the petitioner submitted, among other things, a copy of its organizational chart, a copy of the summary of terms of agreement under which beneficiary will be employed, and a copy of its performance appraisal process, these documents also do not detail the beneficiary's proposed duties or otherwise establish who has the right to fire, supervise or otherwise control the performance of the beneficiary's work. 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 an alien 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 alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary's employer. Here, the record contains insufficient evidence to demonstrate that the petitioner will be overseeing and directing the work of the beneficiary. Without full disclosure of all of the relevant factors, we are unable to find that the requisite employer-employee relationship will more likely than not exist between the petitioner and the beneficiary.

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). Based on the tests outlined above, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii).

Moreover, the petition must also be denied due to the petitioner's failure to establish eligibility at the time of filing and to proffer non-speculative employment to the beneficiary. As the record does not include any probative evidence that the petitioner has work for the beneficiary for the requested employment period, beginning October 1, 2013 to September 13, 2016, we also find that the petitioner has failed to establish that the petition was filed for non-speculative work for the beneficiary that existed as of the time of the petition's filing for the entire period requested. 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 (Reg. Comm'r 1978). Thus, even if the petitioner established that it would be the beneficiary's United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii), which it has not, the

petitioner has not demonstrated that it would maintain such an employer-employee relationship for the duration of the period requested.⁶

D. Failure to Establish that Proffered Position Qualifies as a Specialty Occupation

Beyond the decision of the director, we will now address the petitioner's failure to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions.

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

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

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

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

⁶ The agency made clear long ago that speculative employment is not permitted in the H-1B program. 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.

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

Specialty occupation means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

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

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

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

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), USCIS consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific

specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F.3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum, for entry into the occupation, as required by the Act.

We note that, as recognized by the court in *Defensor, supra*, where the work is to be performed for entities other than the petitioner, evidence of the client's job requirements is critical. *See Defensor v. Meissner*, 201 F.3d at 387-388. That is, it is necessary for the end client to provide sufficient information regarding the proposed job duties to be performed at its location in order to properly ascertain the minimum educational requirements necessary to perform those duties. *Id.* 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.* at 384. 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.

In the instant matter, the record of proceeding does not include sufficient information from the alleged end client, [REDACTED] regarding the specific job duties to be performed by the beneficiary. Although Ms. [REDACTED] in her June 24, 2013 letter, provided an overview of the beneficiary's responsibilities in support of the Massachusetts Executive Office of Health and Human Services Mapping and Remediation project, the letter does not include sufficient probative information to assess whether these responsibilities require the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation. In addition, as noted above, the letters do not establish that the beneficiary will actually be employed for [REDACTED] for the requested employment period.

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary, therefore, precludes a finding that the proffered position satisfies any criterion at

8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

Here, we review the opinion letter counsel submitted in support of the assertion that the proffered position qualifies as a specialty occupation. The letter is prepared by [REDACTED] Stern School of Business Administration, [REDACTED] and is dated August 5, 2013. Dr. [REDACTED] stated, "[a]s a point of central reference, I find that the position of 'Organizational Analyst' is a specialty occupation requiring at least bachelor's-level educational training in organizational development, industrial/organizational psychology, human resources management or a related field." We reviewed the letter in its entirety. However, as discussed below, the letter from Dr. [REDACTED] is not persuasive in establishing that the proffered position qualifies as a specialty occupation position. In addition, as discussed above, the petitioner has not provided sufficient evidence to establish that the proffered position is in fact an organizational analyst as discussed in this letter.

Upon review of the opinion letter, there is no indication that Dr. [REDACTED] possesses any knowledge of the petitioner's proffered position and its business operations beyond the information provided by counsel. Dr. [REDACTED] does not demonstrate or assert in-depth knowledge of the petitioner's specific business operations or how the duties of the position would actually be performed in the context of the petitioner's business enterprise. Moreover, Dr. [REDACTED] did not indicate that he visited the petitioner's business, observed the petitioner's employees, interviewed them about the nature of their work, or documented the knowledge that they apply on the job. Furthermore, there is no indication that Dr. [REDACTED] investigated or consulted any agreements leading to the assignment of the beneficiary at a third party. Finally, there is no indication that the petitioner and counsel advised Dr. [REDACTED] that the petitioner characterized the proffered position as a low, entry-level organizational analyst, for a beginning employee who has only a basic understanding of the occupation (as indicated by the wage-level on the LCA).⁷ It appears that Dr. [REDACTED] would have found this information relevant for his opinion letter.

Without this information, the petitioner has not demonstrated that Dr. [REDACTED] possessed the requisite information necessary to adequately assess the nature of the petitioner's position and appropriately determine the educational requirements based upon the job duties and responsibilities. Dr. [REDACTED] has not provided sufficient facts that would support the contention

⁷ The Level I wage-rate indicates that the beneficiary will be expected to perform routine tasks that require limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results. 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.

that the proffered position requires at least a bachelor's degree in a specific specialty. He does not provide a sufficiently substantive and analytical basis for his opinion.

We note that although Dr. [REDACTED] may be a recognized authority on various topics, he has failed to provide sufficient information regarding the basis of his claimed expertise on this particular issue. That is, he has not established his expertise pertinent to the hiring practices of organizations seeking to fill positions similar to the proffered position in the instant case. Dr. [REDACTED] provides his extensive resume and asserts that he is familiar with the nature and depth of knowledge and skill gained by university students who study within a variety of business fields, including Organizational and Human Resources Development and that he is familiar with how that knowledge is recruited. However, without further clarification, it is unclear how Dr. [REDACTED] education, training, skills or experience would translate to expertise or specialized knowledge regarding the *current recruiting and hiring practices* of companies engaged in information technology solutions (as designated by the petitioner in the Form I-129) or similar organizations, for parallel positions. Dr. [REDACTED] opinion letter does not cite specific instances in which his past opinions have been accepted or recognized as authoritative *on this particular issue*. There is no indication that Dr. [REDACTED] has published any work or conducted any research or studies pertinent to the educational requirements for such positions (or parallel positions) in the petitioner's industry for similar organizations, and no indication of recognition by professional organizations that he is an authority on the specific recruiting and hiring requirements of companies such as the petitioner.

In summary, and for each and all of the reasons discussed above, we conclude that the opinion letter rendered by Dr. [REDACTED] is not probative evidence to establish the proffered position as a specialty occupation. The conclusion reached by Dr. [REDACTED] lacks the requisite specificity and detail pertinent to this specific position and is not supported by independent, objective evidence demonstrating the manner in which he reached such conclusion. There is an inadequate factual foundation established to support the opinion and the opinion is not in accord with other information in the record. 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 required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988). As a reasonable exercise of our discretion we discount the advisory opinion letter as not probative of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). For efficiency's sake, we hereby incorporate the above discussion and analysis regarding the opinion letter into each of the grounds in this decision for dismissing the appeal.

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 as a specialty occupation. For this additional reason, the appeal will be dismissed and the petition will be denied.

We do not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient documentation to demonstrate that the position proffered here 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. Therefore, we need not and will not address the beneficiary's qualifications.

E. Lack of an LCA That Corresponds to the Petition

Also, beyond the decision of the director, the petitioner failed to provide a certified LCA that corresponds to the petition.

Specifically, the LCA submitted with the petition was certified for SOC (O*NET/OES) Code 19-3032 or "Industrial-Organizational Psychologists." For the reasons discussed, *supra*, the job as described by the petitioner does not fall within this occupational classification. Thus, the LCA submitted with the petition does not correspond to the petition.

The LCA serves as the critical mechanism for enforcing section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). *See* 65 Fed. Reg. 80110, 80110-80111 (indicating that the wage protections in the Act seek "to protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring temporary foreign workers" and that this "process of protecting U.S. workers begins with [the filing of an LCA] with [DOL]."). Again, according to section 212(n)(1)(A) of the Act, an employer must attest that it will pay a holder of an H-1B visa the higher of the prevailing wage in the "area of employment" or the amount paid to other employees with similar experience and qualifications who are performing the same services. *See* 20 C.F.R. § 655.731(a); *Venkatraman v. REI Sys., Inc.*, 417 F.3d 418, 422 & n.3 (4th Cir. 2005); *Patel v. Boghra*, 369 Fed.Appx. 722, 723 (7th Cir. 2010); *Michal Vojtisek-Lom & Adm'r Wage & Hour Div. v. Clean Air Tech. Int'l, Inc.*, No. 07-97, 2009 WL 2371236, at *8 (Dep't of Labor Admin. Rev. Bd. July 30, 2009).

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 of H-1B visa classification.

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 record does not include sufficient probative evidence to establish that the proffered position is that of an "Industrial-Organizational Psychologist." Accordingly, the petitioner has failed to submit a valid LCA that has been certified for the proper occupational classification, and the petition must be denied for this additional reason.

III. CONCLUSION

An application or petition that fails to comply with the technical requirements of the law may be denied by us even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 145 (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when we deny a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that we abused our discretion with respect to all of our enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

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

ORDER: The appeal is dismissed. The petition is denied.