

(b)(6)

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: JUN 27 2014

OFFICE: CALIFORNIA 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:

INSTRUCTIONS:

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

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

Thank you.


Ron Rosenberg
Chief, Administrative Appeals Office

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

On the Form I-129 visa petition, the petitioner describes itself as a software development and consulting business established in 2009. In order to employ the beneficiary in what it designates as a programmer analyst position, 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 on October 22, 2013, concluding that the petitioner failed to establish that the proffered position is a specialty occupation in accordance with the applicable statutory and regulatory provisions. Counsel for the petitioner subsequently filed an appeal. On appeal, counsel asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements.

The record of proceeding before us contains: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) the Form I-290B and supporting materials. We reviewed the record in its entirety before issuing our decision.

For the reasons that will be discussed below, we agree with the director's decision that the petitioner has failed to establish eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

I. FACTUAL AND PROCEDURAL BACKGROUND

In this matter, the petitioner states in the Form I-129 that it seeks the beneficiary's services as a programmer analyst on a full-time basis at the rate of pay of \$71,000 per year. The petitioner further indicates that beneficiary will work off-site at [REDACTED] from October 1, 2013 to September 1, 2016.

In the letter of support dated March 22, 2013, the petitioner states that the beneficiary "will work off-site from [REDACTED]'s office at [REDACTED]. The petitioner claims that the beneficiary will be responsible for the following duties:

1. Develop specifications, perform high level system design, implement and document complex applications in compliance with departmental policies and procedures.
2. Analyze[sic] Use cases, Business Requirement Document and develop[sic] Application screens as per the application framework.
3. Be involved in the testing of the module across various Operation Systems and Web Browsers.

4. Test and debug application & interact with QA Team and testing team on a regular basis to resolve defects and provide time status report.

Further, the petitioner states that the proffered position "rises to the level of a specialty occupation requiring at least a Bachelor's degree, as this is typically the minimum requirement and U.S. industry standard for entry into the position."¹ With the initial petition, the petitioner submitted copies of the beneficiary's foreign diploma and transcript, however, the petitioner did not submit an educational evaluation of the beneficiary's academic credentials.

The petitioner also submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The petitioner indicated that the occupational classification for the proffered position is "Computer Programmers" – SOC (ONET/OES Code) 15-1131, at a Level I (entry level) wage. The location of the beneficiary's place of employment is listed as the petitioner's address at [REDACTED]

In addition, the petitioner submitted the following documents, in part:

- Documents that relate to the beneficiary's current L-1B status, which includes a blanket L-1 approval notice for [REDACTED] a partial copy of the Form I-129 filed by [REDACTED] as a specialized knowledge professional, where the position is described as a project lead whose duties include "develop[ing] new programs per [REDACTED] coding standards using in-sync, launchpad & spring framework and maintain code under SVN; and the Form I-94 which shows that the beneficiary was admitted on December 22, 2012 in L-1 status valid until December 21, 2015 as a software engineer.
- A copy of the offer letter dated March 22, 2013 from the petitioner to the beneficiary. The right-hand side of the letter is cut off, and is not discernable. Further, the signature line for the employee is left blank. The offer letter indicates that the beneficiary is being offered the position of "Programmer/Analyst" and will be compensated at the rate of \$75,000 per year.
- An agreement between [REDACTED] and [the petitioner] dated November 9, 2009. The agreement indicates the following, in part:

During the Term of this Agreement (as defined in Section 4 below),
[the petitioner] agrees to use his/her best efforts to provide Client(s)

¹ Notably, the petitioner does not indicate that the minimum academic requirement for the proffered position is a bachelor's degree in a specific specialty, or its equivalent, that directly relates to the duties and requirements of the position.

with various technical or management services, as more particularly described on one or more "Work Schedules."

* * *

The Parties agree that [the petitioner]'s services under a Work Schedule will terminate at the end of the minimum term requirement covered by the Work Schedule and any renewals or extensions thereof ("End Date") of upon notice by Client or [redacted] if for any reason the Client no longer desires the services of Contractor.

- An e-mail dated March 31, 2013 from [redacted] Associate Vice President, Application Manager, whose e-mail domain is [redacted] sent to the petitioner. The email states that the beneficiary worked as a contractor at [redacted] in the past. The beneficiary "as a Web Developer participated in the team developing and implanting large scale redesign of a highly complex banking application, CEO Credit Management, interfacing with multiple database platforms." It also adds that "[redacted] has also engaged [redacted] to provide application consulting and staffing services" and that it has "an intent to re-hire [the beneficiary] as a contractor on assignment at our office located at [redacted]". The e-mail indicates that the beneficiary's day-to-day duties require him to:

- + Have a thorough knowledge of web technologies, including Java, Servlets, EJB, Java Script, HTML, XML, Oracle, JMeter, and multimedia applications.
- + Evaluate systems specifications for client area web site requirements and determine and implement the most efficient and cost-effective software solution.
- + Research and track new web technologies.
- + Participate in UAT System Integration Testing.
- + Assure quality of the code delivered consistent with installation and security policy standards.
- + Prepare documentation for the Application.

The email further states that the requirements for the position includes a "4 yr college degree in [a] related field and relevant experience in information technology, mission critical J2EE applications[,] Web Logic application servers in clustered environment, Oracle databases, source code management tools, and performance monitoring tools."

- A letter dated March 28, 2013 from [redacted] The letter states that a Statement of Work (SOW) is issued for the beneficiary to work at

[REDACTED] It also indicates that "the purchase order is initially for a period of eighteen months and is extendable further depending on the needs of the company." It asserts that "it is normal practice of the company not to issue purchase orders for more than eighteen months although we have clear intentions of renewing it further periods depending on the needs."

Further, the letter states that the beneficiary "has been assigned to work on Wholesale Credit Management Project with our client [REDACTED] as a Web Developer." It indicates that the beneficiary "will be implementing Service Oriented Design principles for finance domain" and his primary focus will be "on areas of design, analysis, development, testing and implementation of various interfaces, conversions, forms, web services and workflow." He will also "be responsible for post-production system support, data analysis and code related performance tuning."

- An SOW signed by the petitioner and [REDACTED] on [REDACTED] letterhead. It states that the project responsibilities are as a "Web Developer" and the end client's name is [REDACTED]. It names the beneficiary as the consultant. The anticipated start date is October 14, 2013 and the anticipated project duration is 18 months.

Upon review of the documentation, the director found the evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on September 3, 2013. The director noted that while the petitioner referred to the proffered position as a "systems analyst," the LCA was filed for a "computer programmer," and the SOW states that the services are needed as that of "web developer." The director outlined the additional evidence to be submitted.

In its response to the RFE dated October 6, 2013, counsel states that "the beneficiary is already working in L-2 status with the same client in the same position."² The petitioner also responded in a letter dated October 1, 2013. In the letter, the petitioner refers to the proffered position as "Web Programmer Analyst." The petitioner claims that the discrepancy in the job title is due to the fact that "the type of work undertaken by [the beneficiary] will be working more on programs in connection with Web development." The petitioner provided the following breakdown of the duties:

- Have a thorough knowledge of web technologies, including Java, Servlets, EJB, Java Script, HTML, XML, Oracle, JMeter, and multimedia applications. (15%)
- Evaluate systems specifications for client area web site requirements and determine and implement the most efficient and cost-effective software solution. (25%)

² It is noted that the beneficiary is in L-1B status. Further, according to the Form I-129, the job title for the position is "project lead." On the Form I-94 for entry to the United States, it indicates that the beneficiary is a software engineer.

- Research and track new web technologies. (15%)
- Participate in UAT System Integration Testing. (10%)
- Assure quality of the code delivered consistent with installation and security policy standards. (20%)
- Prepare documentation for the Application. (15%)

It is noted that this job description is verbatim from the e-mail dated March 31, 2013 from [REDACTED] and differs from the description provided in the support letter.

Counsel provided additional supporting evidence, including the following documentation:

- A credential evaluation from [REDACTED] which states that the beneficiary has a U.S. equivalent of a Bachelor of Science in Electronics Engineering with concentration in Computer Information Systems.
- Job postings.
- A letter dated October 1, 2013 from [REDACTED] which states that the beneficiary will be working "on a project for [REDACTED]...as a web developer" which will "begin on October 21, 2013 and go through April 21st, 2015." Mr. [REDACTED] further states that "a minimum of a Bachelor's degree is a requirement for this position along with relevant experience." In addition, he states that the project supervisor is [REDACTED] Technology Manager. Notably, Mr. [REDACTED] provides a job description that differs from the description provided by the petitioner in the letter of support.
- A blank copy of the petitioner's performance review template.
- An organizational chart for the petitioner's operations. The chart shows that the programmer analysts report to the Software Engineering Manager, [REDACTED] who reports to the CEO, [REDACTED]
- The petitioner's Employee Handbook.

The director reviewed the documentation and found it insufficient to establish eligibility for the benefit sought. The director denied the petition on October 22, 2013. Counsel submitted an appeal of the denial of the H-1B petition, along with a brief.

II. ISSUE NOT ADDRESSED BY THE DIRECTOR'S DECISION

Employer-Employee

We reviewed the record of proceeding in its entirety. As a preliminary matter, we will discuss an issue, beyond the decision of the director that precludes the approval of the petition.³ More specifically, 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.*

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.

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)

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

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 legacy Immigration and Naturalization Service ("INS") nor 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

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).

The regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to employ persons in 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," "employed," "employment" or "employer-employee relationship" indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition." Therefore, in the absence of an intent to impose broader definitions by either Congress or USCIS, the "conventional master-servant relationship as understood by common-law agency doctrine," and the *Darden* construction test, apply to the terms "employee," "employer-employee relationship," "employed," and "employment" 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). That being 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).

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

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).

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 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).

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, not who has the *right* to provide the tools required to complete an assigned project. See *id.* at 323. Lastly, the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450. "Rather, . . . the answer to whether [an individual] is an employee depends on 'all of the incidents of the relationship . . . with no one factor being decisive.'" *Id.* at 451 (quoting *Darden*, 503 U.S. at 324).

Applying the *Darden* and *Clackamas* tests to this matter, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee."

We note that there are numerous inconsistencies and discrepancies in the petition and supporting documents, which undermine the petitioner's credibility with regard to the beneficiary's employment. When a petition includes numerous errors and discrepancies, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions. Doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

As a preliminary matter, the petitioner has provided inconsistent information regarding the beneficiary's place of employment. In the Form I-129, the petitioner indicates that the worksite for the beneficiary is [REDACTED]. However, the LCA indicates that the beneficiary will have two places of employment: [REDACTED] and [REDACTED]. No explanation for the discrepancy was provided.

Furthermore, we find that there are additional discrepancies and inconsistencies in the record of proceeding with regard to the beneficiary's salary. For instance, in the Form I-129 and LCA, the petitioner indicates that the beneficiary will be compensated at the rate of \$71,000 per year.

However, in the March 22, 2013 letter of support and the offer letter, the petitioner states that the beneficiary will be paid \$75,000 per year. No explanation for the variance was provided.

There are additional discrepancies and inconsistencies in the record of the proceeding with regard to the beneficiary's job title of the proffered position. For example, in the Form I-129 and LCA, the petitioner refers to the proffered position as "Programmer Analyst." However, in the March 22, 2013 letter of support, the petitioner refers to the proffered position as "Programmer." Further, in the letters from [REDACTED] he refers to the proffered position as "Web Developer." In addition, in the SOW, the petitioner refers to the proffered position as "Web Developer." Moreover, in the October 1, 2013 letter, submitted in response to the RFE, the petitioner refers to the proffered position as "Programmer Analyst (Web)" and "Web Programmer Analyst." Further, the petitioner claims that the discrepancy in the job title is due to the fact that "the type of work undertaken by [the beneficiary] will be working more on programs in connection with Web development." The petitioner did not provide any further information on this matter.

In addition, the record of proceeding contains inconsistent information regarding who will supervise the beneficiary. For instance, the SOW indicates that the beneficiary will be supervised by the "On-site Manager: [REDACTED]" In addition, in the October 1, 2013 letter, Mr. [REDACTED] indicates that the beneficiary will be supervised by the project supervisor, [REDACTED] Technology Manager. However, the organizational chart submitted in response to the RFE, indicates that the beneficiary will report to [REDACTED] Software Engineering Manager at the petitioning company. No explanation for the discrepancy was provided.

Furthermore, the record of proceeding contains inconsistent information regarding the beneficiary's start date. In the Form I-129, the petitioner indicates that the dates of intended employment are from **October 1, 2013** to September 1, 2016. Further, the SOW, submitted with the initial petition, indicates "Anticipated Start Date of Project: **October 14, 2013.**" Moreover, the October 1, 2013 letter, Mr. [REDACTED] states that the beneficiary's "project as a Web Developer will begin on **October 21, 2013** and go through April 21st, 2015." No explanation for the variances was provided.

In the instant case, the petitioner claims that it will pay the beneficiary's salary. We acknowledge that the method of payment of wages can be a pertinent factor to determining the petitioner's relationship with the beneficiary. However, while such items such as wages, contributions, federal and state income tax withholdings, and other benefits are relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., where will the work be located, who will provide the instrumentalities and tools, who will oversee and direct the work of the beneficiary, 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.

For H-1B classification, the petitioner is required to submit written contracts between the petitioner and the beneficiary, or if there is no written agreement, a summary of the terms of the oral agreement under which the beneficiary will be employed. See 8 C.F.R. § 214.2(h)(4)(iv)(A) and (B). In the instant case, the record contains an offer letter from the petitioner to the beneficiary. The

letter is dated March 22, 2013. Notably, the offer letter is not signed by the beneficiary. The letter indicates the beneficiary's job title and salary; however, upon review of the document, we note that it does not provide any level of specificity as to the beneficiary's duties and the requirements for the position. While the offer letter may provide some insights into the relationship of a petitioner and a beneficiary, it must be noted again that 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.

As previously noted, when making a determination of whether the petitioner has established that it has or will have an employer-employee relationship with the beneficiary, we look at a number of factors, including who will provide the instrumentalities and tools required to perform the specialty occupation. In the instant case, the director specifically noted this factor in the RFE. Moreover, the director provided examples of evidence for the petitioner to submit to establish eligibility for the benefit sought, which included documentation regarding the source of the instrumentalities and tools needed to perform the job. However, upon review of the record of proceeding, the petitioner did not provide any information on this matter. Here, the petitioner was given an opportunity to clarify the source of instrumentalities and tools to be used by the beneficiary, but it failed to address or submit any probative evidence on the issue.

Moreover, through the RFE, the director provided the petitioner an opportunity to submit documentation regarding the beneficiary's role in hiring and paying assistants. In the instant case, the petitioner did not address this issue or provide any documentation regarding the beneficiary's role in hiring and paying assistants.

Further, the petitioner has not established the duration of the relationship between the parties. More specifically, on the Form I-129, the petitioner requested that the beneficiary be granted H-1B classification from October 1, 2013 to September 1, 2016. As previously mentioned, the petitioner stated on the Form I-129 that the beneficiary will work at [REDACTED]

[REDACTED] With the initial petition, the petitioner provided an agreement between itself and [REDACTED] dated November 9, 2009. The agreement indicates the following, in part:

During the Term of this Agreement (as defined in Section 4 below), [the petitioner] agrees to use his/her best efforts to provide Client(s) with various technical or management services, as more particularly described on one or more "Work Schedules."

* * *

The Parties agree that [the petitioner]'s services under a Work Schedule will terminate at the end of the minimum term requirement covered by the Work Schedule and any renewals or extensions thereof ("End Date") of upon notice by Client or [REDACTED] if for any reason the Client no longer desires the services of Contractor.

In addition, the petitioner submitted an SOW between itself and [REDACTED]. The SOW indicates that the anticipated start date of the project is October 14, 2013, and the anticipated project duration is 18 months. Thus, the SOW indicates that the end date is April 14, 2015.

The petitioner also provided an email from [REDACTED] Associate Vice President, Application Manager for [REDACTED]. The email is dated March 31, 2013. In the email, Mr. [REDACTED] states that "[we] have an intent to re-hire [the beneficiary] as a contractor on assignment at our office located at [REDACTED]. However, Mr. [REDACTED] does not indicate the dates that the beneficiary will be working at [REDACTED]. Mr. [REDACTED] also provides a list of the beneficiary's duties, which contains vague tasks such as evaluate systems specifications for client area website requirements and determine and implement the most efficient and cost-effective software solutions, and research and track new web technologies. The list of duties fails to provide the beneficiary's specific role in performing such tasks.

Moreover, the petitioner provided two letters from [REDACTED]. The letters are dated March 28, 2013 and October 1, 2013. In one of the letters, Mr. [REDACTED] states that "[the beneficiary's] project as a Web Developer will begin on October 21st, 2013 and go through April 21st, 2015." In both of the letters, Mr. [REDACTED] indicates the beneficiary's duties and responsibilities. Notably, the duties and responsibilities listed in the letters differ from each other.

We note that the petitioner did not submit any further evidence establishing any additional projects or specific work for the beneficiary. The petitioner requested the beneficiary be granted H-1B classification from October 1, 2013, to September 1, 2016. However, the documentation does not establish that the [REDACTED] project will continue through September 1, 2016. Thus, the record does not demonstrate that the petitioner will maintain an employer-employee relationship for the duration of the validity of the requested period. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

In addition, a key element in this matter is who would have the ability to hire, fire, supervise, or otherwise control the work of the beneficiary for the duration of the H-1B petition. As previously discussed, the petitioner has provided inconsistent information as to who will supervise the beneficiary. We incorporate by reference the prior discussion on the matter. We observe that in the RFE, the director specifically requested that the petitioner provide documentation to clarify the petitioner's employer-employee relationship with the beneficiary. The director provided a list of the types of evidence to be submitted, which included a request that the petitioner provide such documentation as a brief description of who will supervise the beneficiary along with the person's duties and/or other similarly probative documents. However, the petitioner failed to provide specific information regarding the beneficiary's supervisor (e.g., brief description of job duties, location).

In response to the director's RFE, the petitioner submitted a copy of its performance review template. However, the record of proceeding lacks information regarding how work and performance standards are established, the methods for assessing and evaluating the beneficiary's performance, and the specific criteria for determining bonuses and salary adjustments.

Upon complete review of the record of proceeding, we find that the evidence in this matter 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). The evidence of record does not establish that the petitioner would act as the beneficiary's employer. Despite the director's specific request for evidence on this issue, the petitioner failed to submit sufficient evidence to corroborate its claim. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). Based on the tests outlined above, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii).

Moreover, there is a lack of probative evidence to support the petitioner's assertions. It cannot be concluded, therefore, that the petitioner has satisfied its burden and established that it qualifies as a United States employer with standing to file the instant petition in this matter. *See* section 214(c)(1) of the Act (requiring an "Importing Employer"); 8 C.F.R. § 214.2(h)(2)(i)(A) (stating that the "United States employer . . . must file" the petition); 56 Fed. Reg. 61111, 61112 (Dec. 2, 1991) (explaining that only "United States employers can file an H-1B petition" and adding the definition of that term at 8 C.F.R. § 214.2(h)(4)(ii) as clarification). Accordingly, beyond the director's decision, the petition must be denied on this basis.

III. THE DIRECTOR'S BASIS FOR DENIAL OF THE H-1B PETITION

Specialty Occupation

We will now address the director's determination that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions.

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

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

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

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

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

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

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

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

§ 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 387. To avoid this illogical and absurd 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.

The petitioner asserted that the beneficiary would be employed as a programmer analyst. However, 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.

As a preliminary matter, the record contains inconsistent information regarding the minimum requirements for the proffered position.

- In the support letter dated March 22, 2013, the petitioner claims that the proffered position "rises to the level of specialty occupation requiring a bachelor's degree." In other words, the petitioner did not state that a bachelor's degree in a specific specialty is required.
- The petitioner also added that "the beneficiary was chosen because at the time of the interview[,] we found that he has a good understanding of Financial Software Applications Development."
- In response to the RFE, the petitioner claims that "the complexity inherent in the role requires a minimum of bachelor's degree or even higher-Master's degree in business

or technology."

- The petitioner also indicates that a "person who does not have a degree in computer science or related field will not be able to perform the role of a programmer analyst(web)."
- Further, the petitioner claims that the position "requires experienced person who is involved in software project management, business analysis, testing, cloud computing, **someone who has healthcare industry specific knowledge**" (emphasis added).
- In the letter dated October 1, 2013, Mr. [REDACTED] states that "[a] minimum of a Bachelor's degree is a requirement for this position along with relevant experience."
- In the March 31, 2013 email from Mr. [REDACTED] he states that a "4 yr college degree in [a] related field and relevant experience in information technology, mission critical J2EE applications[,] Web Logic application servers in clustered environment, Oracle databases, source code management tools, and performance monitoring tools" is required for the position.
- On appeal, counsel asserts that the evidence in the record demonstrated with specificity why the specific duties for the proffered position...required background in Electrical Engineer, Computer Science, or closely related field."

No explanation for the variances was provided. The petitioner and counsel have provided inconsistent information regarding the minimum educational requirement for the proffered position. 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).

Moreover, it must be noted that within the record of proceeding, the petitioner and its counsel have represented that the position requires a bachelor's degree in business, technology, computer science, and/or electrical engineer.

In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty (or its equivalent)" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in two disparate fields, such as philosophy and engineering, 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).

In other words, while the statutory "the" and the regulatory "a" both denote a singular "specialty," we do not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. *See* section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). This also includes even seemingly disparate specialties providing, again, the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

Again, the petitioner and counsel have represented that a bachelor's degree in a number of disciplines is acceptable, specifically, business, technology, computer science, and electrical engineer. However, it must be noted that these include broad categories that cover numerous and various specialties.⁷ Therefore, it is not readily apparent that a degree in any and all of these fields is directly related to the duties and responsibilities of the particular position proffered in this matter.

Here and as indicated above, the petitioner, who bears the burden of proof in this proceeding, fails to establish either (1) that all of the disciplines are closely related fields, or (2) that all of the disciplines are directly related to the duties and responsibilities of the proffered position. Absent this evidence, it cannot be found that normally the minimum requirement for entry into the particular position proffered in this matter is a bachelor's or higher degree in a specific specialty, or its equivalent, under the petitioner's own standards.

As the evidence of record fails to establish how these dissimilar fields of study form either a body of highly specialized knowledge or a specific specialty, or its equivalent, the petitioner's assertion that the job duties of this particular position can be performed by an individual with a bachelor's degree in any of these fields suggests that the proffered position is not in fact a specialty occupation. Therefore, absent probative evidence of a direct relationship between the claimed degrees required and the duties and responsibilities of the position, it cannot be found that the proffered position requires, at best, anything more than a general bachelor's degree. Again, going on record without

⁷ We note that the term "business" is defined as "1. The occupation, work, or trade in which one is engaged. . . . 2. Commercial, industrial, or professional dealings. 3. A commercial enterprise or establishment." WEBSTER'S II NEW COLLEGE DICTIONARY 153 (2008). A degree in business administration may include a range of disciplines, some of which may not directly relate to the duties of the proffered position. For instance, U.S. News and World Report publishes a guide for colleges. The entry for Harvard University indicates that its business school offers concentrations in a range of disciplines, including arts administration, e-commerce, health care administration, human resources management, not-for-profit management, organizational behavior, public administration, public policy, real estate, sports business, as well as many others. *See* U.S. News and World Report on the Internet at http://www.usnewsuniversitydirectory.com/graduate-schools/business/harvard-university_01110.aspx (last visited June 25, 2014).

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.

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

With the initial petition, the petitioner submitted an email dated March 31, 2013 from [REDACTED] who works for the end-client (according to the petitioner), [REDACTED]. In the email, Mr. [REDACTED] provided a list of the beneficiary's duties and responsibilities. In addition, Mr. [REDACTED] stated that "4 yr college degree in [a] related field and relevant experience in information technology, mission critical J2EE applications[,] Web Logic application servers in clustered environment, Oracle databases, source code management tools, and performance monitoring tools" is required for the position. The client does not state a requirement for a degree in a specific specialty. We here reiterate that the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but such a degree in a *specific specialty* that is directly related to the duties and responsibilities of the position. *See* 214(i)(1)(b) of the Act and 8 C.F.R. § 214.2(h)(4)(ii).

While the petitioner has identified its proffered position as that of a programmer analyst, the descriptions of the beneficiary's duties, as provided by the petitioner and the client, lack the specificity and detail necessary to support the petitioner's contention that the position is a specialty occupation. While a generalized description may be appropriate when defining the range of duties that are performed within an occupation, such generic descriptions generally cannot be relied upon by the petitioner when discussing the duties attached to specific employment for H-1B approval. In establishing such a position as a specialty occupation, especially one that may be classified as a staffing position or labor-for-hire, the description of the proffered position must include sufficient details to substantiate that the petitioner has H-1B caliber work for the beneficiary. Here, the job description fails to communicate (1) the actual work that the beneficiary would perform on a day-to-day basis; (2) the complexity, uniqueness and/or specialization of the tasks; and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty.

The failure to establish the substantive nature of the work to be performed by the beneficiary 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.

For the reasons related in the preceding discussion, 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. For this reason, the appeal must be dismissed and the petition denied.

IV. CONCLUSION AND ORDER

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 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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

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

ORDER: The appeal is dismissed.