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



U.S. Citizenship
and Immigration
Services

DATE: **JUL 16 2014** OFFICE: VERMONT SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
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:

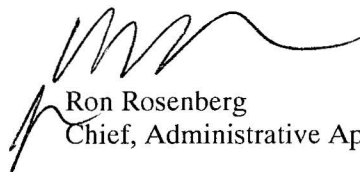
SELF-REPRESENTED

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 ("the 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.

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as an "IT Solutions & Consulting Services" company established in 1996, with 32 U.S. employees. In order to employ the beneficiary in what it designates as a "Business Analyst" position, 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 the grounds that: (1) the petitioner failed to establish an employer-employee relationship; (2) the petitioner failed to provide an itinerary; and (3) the petitioner failed to establish that the job offered qualifies as a "specialty occupation" pursuant to Section 101(a)(15)(H)(i)(b) of the INA.

The record of proceeding before us contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's notice of decision; and (5) the petitioner's Form I-290B, Notice of Appeal of Motion, 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.¹ Accordingly, the director's decision will not be disturbed. The appeal will be dismissed and the petition will remain denied.

I. PROCEDURAL AND FACTUAL BACKGROUND

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 a Business Analyst to work on a full-time basis at a salary of \$55,000 per year. In addition, the petitioner indicated that the beneficiary would be employed at [REDACTED] NY as well as at its main office located in [REDACTED], NJ. The petitioner stated that the dates of intended employment are from February 21, 2013 to February 12, 2016.²

The petitioner appended the requisite Labor Condition Application (LCA) to the petition, which indicates that the occupational classification for the position is "Computer Systems Analyst" SOC

¹ The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

² The petitioner initially marked the requested dates as February 21, 2013 to February 12, 2013 but clarified in response to the RFE that this was a typographical error and submitted a revised Form I-129 with the corrected requested dates.

(ONET/OES) Code 15-1121, at a Level I (entry-level) wage. The petitioner listed the [REDACTED] NJ and the [REDACTED] NY work locations as places of employment on the LCA.

In a letter dated February 21, 2013, and submitted with the initial petition, the petitioner stated that the beneficiary will be assigned to work at its client [REDACTED] ([REDACTED] in [REDACTED] NY through the intermediate vendor, [REDACTED] As a Business Analyst on this assignment, the petitioner described the beneficiary's duties as follows:

[The beneficiary] will continue to support the production issues. Her responsibilities will include analysis of operations and procedures to refine and convert data to programmable form. This will include design development testing implementation of mainframe EDI Projects and applications. She also will determine user requirements and study existing software to evaluate effectiveness. In addition, [the beneficiary] will be involved in the documentation of technical and functional design specifications.

The petitioner stated that the requirements for the position are "at least a Bachelor's degree or the equivalent in Computer Science/Business Administration/Management Information Systems/Engineering or a related area."

The petitioner also provided the following documentation:

- A document entitled "Itinerary and Right to control" showing the job location as [REDACTED] NY from February 21, 2013 to February 12, 2016. The document is signed by [REDACTED] HR Manager for the petitioner, and discusses the terms of the beneficiary's employment and placement at a third party client site.
- An employment agreement dated February 11, 2013 and signed by both parties.
- A copy of a "Subcontractor Agreement" between the petitioner and [REDACTED] The agreement is dated February 12, 2013 and signed by both parties. The agreement is valid for two years from the effective date and then may continue month-to-month thereafter.
- A copy of "Exhibit A- Task Order" to the petitioner's agreement with [REDACTED] signed by both parties. The task order is effective as of February 12, 2013 and provides the following details:
 - Client: [REDACTED]
 - Subcontractor Employee/Consultant: [the beneficiary]
 - Job Title: Business Analyst
 - Start Date: March 5, 2013
 - Expected Duration: 26 months
- Information regarding the petitioner's appraisal process, benefits, and company organizational chart.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and

issued an RFE on March 21, 2013. The petitioner was asked to submit evidence that a valid employer-employee relationship will exist with the beneficiary for the duration of the requested H-1B employment period, evidence regarding any project to which the beneficiary will be assigned for in-house employment, and evidence that the petitioner will have the right to control the beneficiary's work.

In response to the director's RFE, the petitioner submitted an undated letter signed by the petitioner's human resources manager. The petitioner stated again that the beneficiary will be working at [REDACTED] through the vendor [REDACTED]. Regarding the contract for the actual worksite of the beneficiary, the petitioner noted that "due to some legal issues end client [REDACTED] of education [sic] will not provide the agreement with [REDACTED]" but that a "[v]endor letter confirms that he [sic] has a valid contract with end client [REDACTED] of Education." The petitioner provided the same position description as provided in the initial submission. The petitioner also reiterated that the position requires "at least a Bachelor's degree or the equivalent in Computer Science/Business Administration/Management Information Systems/Engineering or a related area." In the same letter, the petitioner provided a second description of the educational background necessary to perform the duties of the position by rearranging and adding the acceptable bachelor's degrees to include "Business Management/Computer Science/Electronics/Management Information Systems/Engineering or a related area." In a third iteration of the requirements to perform the petitioner's business analyst position, the petitioner restated the requirements as "at least the equivalent of a Bachelor's degree in Computer Science, Engineering, Business, Math, Physics or a related technical field, or equivalent." The petitioner does not provide an explanation for the addition and deletion of the types of degrees it finds acceptable and necessary to perform the duties of the position proffered here.³

The petitioner also noted that it "is executing some projects for their [sic] clients from their [sic] office" and referred to an attached agreement and contract with its client for in-house work. The petitioner provided an exhibit entitled "In House Project Agreement with Vendor" and submitted a subcontractor agreement with [REDACTED] effective as of May 2, 2011. The subcontractor agreement noted that the petitioner "agrees to use its good faith best efforts to supply qualified Personnel as temporary technical employees to meet our project requirements from time-to-time." On appeal, however the petitioner withdraws this contract stating the following:

We are not sure how [REDACTED] came in to this petition, due to some clerical mistake they [sic] have added this agreement, and this company does not have any roll [sic] in this transaction.

The petitioner also provided the same subcontractor agreement and task order provided with the

³ 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).

initial petition. The petitioner further provided a letter from [REDACTED] on company letterhead dated April 19, 2013. The letter confirmed that "[the beneficiary] is a subcontractor of [REDACTED], is working as a Business Analyst at the [REDACTED] State Education Department." The letter provided the following duties for the beneficiary:

- Responsible for identifying and documenting business requirements
- Work and help manage application development projects
- Involve in project planning, communications plan, scope management and works to deliver the project deliverables and milestones to meet the deadlines.
- Involves [sic] in development of detailed Test Plan, and Test Cases for new functionality
- Monitor Portal transports, daily Monitoring of the production systems and portal systems, workload analysis, performance tuning
- Involves [sic] in business to gather requirements, assist in the design, negotiate a delivery schedule, juggle resources

The petitioner provided the following additional evidence in response to the RFE:

- Information regarding the company profile
- Copies of the petitioner's IRS Form 1120S, Income Tax Return for an S Corporation for 2010 and 2011
- Copies of previously submitted information regarding company benefits, employment agreement, evaluation process, and organizational chart

Based on the record, the director denied the petition stating that the petitioner failed to establish an employer-employee relationship with the beneficiary, the petitioner failed to provide a complete itinerary for the beneficiary's employment, and the petitioner failed to establish that the job offered qualifies as a "specialty occupation" pursuant to Section 101(a)(15)(H)(i)(b) of the INA.

On appeal, counsel for the petitioner asserts that the evidence clearly establishes an employer-employee relationship. The petitioner submits a copy of the beneficiary's contractor identification card with the [REDACTED] State Education Department, a copy of the same subcontractor agreement with [REDACTED] submitted initially and in response to the RFE, copies of the beneficiary's paystubs, a copy of the beneficiary's IRS Form W-2 for 2012, and a copy of the certificate of incorporation for the petitioner.

II. LAW AND ANALYSIS

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

We will first discuss whether the petitioner has established that it meets the regulatory definition of a "United States employer" and whether the petitioner has 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" as set out at 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.⁴

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 318-319.⁵

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).⁶

⁴ 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 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).

⁵ 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))).

⁶ 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

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 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).

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).

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 record does not contain evidence such as contracts, work orders, and statements of work which outline in sufficient detail the nature and scope of the beneficiary's intended employment with the end-client. Specifically, while the petitioner claimed that the beneficiary will work for the [REDACTED] the beneficiary has not provided confirmation from the [REDACTED] that the beneficiary will be working as a Business Analyst for it as the end client. Although the petitioner claims that the beneficiary will be working at [REDACTED] through the intermediary client [REDACTED] the petitioner has not provided any contracts, statements of work, or work orders between [REDACTED] and [REDACTED] for the period of work requested.

We have reviewed the copy of the subcontractor agreement with [REDACTED] provided by the petitioner as well as the "Task Order" for the beneficiary's service at [REDACTED]. The task order states that the beneficiary will work as a Business Analyst for 26 months beginning on March 5, 2013, approximately two weeks after the requested start date of February 21, 2013 and ending slightly under one year prior to the requested end date of February 12, 2016. The task order, however, does not provide any detailed information regarding the beneficiary's job duties or the terms of the agreement between [REDACTED] and [REDACTED]. Furthermore, the contract does not cover the entire period requested of 36 months, but only covers 25.5 months of work after the requested start date.

In response to the RFE, the petitioner provided a letter from [REDACTED] dated April 19, 2013. The letter states that the "present contract has been executed with [the petitioner]" and further explains that the beneficiary is working as a Business Analyst with six listed job responsibilities. Without confirmation from the end client, however, the job duties cannot be verified. Furthermore, these duties differ from the duties submitted by the petitioner in the initial support letter.

The petitioner stated in response to the RFE that "due to some legal issues end client [REDACTED] [sic] will not provide the agreement with [REDACTED]" but that a "[v]endor letter confirms that he [sic] has a valid contract with end client [REDACTED]". Thus the petitioner acknowledges that the contract between [REDACTED] and [REDACTED] is not available. The record does not include other probative evidence to verify the contract between [REDACTED] and [REDACTED] or the terms of that contract, and the beneficiary's proposed duties at the actual end-client. As the record does not include this information, we are unable to review any conditions, restrictions, or limitations placed by [REDACTED] on its relationship with [REDACTED] and the subcontractors supplied by [REDACTED]. In addition, although the petitioner claims that the beneficiary will report directly to its management, the petitioner fails to provide the names and contact information for the beneficiary's proposed supervisor. Moreover, without corroborating documentation from the end-client regarding the beneficiary's direct supervisor, such a claim is not substantiated.

The petitioner stated in the document labeled "Itinerary" submitted in support of the initial petition

that the beneficiary would be assigned to an in-house project should the project with [REDACTED] not be continued. In response to the RFE, the petitioner stated that it "is executing some projects for their [sic] clients from their [sic] office" and referred to an attached agreement and contract with its client [REDACTED] for in-house work. However, on appeal, the petitioner requested that the subcontractor agreement with [REDACTED] be withdrawn from consideration.

As a result, the record is devoid of any documentation indicating and/or corroborating that the beneficiary would be the individual assigned to perform services pursuant to any contract(s), work order(s), and/or statement(s) of work for the requested, three-year validity period at [REDACTED] or the petitioner's location. There is insufficient documentary evidence in the record corroborating what the beneficiary would do, where the beneficiary would work, and the availability of work for the beneficiary for the entire requested period of employment. 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 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190).

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. Without full disclosure of all of the relevant factors relating to the end-client, including any restrictions, conditions, or limitations the end-client placed in the contract, we are unable to find that the requisite employer-employee relationship will exist between the petitioner and the beneficiary.

The evidence of record is insufficient to establish that the petitioner qualifies as a "United States employer," as defined by 8 C.F.R. § 214.2(h)(4)(ii). Merely claiming in its letters that the beneficiary is the petitioner's employee and that the petitioner - from its remote relationship to the end-client - supervises the beneficiary does not establish that the petitioner exercises any substantial control over the beneficiary and the substantive work that she performs. The petitioner's reliance on evidence showing that it pays the beneficiary's salary, makes contributions to worker's compensation, and withholds federal and state income tax as well as providing the beneficiary with certain health benefits, establishes in this matter only that the petitioner is providing an administrative function. The petitioner has not provided the necessary documentary evidence establishing that it provides the beneficiary's actual daily work and supervises her and her work. Without evidence supporting the petitioner's claims, the petitioner has not established eligibility in this matter. 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 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190).

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

The petitioner also failed to establish that the proffered position qualifies as a specialty occupation. 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:

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 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 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 companies' job requirements is critical. *See Defensor v. Meissner*, 201 F.3d at 387-388. 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.

As previously noted, the petitioner indicated on the Form I-129 and in supporting documentation that it seeks the beneficiary's services in a position titled "Business Analyst," to work on a full-time basis at a salary of \$55,000 per year.

One consideration that is necessarily preliminary to, and logically even more foundational and fundamental than the issue of whether a proffered position qualifies as a specialty occupation, is whether the petitioner has provided substantive information and supportive documentation sufficient to establish that, in fact, the beneficiary would be performing services for the type of position for which the petition was filed (here, a business analyst). In this matter, the record does not include evidence of the beneficiary's actual duties for the end-client. In addition, although the petitioner claims that the beneficiary will work in-house upon completion of the claimed work with NYSE Dept., the record does not include any documentation indicating and/or corroborating that the beneficiary would be assigned to work on any specific software development or other IT project for the petitioner.

In this matter, the petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for entry into the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4. Thus, the petitioner has failed to establish that the proffered position is a specialty occupation under the applicable provisions.

Accordingly, as the petitioner has not provided documentary evidence substantiating the beneficiary's actual work, we cannot conclude that the petitioner established that it would employ the beneficiary in a specialty occupation. Even if we were to accept that the beneficiary will perform the work as generally described by the petitioner or by [REDACTED] the descriptions lack the requisite detail and specificity to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work.⁷

⁷ A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. *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).

In that regard, we observe that the petitioner has cited a variety of degrees, including the general-purpose degree of business administration as acceptable to perform the duties of the proffered position. This claim is tantamount to an admission that the proffered position is not in fact a specialty occupation. The petitioner has not described duties comprising a position that require the theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor's or higher degree in the specific specialty, or its equivalent.⁸ As such, even if the substantive nature of the work had been established, the instant petition could not be approved for this additional reason.

For the reasons related in the preceding discussion, we find that the petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. Accordingly, the petition cannot be approved.

C. Failure to Provide a Complete Itinerary

General requirements for filing immigration applications and petitions are set forth at 8 C.F.R. § 103.2(a)(1) in pertinent part as follows:

Every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions . . . and such instructions are incorporated into the regulations requiring its submission.

⁸ We note that the petitioner attested on the LCA that the proffered position most closely comprises the duties of a computer systems analyst. However, the information on the educational requirements in the "Computer Systems Analysts" chapter of the 2014-2015 edition of the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook* (the *Handbook*) indicates at most that a bachelor's or higher degree in a computer or information science field may be a common preference, but not a standard occupational, entry requirement. See U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Computer Systems Analysts," <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-4> (last visited July 16, 2014). In fact, this chapter notes that many computer systems analysts only have liberal arts degrees and programming or technical experience. See *id.* As such, the instant petition could not be approved based on the evidence of record even if the proffered position were established as being that of a computer systems analyst.

Further discussion of the filing requirements for applications and petitions is found at 8 C.F.R. § 103.2(b)(1):

Demonstrating eligibility. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request and must continue to be eligible through adjudication. Each benefit request must be properly completed and filed with all initial evidence required by applicable regulations and other USCIS instructions. Any evidence submitted in connection with a benefit request is incorporated into and considered part of the request.

Additionally, the regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) provides as follows:

Service or training in more than one location. A petition that requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with USCIS as provided in the form instructions. The address that the petitioner specifies as its location on the I-129 shall be where the petitioner is located for purposes of this paragraph.

In this matter the petitioner submitted an LCA which listed two work locations for the beneficiary's employment. The petitioner, however, failed to provide an itinerary with the dates the beneficiary will provide services at each location. Thus, the petitioner also failed to meet the itinerary requirement at 8 C.F.R. § 214.2(h)(2)(i)(B). Accordingly, we shall not disturb the director's denial of the petition on this ground.

III. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.