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



U.S. Citizenship
and Immigration
Services

DATE: **JUN 30 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,

for Michael T. Kelly
Ron Rosenberg
Chief, Administrative Appeals Office

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

On the Form I-129 visa petition, the petitioner describes itself as a 316-employee software design and development services company¹ established in 1997. In order to employ the beneficiary in what it designates as a full-time network engineer at a minimum salary of \$57,000 per year,² the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, concluding that the evidence of record fails to demonstrate the existence of an employer-employee relationship between the petitioner and the beneficiary.

The record of proceeding before us contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's letter denying the petition; and (5) the Form I-290B and supporting documentation.

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

Beyond the decision of the director, we find an additional aspect which, although not addressed in the director's decision, nevertheless also precludes approval of the petition, namely, the failure of the evidence of record to demonstrate that the proffered position is a specialty occupation.³ For this additional reason, the petition must also be denied.

I. EVIDENTIARY STANDARD

¹ The petitioner provided a North American Industry Classification System (NAICS) Code of 541511, "Custom Computer Programming Services." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "541511 Custom Computer Programming Services," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited June 17, 2014).

² The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for use with a job prospect within the occupational classification of "Network and Computer Systems Administrators," SOC (O*NET/OES) Code 15-1142, and for which the appropriate prevailing wage level would be Level I (the lowest of the four assignable wage-rates).

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

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

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

* * *

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

* * *

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

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

Id.

We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In doing so, we apply the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon our review of the present matter pursuant to that standard, however, we find that the evidence in the record of proceeding does not support counsel's contentions that the evidence of record requires that the petition at issue be approved.

Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, we find that the director's determinations in this matter were correct. Upon review of the entire record of proceeding, and with close attention and due regard to all of the evidence, separately and in the aggregate, submitted in support of this petition, we find that the petitioner has not established that its claims are "more likely than not" or "probably" true. As the evidentiary analysis of this decision

will reflect, the petitioner has not submitted relevant, probative, and credible evidence that leads us to believe that the petitioner's claims are "more likely than not" or "probably" true.

II. GENERAL OVERVIEW

As noted above, the petitioner described itself on the Form I-129 as a software design and development services company and stated that it has been in business since 1997, that it currently employs 316 individuals, and that it has a gross annual income of approximately \$30 million.

The beneficiary, a national of India, earned a Bachelor of Engineering degree in electronics and communication engineering from [REDACTED] in India, in 2008. He also earned a Master's Degree in electrical engineering from [REDACTED] in Ohio, in 2011. (The beneficiary's qualifications are not an issue in this appeal.)

It appears that beneficiary began working for the petitioner via a grant of Optional Practical Training awarded pursuant to his F-1 student visa status. The beneficiary's first employment authorization document (EAD) was issued on February 8, 2012. The petitioner and the beneficiary executed an Employment Agreement November 19, 2012, and the petitioner stated that the beneficiary began working for its company at that time.

At the outset, we acknowledge the many documents of various types attesting, directly and indirectly, to the apparent vitality of the petitioner as a robust business entity in the IT areas in which it is engaged. However, neither the viability nor the strength and industry standing of the petitioner is an issue before us. Nor is the petitioner's ability to pay the beneficiary in question. Rather, in light of the express basis of the director's denial, we will focus upon whether the evidence of record establishes that approval of the petition would manifest and be based upon a business relationship between the petitioner and the beneficiary that would be sufficient to recognize them as being in an employer-employee relationship with each other, so as to qualify the petitioner as "United States employer" as defined at 8 C.F.R. § 214.2(h)(4)(ii), as is required for the petitioner to have standing to file an H-1B specialty occupation petition.

The following review is prelude to this decision's later discussion of the relevant statutory, regulatory, and common law aspects of the employer-employee distinction.

The petitioner filed the petition on April 15, 2013, and proposed employing the beneficiary as a network engineer from October 1, 2013 through September 3, 2016 at a minimum salary of \$57,000 per year. On the Form I-129 the petitioner, which is located in [REDACTED] Kentucky, stated that the beneficiary would provide his services to its client [REDACTED] in [REDACTED] Washington.

In its March 29, 2013 letter of support, which was signed by the petitioner's Vice President of Operations, the petitioner claimed that it was "a leading Information Technology ("IT" consulting and custom application development services provider," and further stated as follows:

[The petitioner's] mission is to provide software-consulting services to small, medium and enterprise level clients with affordable, versatile and reliable applications to help maximize their revenues and reduce overhead. [The petitioner] offers a wide range of IT services including diversified systems applications, and development and management assistance to all areas of IT-related services and technical training. [The petitioner] employs seasoned IT professionals who deliver these services in a timely and cost effective manner to clients in a broad range of business applications.

[The petitioner's] IT professionals work on various types of software design and development projects for clients in a wide range of industries. Our consulting services include programming services, application support and maintenance, system integration project management, technical education and training, technical writing and documentation, full life-cycle design, and development and implementation.

The petitioner described the proffered position and its constituent duties as follows:

Specifically, in this assignment, [the petitioner and the beneficiary] will Maintain and administer computer networks and related computing environments including computer hardware, systems software, applications software, and all configurations. Perform data backups and disaster recovery operations. Diagnose, troubleshoot, and resolve hardware, software, or other network and system problems, and replace defective components when necessary. Plan, coordinate, and implement network security measures to protect data, software, and hardware. Configure, monitor, and maintain email applications or virus protection software. Operate master consoles to monitor the performance of computer systems and networks, and to coordinate computer network access and use. Load computer tapes and disks, and install software and printer paper or forms. Design, configure, and test computer hardware, networking software and operating system software. Monitor network performance to determine whether adjustments need to be made, and to determine where changes will need to be made in the future. Confer with network users about how to solve existing system problems.

More specifically, the petitioner claimed that the beneficiary would assist with what the petitioner refers to as the MLS – Network Implementation Project for its end-client, [REDACTED] Washington. The petitioner presented the following as duties for the beneficiary on this project:

- Work on Ticketing Systems like [REDACTED] dashboard to perform and track the work done on various devices as per requests received

- Responsible for Deploying VLANS, TORS and F5 devices which mostly involves working with Cisco, HP and F5 devices
- Responsible for working with Customers [REDACTED] to identify their needs, make them aware of available resources and provide them with appropriate Networking solutions
- Responsible for deploying MAC projects and assign tickets to [REDACTED] – Network Operations team for the logical Configuration of deployed devices
- Responsible to test and troubleshoot configured devices in Self-managed and Managed Lab Services which include different vendor devices like HP, Cisco, Juniper and F5
- Responsible to allocate available IPV4 and IPV6 subnets to customer via tools like Net-Design and Men & Mice
- Extensive use of [REDACTED] to create Network Diagrams and use of documentation for Device Tracking
- Expertise on Network Management tools such as HPNA, HPNNMI to verify Network Diagrams and changes implemented
- Responsible to update the Networking tools like iadmin, NMTools when there is a change in the network.

The petitioner further stated that the beneficiary would work utilizing specific tools and technologies such as Computer Networking, CCNA, Routing and Switching, and Trouble-shooting.

III. EMPLOYER-EMPLOYEE RELATIONSHIP ISSUE

We will now address the sole basis that the director specified for denying this petition, that is, her determination that the evidence of record does not establish that the petitioner would engage the beneficiary in an employer-employee relationship.

A. Evidentiary Background

There are four business entities involved in this petition. These are (1) [REDACTED] which is identified as the end-client or business entity generating the work for which the beneficiary would be assigned; (2) [REDACTED] (hereinafter referred to as [REDACTED]) (3) [REDACTED] (hereinafter referred to as [REDACTED]) and (4) the petitioner, of course, who would make the beneficiary available for work at [REDACTED]

According to the evidence of record, [REDACTED] are vendors involved in obtaining the beneficiary's services for [REDACTED]. The record also reflects that the petitioner is to provide the beneficiary to [REDACTED] clients as requested by [REDACTED] pursuant to a "Professional Services Agreement" between the petitioner and [REDACTED]

Submissions filed with the Form I-129

When it filed the petition, the petitioner submitted, *inter alia*, a copy of that "Professional Services Agreement" document executed between the petitioner and [REDACTED] which was dated November 24, 2009. It called for the petitioner to provide personnel to perform services for [REDACTED] clients.

The petitioner also submitted a letter from [REDACTED] dated March 26, 2013. In that letter [REDACTED] stated that the beneficiary was currently providing services to [REDACTED]. [REDACTED] stated that it was contracting the services of the beneficiary through [REDACTED] with whom it claimed to have a "Services Agreement."

In addition, the petitioner submitted a Purchase Order for the beneficiary's services dated November 12, 2012, indicating that the beneficiary would be assigned to the [REDACTED] project beginning on November 19, 2012 for a period of six months.

Finally, the petitioner submitted a number of other documents with the petition, including (1) copies of the beneficiary's academic credentials; (2) a copy of the petitioner's [REDACTED] ID badge, which includes his name and "[REDACTED]"; (3) copies of the beneficiary's timesheets and approval notices issued via email; (4) a copy of the aforementioned employment agreement, dated November 19, 2012; (5) a copy of the petitioner's employee handbook, benefits summary, employee project startup checklist and resource management process; (6) copies of the beneficiary's bi-weekly status reports; (7) a copy of the petitioner's organizational chart; and (8) documents submitted as evidence of the petitioner's "established record of success and business judgment within the competitive field of software development and IT consulting."

We note not only (a) that the March 29, 2013 [REDACTED] letter indicates that the petitioner had no direct contractual relationship with [REDACTED] although [REDACTED] was the end-client for whom the beneficiary would perform services, but also (b) that the record contains no contract documents of any kind that [REDACTED] executed.

Submissions in response to the RFE

The RFE, issued on May 14, 2013, requested, *inter alia*, additional evidence to demonstrate the existence of a valid employer-employee relationship between the petitioner and the beneficiary. In addition to resubmitting several documents already contained in the record, the petitioner, through counsel, submitted the following:

1. Letter from the petitioner dated July 31, 2013;
2. Letter from [REDACTED] dated August 1, 2013
3. Affidavit by [REDACTED] employee;
4. Affidavit by [REDACTED] employee;
5. Letter from [REDACTED] dated June 6, 2013;

6. Copy of beneficiary's Employee Performance Review dated July 23, 2013;
7. Updated Bi-weekly status reports for the beneficiary;
8. Updated paystubs for the beneficiary;
9. Letter from [REDACTED] dated July 26, 2013;
10. Updated Purchase Order dated July 30, 2013;
11. Copies of Invoices for the beneficiary's services;
12. Photos of the beneficiary's work location; and
13. Updated copies of the beneficiary's timesheets.

In the petitioner's July 31, 2013 letter, it claims that its temporary, professional employment of the beneficiary is verified by the previously submitted documents, as well as by the updated letter and purchase order from [REDACTED] the letters from [REDACTED] and [REDACTED] and the affidavits by [REDACTED] employees. The AAO will individually address these documents below.

Updated letter from [REDACTED] dated July 26, 2013

The petitioner submits an updated letter from [REDACTED] signed by [REDACTED] its HR Manager. A review of this letter reveals it is virtually identical to the previously submitted letter from [REDACTED] dated March 26, 2013. Specifically, it lists the same duties previously discussed and provides the same overview of the working conditions of the beneficiary.

Updated Purchase Order dated July 30, 2013

This [REDACTED] Petitioner Purchase Order is identical to the first purchase order submitted except for the start date, which on this document is August 1, 2013.

Letter from [REDACTED] dated August 1, 2013

In this letter, signed by [REDACTED] Senior SE Network Architect, [REDACTED] confirms that the beneficiary will be assigned to one of its projects though its contract with [REDACTED]. The letter also states that [REDACTED] is not the employer of the beneficiary, and it also claims that [REDACTED] does not provide training or hire and fire employees or contractors of [REDACTED]. It claims the "[REDACTED] provides overall management for all its personnel working onsite at [REDACTED] on various temporary projects."

Letter from [REDACTED] dated June 6, 2013

In this letter, signed by [REDACTED] Business Relationship Manager, [REDACTED] confirms the placement of the beneficiary on the [REDACTED] project, in addition to confirming that it has a contractual agreement with [REDACTED] who in turn has an agreement with the petitioner. Although [REDACTED] claims that the petitioner retains the right to hire, fire, pay and control the beneficiary's assignment, it simultaneously states that the beneficiary "works under the oversight of [REDACTED] who is a [REDACTED] employee."

Affidavits from [REDACTED] employees

The petitioner also submitted two affidavits from [REDACTED] and [REDACTED] employees. These employees claim to have worked with the beneficiary on the same [REDACTED] project and, in addition to confirming the duties associated with the project, these employees claim that the beneficiary was known to them as a consultant from the petitioner.

The director denied the petition on October 3, 2013, finding that the evidence of record did not demonstrate the existence of a valid employer-employee relationship between the petitioner and the beneficiary. The director noted that the petitioner's role in supervising the beneficiary and the manner in which the beneficiary would perform his duties was unclear.

We observe again that up to this point the record of proceeding included no contractual document from [REDACTED] the entity which would generate the beneficiary's work and pay for it.

Submissions on Appeal

On appeal, counsel for the petitioner submitted a brief supported by documentary evidence previously submitted into the record. A supplemental submission, received by our office on December 3, 2013, includes an updated letter from [REDACTED] dated November 1, 2013, which states in pertinent part as follows:

Our company is responsible for the delivery and "overall management" of the project for which we have been retained by [REDACTED]. While our project managers may supervise and exercise limited control over non-employee technical staff working on-site on our project at [REDACTED] office, located in [REDACTED] Washington, we wish to point out that our subcontractors such as [the petitioner] always retain the *right to control* the staff that they deploy on our projects, which is the legal standard for H-1B petitioners as outlined in the USCIS memorandum of January 8, 2010 issued by Donald Neufeld.

The updated letter from [REDACTED] further contends that the beneficiary is not its employee nor is [REDACTED] responsible for paying the beneficiary's salary. The letter also provides the following statement:

Just because [REDACTED] exercise[s] some actual control over [the beneficiary's] work product does not mean that his employer ceded its *right to control* him at all times. To the contrary, our vendor retains the right to control [the beneficiary] throughout his deployment on our project. If they choose to remove him from our project, they have the right to do so at any time.

Despite the submission of letters from all parties involved to some extent in the procurement and ultimate assignment of the beneficiary to [REDACTED] project work, the record of proceeding does not contain either copies of the contractual agreements referenced in these letters or statements from the

parties to each of the various contracts involved in this record's multi-tiered contractual scenario that would clearly relate the particular terms and conditions in those contractual documents that would be pertinent factors for determining the employer-employee issue in accordance with the applicable common-law analysis that we shall discuss below. An example of such material and helpful evidence would be documents from both [REDACTED] in which an authorized representative, who establishes the basis of his or her knowledge of the contracts involved, describes the substantive content of clauses relevant to such employer-employee-related issues as the exercise of the most immediate and effectual control of the beneficiary's day-to-day work, the specific latitude of the petitioner, the end-client, and the other business entities [REDACTED] to determine how long and subject to what terms and conditions the beneficiary would perform the [REDACTED] project work, and to suspend or terminate the beneficiary's services at [REDACTED]. Likewise, the documents submitted into this record do not substantiate the extent – if any – of the petitioner's participation in determining what the beneficiary would on a day-to-day basis once assigned to [REDACTED].

The record does not contain an array of submissions that would provide a substantial factual basis sufficient for us to review and weigh such relevant common-law employer-employee indicia as who would provide and manage the particular means and instrumentalities which the beneficiary would use, what particular person or persons would exert the most direct and substantial supervisory control in assigning day-to-day work to the beneficiary, in determining the particular scope of the beneficiary's work as the project evolves, and in evaluating whether that work would satisfy the end-client's specifications and standards. In short, the petitioner simply has not provided sufficiently comprehensive evidence for us to reasonably determine that the petitioner would more likely than not have an employer-employee relationship with the beneficiary.

We note again that the record does include a copy of that single "Professional Services Agreement" document between [REDACTED] (the "Client") and the petitioner (the "Contractor"). We note that Paragraph 1, entitled "Contractor's Staff," states as follows:

The daily activities of Contractor's staff assigned to the Client in fulfillment of this Agreement will be directed and controlled by the Client. *The Client is the sole judge as to the acceptability and capability of an individual contractor and/or team member, and may at any time request the removal of said contractor.* In the event of a client request for removal of an Individual, Contractor will have the right to replace the Individual for the remainder of the assignment.

We find that the above contractual term is material to the employer-employee issue, because it is a binding contractual acknowledgement that tends to indicate that primary and decisive control over the beneficiary and the substantive requirements of the beneficiary's work on a day-to-day basis resides not with the petitioner, or any of its personnel, but with the "Client," who in this case is [REDACTED].

Moreover, Paragraph 5 of this agreement, entitled "Invoices," indicates that the petitioner will submit monthly invoices to [REDACTED] for services furnished. However, this paragraph further indicates that "if the Client's client does not pay or underpays [REDACTED] with respect to any timesheet or invoice

submitted by Contractor, Contractor shall not be entitled to compensation from [REDACTED] in connection with such timesheets or invoices." This indicates that [REDACTED] "client," who in this case would be [REDACTED] has ultimate evaluative and decisional authority as to whether the beneficiary's work on assignment to [REDACTED] for any given pay period would merit payment. The letter from [REDACTED] dated June 6, 2013, confirms this when it states that the beneficiary "works under the oversight of [REDACTED] who is a [REDACTED] employee."

While the evidence of record indicates that the petitioner will regularly evaluate the beneficiary's performance for the end-client [REDACTED] as part of the petitioner's performance-evaluation procedures of persons that it assigns, the evidence of record does not establish that the petitioner – which, by the way, is located in Kentucky - has assigned any supervisor to [REDACTED] Washington location where the beneficiary would work. As earlier noted, the record reflects that the beneficiary would be assigned to [REDACTED] Washington.

B. Law, Interpretations, and Analysis

In support of an H-1B petition, a petitioner must not only establish that the beneficiary is coming to the United States temporarily to work in a specialty occupation but the petitioner must also satisfy the requirement of being a U.S. employer by establishing that a valid employer-employee relationship exists between the petitioner and the beneficiary throughout the requested H-1B validity period. To date, USCIS has relied on common law principles and two leading Supreme Court cases in determining what constitutes an employer-employee relationship.

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)

"United States employer" is defined 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 or any of its clients 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 (LCA) 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 legacy Immigration and Naturalization Service ("INS") nor U.S. Citizenship and Immigration Services ("USCIS") defined the terms "employee" or "employer-employee relationship" by regulation for purposes of the H-1B visa classification, even though the regulation describes H-1B beneficiaries as being "employees" who must have an "employer-employee relationship" with a "United States employer." *Id.* Therefore, for purposes of the H-1B visa classification, these terms are undefined.

The United States Supreme Court has determined that where federal law fails to clearly define the term "employee," courts should conclude that the term was "intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (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. at 440 (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

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

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

Therefore, 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

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).

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).

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, not who has the *right* to provide the tools required to complete an assigned project. See *id.* at 323.

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

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

The evidence of record does not demonstrate the requisite employer-employee relationship between the petitioner and the beneficiary. While social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are still relevant factors in determining who will control 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 relevant factors, we are unable to find that the requisite employer-employee relationship will exist between the petitioner and the beneficiary.

The evidence, therefore, is insufficient to establish that the petitioner qualifies as a United States employer, as defined by 8 C.F.R. § 214.2(h)(4)(ii). Even letters claiming that the petitioner is the "employer" and exercises complete control over the beneficiary are not persuasive where neither the letters nor other evidence of record provides supporting factual grounds for such conclusory statements. 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)).

As will now be discussed, based on the tests outlined above, the evidence in the record of proceeding has not established that the petitioner or any of its clients 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). Accordingly, the petition will be denied and the appeal dismissed on this basis.

The record contains some indicia both for and against the proposition that the petitioner has established the requisite employer-employee relationship within the context of the analytical framework that we reviewed above. Ultimately, we find that the evidence of record is not sufficient for us to find that it is more likely than not that the petitioner meets this requirement.

We consider the following factors as somewhat favorable to the claim of the requisite employer-employee relationship:

1. It appears that the petitioner will hire, pay, and have the ability to fire the beneficiary. However, the petitioner's latitude in those areas are substantially limited within what we know of the contractual context of the particular project-work for which this petition specifies as the basis for its specialty occupation claim.
 - The record of proceeding indicates that the petitioner's right to hire the beneficiary for the particular project work covered by the Petitioner PSA - which work is the asserted basis for this petition - is subordinate to and conditioned upon the client's sole and independent discretionary determination as to whether that client would find the beneficiary acceptable for the work in the first place. We direct the petitioner to Section 2 (Requests for Services) of the Petitioner PSA. It indicates that the beneficiary would not be authorized to work on the Client's project until and unless the Client accepted him for assignment, after a review of his background and credentials.

- The petitioner and counsel fail to note that, as per paragraph 3 of the same PSA, the Client would have the unilateral and totally discretionary right to determine the duration of its use of the beneficiary's services and could cancel them for any reason or no reason at all – and without any notice.
2. Also, we must note that the petition is premised upon only one assignment – the only one addressed in the petition – that is, the assignment to [REDACTED]. In this regard, we note again that few of the related contractual terms are presented in the proceeding, but that the totality of the evidence indicates that the end-client would retain the power to at least control the extent to which the petitioner would be compensated for the beneficiary's work, at least to the extent that the end-client would not have to pay for work that does not satisfy its requirements. Also, based upon the evidence of record, without the end-client's use of the beneficiary, the basis for H-1B employment under this petition would evaporate, for the petition did not specify and present substantive evidence regarding any other particular work for the beneficiary.
 3. It appears that the petitioner would be responsible to pay the beneficiary, provide any benefits and insurance, and shoulder whatever taxes would be required due to the beneficiary's being carried in the petitioner's payroll. It is also likely that the petitioner would claim the beneficiary for tax purposes.
 4. We accord very little weight to the petitioner's claims that it will provide regular, periodic performance evaluations and reviews. The totality of the related evidence indicates that such evaluations and reviews are not exercised continuously and contemporaneously with the beneficiary's day-to-day performance of the specific work assigned to the beneficiary, and that they are conducted at a site that is remote from the beneficiary's day-to-day work location. More importantly, the PSA's Section 1 (Contractor's Staff) states that the Client itself will be the "sole judge as to the acceptability and capability" and holds the right to request the removal of any person assigned to it – and leaving the assigning entity only the prerogative to provide a replacement for the removed person.

We will now note numerous aspects of the evidence of record that we regard as factors weighing against a favorable determination on the petitioner's claim that it satisfies the employer-employee requirement. In this regard, we find that the evidence of record:

1. Indicates that the beneficiary would be assigned to a location (in Washington State) that is distant from the petitioner's (which is in Kentucky).
2. Does not indicate that the petitioner has placed any supervisory person at the beneficiary's work site.

3. Indicates that the petitioner's management and evaluation actions regarding the beneficiary's work (a) are not provided at the workplace, and (b) are neither continuously issued nor based upon daily or other regular observation of the beneficiary by the petitioner in the regular course of the beneficiary's work for [REDACTED]. Further, there is no evidence of record that the petitioner's performance evaluations are binding upon the end-client or upon any intermediate vendor. Also, there is no indication that, based upon its performance evaluations, the petitioner could unilaterally keep the beneficiary at the project site regardless of contrary performance determinations by the end-client or an intermediate vendor.
4. Does not indicate that the petitioner plays any substantial role in determining the particular duties and tasks that the beneficiary would perform in the day-to-day work that it would perform for [REDACTED]. In this regard, we have considered the letter-input from the firms involved in the beneficiary's assignment to [REDACTED] but we find that their assertions about the petitioner's control over the beneficiary and his work do not specifically address or relate who would determine the particular, daily scope of the beneficiary's work at [REDACTED].
5. Contains documentary evidence indicating that the day-to-day control of the beneficiary's work would reside in the client's representative - and not in the petitioner. That evidence resides in (1) the aforementioned statement of the role of the "Client" in Paragraph 1 of the Professional Services Agreement, (2) in the letters from both [REDACTED] and [REDACTED] which confirm that overall management of the beneficiary's work lies with [REDACTED] and (3) in Paragraph 5 of the [REDACTED] Petitioner PSA, which indicates that the petitioner would only be paid for such work as the client [REDACTED] determined to be satisfactory by endorsing a timesheet for such work.
 - We accord significant weight to the fact that per paragraph 1 (Contractor's Staff) of the [REDACTED] Petitioner PSA, it is the Client – not the petitioner- who will be "the sole judge as to the acceptability and capability" of any person or team assigned to the Client.
6. Nowhere indicates that the work to which the beneficiary would be assigned would require the petitioner to provide its own proprietary information or technology.
7. Provides no indication that the end-client requires, or for that matter, even allows, the use of that petitioner-issued laptop computer upon which the petitioner focuses as proof of its supplying instrumentalities for the beneficiary's use on the job.

8. By virtue of (a) the applications and programs mentioned in the various descriptions of the beneficiary's duties, and (b) the fact that the beneficiary's duties would inherently require *access to and use of* the end-client's IT instrumentalities (such as [REDACTED] own IT systems, computer programs, and software applications) indicates that [REDACTED] – and not the petitioner – is the supplier of the necessary means and instrumentalities without which the beneficiary could not perform the assigned duties. (And we again note that there is no evidence that the petitioner-supplied laptop is even needed for the beneficiary's work.)
9. The beneficiary would not be used to produce an end-product for the petitioner's own use. Rather, the totality of the evidence indicates that whatever might be produced by the beneficiary is solely for the end-client [REDACTED] use and benefit and must conform to [REDACTED] requirements – not the petitioner's.

We will not speculate as to the full constellation of material terms and conditions that the pertinent contractual documents including purchase orders work orders, amendments, and the like may have imposed of the beneficiary's work. However, we do find (a) that the [REDACTED] Petitioner Professional Services Agreement (or "PSA") is the only contract submitted into the record; (b) and that there is no other probative evidence in the record that provides specific information with regard to the actual supervisory and management framework that would determine, direct, and supervise the beneficiary's day-to-day work at [REDACTED]. Based upon this fact and upon all of the aspects of the record that we have discussed as bearing on the employer-employee issue, we conclude that the evidence of record is inconclusive on the issue of whether it is more likely than not that the petitioner and the beneficiary would have the requisite employer-employee relationship in the context of the work to be performed if this petition were approved. We reach this conclusion based upon the application of the above-discussed common law principles to the totality of the evidence of record. As it is the petitioner's burden to establish that such employer-employee relationship exists, the petition must be denied.

It should be noted that we fully considered all of the submissions from the entities involved, including the letters and affidavits submitted by representatives of [REDACTED]. We find, however, that the evidentiary value of those documents is greatly diminished because they do not remedy the record's lack of detailed factual information regarding the particular terms and conditions in the pertinent contractual documents executed by the business entities involved that would determine such material factors as, for example: (1) the day-to-day supervisory chain under which the beneficiary would work; (2) the particular work-assigning, supervising, and performance-evaluating powers that the particular supervisors and their employing entities would have over the beneficiary; (3) the roles, if any, that [REDACTED] would have with regard to specifying day-to-day, and evaluating day-to-day, work that the beneficiary would perform during his assignment at [REDACTED]; (4) the powers that [REDACTED] would have over determining whether the beneficiary's employment at [REDACTED] should continue and for how long; (5) whether [REDACTED] possessed the right to terminate the beneficiary's assignment; and (6) what restrictions, if any, were placed upon

the petitioner's ability to reassign the beneficiary away from [REDACTED] during the period requested in the petition.

We also note that the letters' suggestions or statements that the petitioner would solely supervise the beneficiary is undercut by the aforementioned clause in the [REDACTED] Petitioner contract clause the "Client" [REDACTED] being the "sole judge" as to the acceptability and capability of an individual contractor or team member such as the beneficiary.

Additionally, we find that the wording of the letters submitted from the various business entities is sufficiently similar in the language *in material sections* to strongly suggest that the ultimate source of those statements may not have been the letter's signatory but rather a person from one of the other entities that also submitted letters.

Further, we find that the petitioner has not established the duration of the relationship between the parties. The updated purchase order, submitted in response to the RFE, provided a start date of August 1, 2013, and provided an estimated project duration of "6 months (extendable)." However, "possible" extensions are not synonymous with definitive, non-speculative employment for the beneficiary. Moreover, in its August 1, 2013 letter, [REDACTED] stated that it contracts with many companies to provide temporary, project-based services, but provides no specific statement describing the nature and duration of the project at issue here.

Again, the employment start-date requested in this petition was October 1, 2013, and the evidence of record does not establish that at the time of the petition's filing the petitioner had secured definite, non-speculative work for the beneficiary that extended beyond December 31, 2013 (six months from the start date identified in the updated purchase order, August 1, 2013). 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. Thus, even if it were found that the petitioner would be the beneficiary's United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii), the petitioner has not demonstrated that it would maintain such an employer-employee relationship for the duration of the period requested.⁷

⁷ The agency made clear long ago that speculative employment is not permitted in the H-1B program. A 1998 proposed rule documented this position as follows:

Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. See section 214(i) of the

For the reason set forth above, we agree with the director's finding that the evidence of record fails to demonstrate that the petitioner would engage the beneficiary in an employer-employee relationship. Accordingly, the appeal will be dismissed, and the petition will be denied.

V. BEYOND THE DECISION OF THE DIRECTOR

Next, we will briefly discuss our supplemental determination that, as currently constituted, the evidence of record does not demonstrate that the proffered position is a specialty occupation. Thus, even if we were to find that the evidence of record demonstrated that the petitioner would engage the beneficiary in an employer-employee relationship, which it does not, the record's failure to establish the proffered position as a specialty occupation would still preclude approval of the proffered position.

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

Here, the record of proceeding in this case is similarly devoid of sufficient information from the end-client [REDACTED], regarding the job duties to be performed by the beneficiary for that company. Although [REDACTED] provides a generic list of duties in its letter dated August 1, 2013, it provides no specific details regarding the order in which those duties would be applied, their duration, and why, if at all, their performance within the context of the [REDACTED] project would require the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in any specific specialty.

Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

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

The evidence of record as presently constituted fails to satisfy any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), and, thus, it cannot be found that the proffered position qualifies as a specialty occupation. For this additional reason, the petition must be denied.

VI. CONCLUSION

As set forth above, we agree with the director's finding that the evidence of record fails to demonstrate that the petitioner would engage the beneficiary in an employer-employee relationship. Beyond the decision of the director, we find that the evidence of record also fails to demonstrate that the proffered position is a specialty occupation.

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 we conduct appellate review on a *de novo* basis).

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

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate 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.