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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

DATE: DEC 08 2014

OFFICE: VERMONT SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner:

Beneficiary:

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:

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, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a forty-employee "Software Development Services" business established in [REDACTED].¹ In order to employ the beneficiary in what it designates as a full-time "Programmer Analyst" position at a salary of \$60,600 per year, the petitioner seeks to classify him 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, concluding that the evidence of record does not demonstrate that the position proffered qualifies as a specialty occupation.

On appeal, counsel for the petitioner asserts that the director's basis for denial was erroneous and contends that the petitioner satisfied the evidentiary requirements.

The record of proceeding contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's letter denying the petition; and (5) the Form I-290B, Notice of Appeal or Motion, and supporting documentation. We have reviewed the record in its entirety before issuing our decision.

Upon review of the entire record of proceeding, we find that the evidence of record does not overcome the director's grounds for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

I. FACTUAL AND PROCEDURAL HISTORY

The petitioner filed the Form I-129 on April 1, 2013, listing its business address as [REDACTED] Delaware. The petitioner indicates that it is a forty-employee "Software Development Services" company. Regarding the beneficiary, the petitioner indicated on the Form I-129 that it seeks to employ the beneficiary as a "Programmer Analyst" at the petitioner's business address above. The petitioner checked the box on the Form I-129 at Part 5, Question 5 indicating that the beneficiary will not work off-site. On the Form I-129 Supplement H, H

¹ The petitioner has made varying claims regarding when its company was established. On the Form I-129 and in its letter of support dated April 1, 2013, the petitioner claims to have been established in [REDACTED]. However, the petitioner submitted its certificate of good standing from the State of New Jersey confirming that it was established on September [REDACTED]. Moreover, in the petitioner's document entitled [REDACTED] "Technical Document," the petitioner indicated that it was established in July [REDACTED]. We also note that, in the appeal brief, counsel asserts that the petitioner has been "engaged in software design and development for the preceding nine (9) years," yet later in the same brief describes the petitioner as "an eight (8) year old consulting/contracting company."

Classification Supplement to Form I-129, the petitioner described the proposed duties as: "As a member of the [REDACTED] team, will define, develop, test, analyze, and maintain highly complex new and existing software applications in support of the project requirements."

The Labor Condition Application (LCA) submitted to support the visa petition states that the proffered position is a programmer analyst, and that it corresponds to Standard Occupational Classification (SOC) code and title 15-1121, Computer Systems Analysts, from the Occupational Information Network (O*NET). The LCA further states that the proffered position is a Level I, entry-level, position.

In support of the initial petition, the petitioner submitted a letter, dated March 22, 2013, describing itself as an information technology firm established to provide software services, products, and business solutions to clients throughout the United States. The petitioner states that it is actively seeking to develop its own proprietary software platform called '[REDACTED]' which it describes as "a fully integrated professional services, automated software system that collects, stores, analyzes and manages information on employees, human resources, accounts management, employee management, sales, customers, resources, etc." The petitioner states that it "has developed a comprehensive business plan, obtained the requisite facilities in [its] Delaware offices, and [has] allocated \$500,000.00 as an initial product development budget for 2013." To "bring [REDACTED] to fruition," the petitioner states that it is "actively seeking out a team of technical professionals including software quality assurance analysts, programmer analysts, business analyst, network systems administrators and software engineers."

With regards to the proffered position, the petitioner asserts that it will assign the beneficiary to the [REDACTED] in-house software development project as a programmer analyst, which it envisions as a long-term assignment extending until September 12, 2016. The petitioner affirms that the beneficiary's work location would remain at the petitioner's offices located at the address stated on the Form I-129. The petitioner then describes the duties of the proffered position as follows:

Analyze, design, develop, and implement highly complex new and existing software applications in support of the [REDACTED] software development project; Convert business and systems requirements into detailed system design and technical specifications according to [REDACTED] team guidelines; Create work effort estimates and may provide input to project schedule or work breakdowns; Convert system designs and technical specifications into program code; Analyze and troubleshoot existing program code and correct errors as required; Run quality assurance tests to find errors and confirm that those programs meet business requirements, system designs, and technical specifications; Create and maintain user, technical and operational documentation that describes program code, logic, changes and corrections; Provide technical support to end users and other support groups as established by service level agreements; Provide performance and production run monitoring for applications assigned after implementation; Interface with Business Analysts, Testers, Implementers, Clients and users if necessary to develop business reports and applications; Analyze [REDACTED] business requirements and develop system

requirement specifications; Develop various implementation plans, e.g., quality assurance, training, documentation, transition, release, software build, as required by the established software development methodology; Maintain appropriate confidentiality regarding [the petitioner's] information and product development information. Participate as a project team collaborating with other programmer analyst assigned to the [REDACTED] project.

As to the educational requirement of the proffered position, the petitioner states that it requires all its programmer analysts to possess a "minimum of a Bachelor's Degree in one of the following; [sic] Engineering, Computer Science, CIS, Mathematics, Electronics, Communications, Technology, Business Administration, Management or a related field."

In support of the petition, the petitioner submitted, *inter alia*, a document entitled [REDACTED] "Technical Document." This document provides a broad overview of the petitioner, such as its name, type of organization, financial status, revenue growth, services offered, and history. It also provides a broad overview of [REDACTED] such as its key offerings, features, and timelines for development.

In pertinent part, the "Technical Document" lists the "Product Development Budget value" as "\$500,000.00," the "Team size" as "7-10 people," and the duration of the project as "Over 1.5 years, ongoing," which is broken down into four phases. Under the sub-section entitled "Product Development," the document states that the petitioner "has a dedicated vertical 'Strategic Business Unit' to develop, market and service similar IT consulting clients," and that its "sales team is headed by one of the finest in the small industry segment."

Under the sub-section entitled "The product evolution process and Life Cycle," the "Technical Document" lists the following processes: (1) Market Research and needs establishment; (2) Defining concept; (3) Concept testing; (4) Gathering requirements and analyzing the need; (5) Building business workflow; (6) Defining architecture; (7) Defining detailed design; (8) Build prototype; (9) Testing prototype with user community; (10) Analyzing all the market/user/target audience inputs and deciding a go-no go; (11) Define a Project/Product plan; (12) Final business work flow analysis and definition with latest inputs; (13) Finalize the business workflow; (14) Finalize architecture; (15) Finalize detailed design specifications; (16) Build module by module; (17) Unit and functional testing module by module; (18) Fix bugs/functionalities and go through test-build-test process till the time modules become robust and bug free; (19) Integrate, test-integrate-test till the product becomes robust; (20) Build help, user manuals and installation guide; (21) Shrink wrap, mass production and packaging; (22) Market (collateral, Website, conduct campaigns) and Sales (direct sales, demo and P.O. closure); (23) Deliver, register, train and support; (24) On going support; and (25) Bug fixing, enhancement and delivering upgrades.

Under the sub-section entitled "Product/Project Status," the "Technical Document" provides the following timeline: (1) Test concept: Q1 2013; (2) Build proto type: Q1/Q2/Q3/Q4 2013; (3) Test the prototype: Q2/Q3 2013; (4) Finalize the product and project plan: Q3 2013; (5) Build and Test the Base Version: Between Q4 2013 and Q1/Q2 2014; (6) Shrink Wrap the base module:

December, 2013; (7) Launch the base version 1.0 product: January 15, 2014; (8) Market, sell and support: Q2, 2014; (9) Start the activity on Enterprise version: Q3 2014; (10) Complete Enterprise version 1.0: Q4 2014; (11) Launch Enterprise version: January 2015; (12) Launch Professional Version: July 2015; (13) Build enhancements: Ongoing; (14) Add more modules: 2015 onwards, ongoing; (15) Build user groups: 2014; (16) User meets: Q4 2013/Q1 2014; and (17) Build advisory board: 2014.

The petitioner submitted a separate document which it characterizes as a "Product Profile." This document provides a broad overview of [REDACTED] anticipated offerings and key features. The "Product Profile" also briefly outlines the several modules that will be available under the system, such as Professional Services Automation, Employee Tracking System, Time Tracking, Customers Tracking, Partner Portals, Human Personnel Management, Company Administration, Accounting, and Help Desk Management.

The petitioner submitted a "Statement of Qualifications & Business Plan" which primarily provides general information about the petitioner, such as the petitioner's "guiding principles," staffing process, recruitment methodology, and employment benefits. It also provides a brief, broad overview of [REDACTED] which it describes as its "Flagship Product." It describes [REDACTED] as "a cost-effective and affordable Professional Services Automation software, capable of automating the entire functioning of the Sales, Recruitment, HR, Finance, Immigration and other activities of a Software Consulting Firm," but provides no substantial details about the software.

The petitioner provided its Organizational Chart for the "Product Development Team." The chart does not identify any employees by name or the exact number of employees filling each position.

The petitioner submitted evidence that the beneficiary received a Degree of Bachelor of Technology (Information Technology) from [REDACTED] in India in May 2009.

The director issued an RFE instructing the petitioner to submit, *inter alia*, additional documentation establishing that has specialty occupation work available for the entire requested H-1B validity period.

In response to the RFE, counsel reaffirmed that the beneficiary would be "assigned specifically to the [REDACTED] technical team," and provided the same list of duties for the proffered position as previously provided by the petitioner. Counsel reaffirmed that the proffered position requires "the minimum of a Bachelor's Degree or Bachelor's Degree equivalent in Engineering, Computer Science, CIS, Mathematics, Electronics, Communications, Technology, Business Administration, Management or a related field."

In support of the RFE, the petitioner resubmitted copies of the [REDACTED] "Technical Document" and other documentation submitted with the initial petition. The petitioner also submitted, *inter alia*:

- (1) The lease to its business premises at the address listed on the Form I-129;
- (2) The petitioner's Employee Handbook; and

- (3) An evaluation of the beneficiary's foreign education reflecting that his foreign degree is the academic equivalent of a U.S. Bachelor's Degree in Information Technology.

The director denied the petition, concluding that the evidence of record does not demonstrate that the proffered position qualifies for classification as a specialty occupation. In particular, the director observed the lack of evidence documenting the petitioner's claimed business activities.

Counsel filed the instant appeal on behalf of the petitioner. In the supporting brief, counsel simultaneously addressed the denial of the instant petitions as well as of four other petitions filed by the petitioner. Explaining that "each of the cases was premised on the same basis or extremely similar basis for denial[,] Petitioner has elected to address each of these denials as a group." On appeal, counsel asserted that the petitioner is a "bona fide business operation and has engaged in software design and development for the preceding nine (9) years." Counsel also asserted that the petitioner has provided an "extensive amount of evidence supporting the bona fides of the [petitioner's] business operations and the internal project known as [REDACTED]" Counsel emphasized that the petitioner has "secured adequate funding" in the form of an application for \$400,000 additional line of credit from [REDACTED] which counsel stated "remains open and available."

In support of the appeal, the petitioner submitted, *inter alia*, a letter from [REDACTED] confirming that the petitioner applied for a Line of Credit for more than \$400K in February 2013, of which \$100,000 was initially granted by the bank and is available for use. The petitioner also submitted a new organizational chart depicting its overall company and twelve pages of documentation bearing the logo of "Employee Time and Accounting Application" next to the word [REDACTED] printed from the root URL of [http://\[REDACTED\]](http://[REDACTED])

II. STANDARD OF PROOF

As a preliminary matter and 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.

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.

III. EMPLOYER-EMPLOYEE RELATIONSHIP

Beyond the decision of the director, the petitioner has not established that it meets the regulatory definition of a United States employer. 8 C.F.R. § 214.2(h)(4)(ii). Specifically, the petitioner has not established that it will have "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." *Id.*

A. The Law

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).

B. Analysis

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.²

² 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).

However, in this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. Instead, in the context of the H-1B visa classification, the term "United States employer" was defined in the regulations to be even more restrictive than the common law agency definition. A federal agency's interpretation of a statute whose

Specifically, the regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to engage a person to work within the United States, and to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee" or "employer-employee relationship" combined with the agency's otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition" or, more importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. *Cf. Darden*, 503 U.S. at 318-319.³

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).⁴

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

administration is entrusted to it is to be accepted unless Congress has spoken directly on the issue. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-845 (1984).

³ 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))).

⁴ 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).

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 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, we find that 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."

In the instant matter, the petitioner asserts that the beneficiary will work exclusively on its in-house project, [REDACTED] at its business premises. However, the petitioner has not submitted sufficient, credible evidence establishing that [REDACTED] is a bona fide internal project as claimed. While the petitioner submitted internally generated documents describing its [REDACTED] project, i.e., the "Technical Document," the "Product Profile," and "Statement of Qualifications & Business Plan," these documents are duplicative in content and provide only broad, generalized overviews of [REDACTED]. They do not explain with any specificity what actual work has been and will be done on the [REDACTED] project.

For example, the "Product Profile" states that [REDACTED] is a "Professional Services Automation software which brings together all the important elements including Employees, Clients, Vendors,

Requirements, Placements, Timesheets, Invoices." However, the document does not provide any specific details related to the above "elements" or to the project's actual development. Similarly, the "Statement of Qualifications & Business Plan" states that [REDACTED] is a cost-effective and affordable Professional Services Automation software, capable of automating the entire functioning of the Sales, Recruitments, HR, Finance, Immigration and other activities of a Software Consulting Firm." This document does not provide any specific details related to the above-listed functions or the project's actual development.

While the "Technical Document" provides slightly more information about the [REDACTED] project, the information provided is still too abstract and vague to establish what actual work has been and will be done by the petitioner. For instance, this document lists the twenty-five overall "processes" underneath the sub-section entitled "product evolution process and Life Cycle." Under Process 6, "Defining architecture," it lists the following steps: (1) "Based on work flow"; (2) "Define technology and tools that will be used to build the application"; and (3) "Define technical architecture." Under Process 7, "Defining detailed design," it lists the following steps: (1) "Once tools, technology and detailed technical architecture is detailed"; (2) "Define various application modules"; (3) "Do a detailed design of application"; and (4) "And flow of business information." The document provides no further descriptions of the specific tasks to be performed underneath each process, and no information about who will perform the specific tasks and when these tasks are scheduled to be performed is provided. Moreover, no technical information about the specific tasks to be performed is provided, despite the name of the document as a "Technical Document." We note that the document states that the overall "Team Size" is "7-10 people," but it does not provide any further details such as the names of the team members, the exact positions they will hold, and their specific duties.

The timelines provided within the "Technical Document" are vague and inherently inconsistent. For example, the document states that the project will consist of four phases: Phase 1 lasting four months; Phase 2 lasting six months; Phase 3 lasting four months; and Phase 4 lasting "4 months + Ongoing." However, in the "product evolution process and Life Cycle" sub-section, the document lists twenty-five separate processes, without any explanation regarding which of the twenty-five listed processes comprise which phase. In the sub-section entitled "Product/Project Status," the document lists yet another seventeen "statuses" that are different from the twenty-five previously listed processes. There is no explanation regarding which of the seventeen statuses corresponds to the twenty-five previously listed processes, or which of the seventeen statuses comprise each phase. Moreover, while the document states, for example, that "Test concept" will occur in "Q1 2013" [duration of three months], "Build proto type" will occur in "Q1/Q2/Q3/Q4 2013" [duration of one year], and "Test the prototype" will occur in "Q2/Q3 2013" [duration of six months], there is no explanation as to how this corresponds to the first phase lasting four months, the second phase lasting six months, and the third phase lasting four months. Overall, the descriptions of the project's processes, phases, and statuses, and their projected duration dates, are unclear and inconsistent throughout the document.

We also note deficiencies and inconsistencies regarding the petitioner's staffing and resources for the [REDACTED] project. Specifically, the petitioner indicated that it will shrink wrap, mass produce,

market, and directly sell the [REDACTED] product. The petitioner specifically asserted that it has a "dedicated vertical 'Strategic Business Unit'" for development, marketing, and support services, as well as a "sales team [that] is headed by one of the finest in the small industry segment." However, the petitioner has not identified who will perform the duties necessary to accomplish its production, marketing, and direct sales duties. We note that neither version of the petitioner's organizational charts depicts any sales and marketing personnel/team or a "Strategic Business Unit."

With respect to funding for the [REDACTED] project, the petitioner asserted that it has "allocated \$500,000.00 as an initial product development budget for 2013." On appeal, counsel states that the petitioner "has secured adequate funding" for this project, in the form of a \$400,000.00 additional line of credit from [REDACTED]. However, the letter from [REDACTED] reflects that the bank has only extended an initial line of credit of \$100,000 to the petitioner. As such, the petitioner's assertions that it has "secured adequate funding" in the form of a \$400,000 or 500,000 line of credit are uncorroborated.⁵ The petitioner has not submitted any other explanation for how it will fund the [REDACTED] project, which will purportedly consist of a team of 7-10 technical professionals including software quality assurance analysts, programmer analysts, business analyst, network systems administrators and software engineers.

Finally, although the "Technical Document" indicates that the processes of "Test concept," "Build proto type," and "Test the prototype" should have already begun or been completed as of the date of filing, the petitioner submitted insufficient credible evidence of actual work performed on each of these processes. We note that the petitioner submitted twelve pages of documentation bearing the logo of [REDACTED] next to the word [REDACTED] on the top, printed from the root URL of [http://\[REDACTED\]](http://[REDACTED]). However, the petitioner provided no explanation regarding this documentation, such as what this documentation is supposed to represent, who created the documentation and the underlying system (if any), for whom it was created, when it was created, and for what purpose it was created. Absent any type of explanation, we cannot find these documents to be credible evidence that [REDACTED] exists and is actively being developed by the petitioner.

Based on the lack of relevant detailed information about the [REDACTED] project, combined with the lack of credible evidence establishing the existence and development of this project, the evidence of record fails to establish that [REDACTED] is a bona fide in-house project of the petitioner. There is insufficient probative evidence that the beneficiary will be employed to exclusively perform in-house services on this project, as claimed. Accordingly, the evidence of record fails to establish the substantive nature of the work to be performed by the beneficiary.

The failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the petitioner qualifies as a U.S. employer that has an employer-employee

⁵ While the bank letter also states that the petitioner has approximately \$202,000 in checking deposits, the petitioner's total checking deposits, in addition to the \$100,000 line of credit, still do not amount to the \$400,000 or \$500,000 the petitioner asserted it has "secured" for this project.

relationship with the beneficiary. *See* 8 C.F.R. § 214.2(h)(4)(ii); Section 101(a)(15)(H)(i)(b) of the Act. The key element in this matter is who will have the ability to control the work of the beneficiary for the duration of the H-1B petition. As discussed earlier, such indicia of control include when, where, and how a worker performs the job, among other factors. *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. Here, without a credible explanation and evidence of what work will be assigned to the beneficiary, the circumstances of his work, as well as other relevant factors necessary to determine whether the petitioner will have the ability to control the beneficiary's work, we are unable to find that the requisite employer-employee relationship will exist between the petitioner and the beneficiary. The petitioner's submission of its Employee Handbook and its claims that it will act as the beneficiary's employer are insufficient to establish that it will ultimately have the ability to control the work of the beneficiary for the duration of the H-1B petition. For the above reasons, beyond the decision of the director, the petition must be denied.

IV. SPECIALTY OCCUPATION

The material deficiencies in the record regarding the employer-employee relationship between the petitioner and the beneficiary preclude the approval of the petition. However, for thoroughness we will next address whether the position proffered here qualifies as a specialty occupation. 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. We find that the director correctly noted in this matter that without evidence of a qualifying position at the petitioner's facility, USCIS cannot determine whether the position qualifies as a specialty occupation. Upon review, we affirm that the evidence of record fails to establish that the proffered position is a specialty occupation.

A. The Law

To meet its burden of proof in establishing the proffered position as a specialty occupation, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one 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 term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires [(1)] 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 requires [(2)] 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, the 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 384, 387 (5th Cir. 2000). To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), 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 rely simply upon a proffered position's title. The specific duties of the 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 beneficiary, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d at 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.

As recognized in *Defensor v. Meissner*, it is necessary for the end-client to provide sufficient information regarding the proposed job duties to be performed at its location(s) in order to properly ascertain the minimum educational requirements necessary to perform those duties. *See Defensor*, 201 F.3d at 387-388. In other words, as the nurses in that case would provide services to the end-client hospitals and not to the petitioning staffing company, the petitioner-provided job duties and alleged requirements to perform those duties were irrelevant to a specialty occupation determination. *See id.*

B. Analysis

Here, the record of proceeding in this case is devoid of sufficient information regarding the specific job duties to be performed by the beneficiary. As discussed earlier in this decision, the evidence of record does not corroborate the petitioner's assertions that [REDACTED] is a bona fide in-house project, and that the beneficiary will be assigned exclusively to this project.

Assuming *arguendo* that [REDACTED] is a bona fide in-house project to which the beneficiary will be assigned, we still find that the petitioner has failed to adequately describe the duties to be performed by the beneficiary so that we may discern the substantive nature of the position. More specifically, in establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in the context of its business operations. The petitioner has not done so here.

In this matter, the record of proceeding presents the duties comprising the proffered position in terms of abstract and generalized duties. The petitioner has not specifically explained or documented the

duties and role of the proffered position with respect to the [REDACTED] project. There is no specific mention of the role of the Programmer Analyst - or the beneficiary individually - in any of the petitioner's internally generated documents describing its [REDACTED] project. Some of the listed duties are so broadly and vaguely described that they could encompass duties that do not involve specialty occupation work, or work with the [REDACTED] project at all. For instance, the petitioner listed the duty of "[p]rovide technical support to end users and other support groups as established by service level agreements." The petitioner has not explained what duties would be included in providing "technical support," and what "end users" and "service level agreements" the beneficiary would service. Likewise, on the Form I-129 Supplement H, the petitioner described the proposed duties as "define, develop, test, analyze, and maintain highly complex new and existing software applications." The petitioner has not specifically identified what "new and existing software applications" the beneficiary would service. The petitioner's statement that the beneficiary will work on "existing" software applications is particularly troublesome, considering that the petitioner asserts that it is employing the beneficiary to "bring [REDACTED] to fruition."

Thus, in light of the vague descriptions of the proposed duties and the overall failure of the petitioner to establish that [REDACTED] is a bona fide in-house project, the evidence of record fails to establish the substantive nature of the work to be performed by the beneficiary.

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.

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 denied.

Finally, we note that even if the petitioner were able to establish the substantive nature of the work to be performed by the beneficiary, we still could not find that the proffered position qualifies as a specialty occupation. Specifically, the petitioner asserts that the proffered position requires a "minimum of a Bachelor's Degree in one of the following; [sic] Engineering, Computer Science, CIS, Mathematics, Electronics, Communications, Technology, Business Administration, Management or a related field."

The claimed requirement of a degree in such majors as "Engineering" or "Business Administration" for the proffered position, without specialization, is inadequate to establish that the proposed position qualifies as a specialty occupation. The petitioner must demonstrate that the proffered

position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

To prove that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As discussed *supra*, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. Although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).

Further, the petitioner's claimed entry requirement of at least a bachelor's degree in a wide variety of majors, without more, does not denote a requirement in a specific specialty. Again, since there must be a close correlation between the required body of highly specialized knowledge and the position, a minimum entry requirement of a degree in disparate fields, such as Computer Science and Communications, would not meet the statutory requirement that the degree be "in *the* specific specialty (or its equivalent)," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added). This has not been established here.

As such, even if the substantive nature of the work had been established, the instant petition could not be approved for this additional reason.

V. CONCLUSION AND ORDER

As set forth above, we find that the evidence of record does not establish (1) an employer-employee relationship between the petitioner and the beneficiary, and (2) that the proffered position qualifies for classification as a specialty occupation. Accordingly, the director's decision will not be disturbed and the petition will be denied.

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 at 145 (noting that we conduct 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 the 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.