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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: **SEP 19 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 (hereinafter "director") denied the nonimmigrant visa petition. The matter is now before us on appeal. The appeal will be dismissed. The petition will be denied.

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as an 8000-employee "IT Consulting" company established in [REDACTED]. In order to employ the beneficiary in a full-time position to which it assigned the job title "Senior Consultant," 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 each of two separate and independent grounds, namely: (1) that the evidence of record failed to establish the existence of an employer-employee relationship between the petitioner and the beneficiary; and (2) that the evidence of record failed to demonstrate that the duties of the proffered position comprise a specialty occupation.

The record of proceeding contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) the Form I-290B, Notice of Appeal or Motion, a brief and supporting documentation.

Upon review of the entire record of proceeding, we find that the petitioner has failed to overcome the director's grounds for denying this petition.<sup>2</sup> Accordingly, the appeal will be dismissed and the petition will remain denied.

## I. FACTUAL AND PROCEDURAL HISTORY

In this matter, the petitioner stated in the Form I-129 that it seeks the beneficiary's services as a senior consultant on a full-time basis at the rate of pay of \$92,769 per year. The petitioner further indicated that the beneficiary will work at the petitioner's office, located at [REDACTED] and for an end-client, [REDACTED] located at [REDACTED].

In a letter dated March 27, 2013, the petitioner indicated that the beneficiary's specific duties will include:

- Reviewing scoping requirements and providing solutions for implementation

<sup>1</sup> The petitioner provided a North American Industry Classification System (NAICS) Code of 5416, "Management, Scientific, and Technical Consulting Services." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "5416 Management, Scientific, and Technical Consulting Services," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited Sept. 19, 2014).

<sup>2</sup> We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

with the client business team;

- Designing and configuring HCM modules for the HCM implementation;
- Analyzing developments to ensure maintainability when coordinating with offshore team;
- Scoping business requirements for SAP ECC HCM designs;
- Transferring knowledge gained in review process and providing solutions to the business team to start developments for the offshore team;
- Developing test cases and resolving defects that arise during integration testing and user-acceptance testing;
- Developing technical requirements and preparing unit test cases; and
- Developing and testing functional specifications, master data migrations, function and development testing, and authorization and security role testing.

The petitioner also submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The LCA designation for the proffered position corresponds to the occupational classification of "Computer Occupations, All Other," SOC (ONET/OES) Code 15-1799, at a Level III wage.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on July 16, 2013. The director noted that the evidence submitted was insufficient to establish eligibility for the benefit sought. The petitioner was asked to submit probative evidence to establish that a valid employer-employee relationship will exist between the petitioner and the beneficiary. The petitioner was also asked to submit probative evidence to establish that the proffered position qualified as a specialty occupation. The director outlined some of the types of specific evidence that could be submitted.

In its August 29, 2013 response to the director's RFE, the petitioner provided the following statements regarding "right to control":

[The petitioner] has provided [REDACTED] with IT consulting services since February 8, 2008 under a Master Services Agreement. Under this agreement, Statements of Work are prepared that specify the ongoing IT consulting work that is required by [REDACTED]. The work on Program [REDACTED] that [the beneficiary] will be performing is governed by the Fiscal Year 2013 Amended and Restated Master Statement of Work #2 and Implementation I-SOW-2.

In addition, we submit a detailed itinerary and project milestone plan listing the



goals of the beneficiary's work assignment and providing a detailed description of day-to-day specialty occupation job duties and an organizational chart showing the beneficiary's supervisory chain and demonstrating that he will report to [the petitioner's] manager, Mr. [REDACTED]

\* \* \*

[A]lthough [the beneficiary] will be assigned to work on a project for our client [REDACTED] at the client's worksite, he will remain a direct employee of [the petitioner]. All the consulting activities conducted at the client site are subject to the control and supervision of [the petitioner's] managers. [The petitioner] will pay [the beneficiary's] salary, manage and supervise his work, and conduct his performance evaluations. [The petitioner] also has the ultimate decision with respect to the termination of [the beneficiary's] employment.

The petitioner further detailed the duties and requirements of the position as follows:

The [beneficiary's] day to day duties will include:

- Coordinating with client business teams for scoping requirements and providing solutions for system implementation.
- Designing and configuring HCM modules for implementation[.]
- Coordination with an offshore team for system development[.]
- Execution of test cases and resolving defects arising during integration testing and user-acceptance testing[.]
- Documenting requirements and preparing the unit test cases[.]

[The beneficiary] will spend 40% of his time on SAP ECC HCM design-related activities; 30% of his time on development and testing (Functional Specification, Master data migration, functional testing and development testing, and Authorization and Security Roles testing); 15% of his time on solution documentation; and the remainder of his time devoted to coordination of teams and attending project planning meetings.

\* \* \*

In summary, the position offered to the beneficiary must be considered to be a specialty occupation. The industry standard for positions within this field normally requires possession of a bachelor's degree as the minimum educational requirement. The examples provided of parallel positions among similar organizations demonstrate that employees are commonly expected to have a degree and it is [the



petitioner's] standard requirement for individuals in this role to have a bachelor's degree in a related area. As the position demands performance of a complex range of duties involving rapidly evolving technology, it is highly unsuitable for an individual who has not attained at least a bachelor's degree in this area of expertise.

The director reviewed the information provided by the petitioner. As noted above, the director determined that 1) the evidence of record failed to establish the existence of an employer-employee relationship between the petitioner and the beneficiary; and (2) that the evidence of record failed to demonstrate that the duties of the proffered position comprise a specialty occupation. The director denied the petition on October 15, 2013. The petitioner submitted an appeal of the denial of the H-1B petition.

## II. STANDARD OF PROOF

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

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

\* \* \*

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

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

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

*Id.*

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

### III. ISSUES NOT ADDRESSED IN THE DIRECTOR'S DECISION

#### A. Failure to specify the need for a degree in a specific specialty

As a preliminary matter, we observe that the petitioner has never alleged that the proffered position requires a minimum of a baccalaureate or higher degree, or its equivalent, in a specific specialty. The petitioner's claim that a bachelor's degree "in a related field" is a sufficient minimum requirement for entry into the proffered position is inadequate to establish that the proposed position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question.<sup>3</sup> There must be a close correlation between the required specialized studies and the position; thus, the mere requirement of a degree, without further specification, does not establish the position as a specialty occupation. Cf. *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988) ("The mere requirement of a college degree for the sake of general education, or to obtain what an employer perceives to be a higher caliber employee, also does not establish eligibility."). Thus, while a general-purpose bachelor's degree may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d at 147 (1st Cir. 2007).

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<sup>3</sup> U.S. Citizenship and Immigration Services (USCIS) cannot determine if a particular job is a specialty occupation based on the qualifications of the beneficiary. A beneficiary's credentials to perform a particular job are relevant only when the job is first found to qualify as a specialty occupation. USCIS is required instead to follow long-standing legal standards and determine first, whether the proffered position qualifies as a specialty occupation, and second, whether an alien beneficiary was qualified for the position at the time the nonimmigrant visa petition was filed. Cf. *Matter of Michael Hertz Assoc.*, 19 I&N Dec. 558, 560 (Comm'r 1988) ("The facts of a beneficiary's background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation].").



The petitioner's assertion that its minimum requirement for the proffered position is only a bachelor's degree "in a related field," without further specifying that the degree be in any specific specialty or what "in a related field" corresponds to, is tantamount to an admission that the proffered position is not in fact a specialty occupation. Accordingly, the director's decision must therefore be affirmed and the petition denied on this basis alone.

#### B. The Speculative Nature of the Work

Based upon a complete review of the record of proceeding, we also find that the evidence fails to establish that, at the time the petition was submitted, the petitioner had secured work for the beneficiary that would entail performing the duties as described in the petition and that was reserved for the beneficiary for the duration of the period requested. For this reason, the petition must also be denied.

On the Form I-129, the petitioner requested the beneficiary's H-1B classification for the period of October 1, 2013 to August 14, 2016. In the document entitled "Itinerary of Services and/or Engagements" the petitioner stated that the beneficiary would be focusing his efforts on the [REDACTED] project at [REDACTED]. As noted by the petitioner, "[t]he [REDACTED] project is a global initiative to rollout a new SAP's ERP 6.0 system with new set of global business processes."

The petitioner further noted in its August 29, 2013 letter that "should the project at [REDACTED] unexpectedly end, then [the petitioner] will file an amended H-1B petition requesting approval to re-assign Mr. [REDACTED] to one of many other consulting projects that it is engaged on in the United States or the company will terminate his employment and provide for him to return to his home country."

The documentation provided does not establish that, at the time of the instant H-1B filing, there was sufficient specialty occupation work to be done by the beneficiary were the H-1B approved for the intended employment dates. The aforementioned "Itinerary of Services and/or Engagement" document states that the dates of service for the beneficiary will be from October 1, 2013 to December 31, 2014. Further, the document entitled "Project Milestone Plan" for Project [REDACTED] states that the Wave 2-SAP Implementation "Go-Live and Stabilization" will be completed in December 2014.

Additionally, as noted in the LCA, the beneficiary may work at the end-client's location or at the petitioner's offices in [REDACTED] Georgia. However, the petitioner did not provide any evidence of the project and job duties the beneficiary would perform if he returned to work with the petitioner. Therefore, it is not clear what the substantive nature of the work would be for the entire period of employment requested on the Form I-129.

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<sup>4</sup> The beneficiary of the instant petition, as noted on the Form I-129 and supporting documents in the record, is [REDACTED]. It is unclear to us who Mr. [REDACTED] is in relation to this petition.



Thus, we conclude that the record of proceeding provides an inadequate factual basis for us to even determine that, at the time of the petition's filing, the petitioner had secured for the beneficiary definite, non-speculative work conforming to the petition's description of the proffered position.

U.S. Citizenship and Immigration Services (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.<sup>5</sup> Moreover, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. 8 U.S.C. 1361 (Section 291 of the Act). The petitioner has thus not established that, at the time the petition was submitted, it had secured work for the beneficiary that would entail performing the duties as described in the petition and that was reserved for the beneficiary for the duration of the period requested.

#### IV. REVIEW OF THE DIRECTOR'S DECISION

##### A. Employer-Employee Relationship

We will now address the director's determination that the petitioner failed to establish that it will have an employer-employee relationship with the beneficiary. The record supports the conclusion

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<sup>5</sup> The agency made clear long ago that speculative employment is not permitted in the H-1B program. For example, a 1998 proposed rule documented this position as follows:

Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. See section 214(i) of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

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

The regulation at 8 C.F.R. § 214.2(h)(9)(i)(B) also contemplates that speculative employment is not permitted stating that a "petition may not be filed. . . earlier than 6 months before the date of **actual need** for the beneficiary's services or training. . ."

that the evidence fails to establish that the petitioner 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." 8 C.F.R. § 214.2(h)(4)(ii).

As a preliminary matter, we find that proper resolution of this issue is to be determined by the evidentiary record that the petitioner has developed with regard to the beneficiary's project work at [REDACTED]. We say this because we find that the record of proceeding contains insufficient evidence to support a reasonable finding that the petitioner had secured any specific work for the beneficiary at its own location. Absent showing at the time of petition filing that the petitioner had definite, non-speculative work for the beneficiary at its own location, there is no basis for a determination that the petitioner and the beneficiary would have an employer-employee relationship. After all, the existence of work for the beneficiary is a basic element of a petitioner's claim that it would be employing the beneficiary if the petition were approved. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

The petitioner maintains that it will have an employer-employee relationship with the beneficiary and that the beneficiary will work at the end-client, [REDACTED]. The petitioner submitted documentation indicating that there is a professional services agreement between the petitioner and [REDACTED].

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

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

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

*United States employer* means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) *Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and*



- (3) Has an Internal Revenue Service Tax identification number.

(Emphasis added); *see also* 56 Fed. Reg. 61111, 61121 (Dec. 2, 1991).

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

Neither the former Immigration and Naturalization Service (INS) nor 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.<sup>6</sup>

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.<sup>7</sup>

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<sup>6</sup> 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).

<sup>7</sup> 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

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).<sup>8</sup>

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

The factors indicating that a worker is or will be an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. *Darden*, 503 U.S. at 323-324; *Clackamas*, 538 U.S. at 445; *see also* *Restatement (Second) of Agency* § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. *See Clackamas*, 538 U.S. at 445; *see also* *New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1) (adopting a materially identical test and indicating that said test was based on the *Darden* decision); *see also* *Defensor v. Meissner*, 201 F.3d 384, 388 (5th Cir. 2000) (determining that hospitals, as the recipients of beneficiaries' services, are the "true employers" of H-1B nurses under 8 C.F.R. § 214.2(h), even though a medical contract service agency is the actual petitioner, because the hospitals ultimately hire, pay, fire, supervise, or otherwise control the work of the beneficiaries).

It is important to note, however, that the factors listed in *Darden* and *Clackamas* are not exhaustive and must be evaluated on a case-by-case basis. Other aspects of the relationship between the parties relevant to control may affect the determination of whether an employer-employee relationship exists. Additionally, 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

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(1945)).

<sup>8</sup> 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).



*right to* assign them, it is the *actual* source of the instrumentalities and tools that must be examined, and not who has the *right to* provide the tools required to complete an assigned project. *See id.* at 323.

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

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

To begin, we observe that petitioner has not provided a complete "Masters Services Agreement" (MSA) between the petitioner and [REDACTED]. That is the record only includes pages 1, 12, 13, and 18 as well as the accompanying Implementation I-SOW-2. Thus, important terms between the petitioner and [REDACTED] are unknown. For example, page 1 indicates at 1.7 that the term "Project Manager" has the meaning set forth in Section 6.4 (Project Manager)." Yet the partial agreement provided by the petitioner does not include this as well as other sections. As the petitioner has not supplied a complete document for our review, we cannot ascertain whether [REDACTED] has set forth specific restrictions on the petitioner's actions as it relates to its project managers, key personnel, or consultants.

Moreover, the record includes provided incomplete and imprecise information regarding who will supervise the beneficiary. While the petitioner states that the beneficiary will be supervised by [REDACTED] the petitioner did not submit a description of the supervisor's job duties and/or other probative evidence on the issue. We observe that the organizational chart shows [REDACTED] as the petitioner's vice president and indicates that there are three individuals in the positions of "Principal," "Senior Manager," and "Manager" between the beneficiary's proposed position of "Senior Consultant" and [REDACTED]. Although the record does include statements of work that indicate at various times Mr. [REDACTED] will have 100 percent expected involvement as program manager for the [REDACTED] project, his position appears to be that of an executive rather than the beneficiary's direct supervisor.<sup>9</sup> Accordingly, other than the organizational chart and the petitioner's assertion, the record of proceeding does not contain any documentation to establish that the petitioner has supervised or would supervise the beneficiary. Further, the petitioner did not provide specific information regarding where the beneficiary's manager/supervisor would be physically located. In other words, the petitioner did not specify how the beneficiary would be supervised on a daily basis. The record lacks sufficient evidence establishing that the petitioner will supervise, direct or even contact the beneficiary regarding any claimed work or how it will do so when the beneficiary is located at the end-client. The record does not establish that the petitioner has any substantive involvement in (1) determining the beneficiary's daily work schedule; (2) assigning

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<sup>9</sup> This same document in "Appendix B" identifies [REDACTED] as the petitioner's "Program Lead" and another individual as the Project Manager of Shared Services" with multiple other individuals identified as holding other managerial positions. This document, nor any others in the record, identifies where the additional employees will be located and their specific duties.



particular tasks to the beneficiary during the course of the project work to which he is assigned; or (3) directing and evaluating the content, pace, and quality of the beneficiary's day-to-day project-work.

Thus, the record of proceeding does not establish that the petitioner will have a direct influence on how the beneficiary's role in the [REDACTED] project would unfold in terms of his actual work and task assignments and their associated performance guidelines on timelines and means and manner of performance.

Further, the petitioner did not submit sufficient documentation from the claimed end-client to establish that the beneficiary will be working for the end-client. The record of proceeding contains a letter from the end-client dated March 6, 2013, which states that it has "an agreement with [the petitioner], pursuant to which [the petitioner] provides us with computer systems and information technology services."<sup>10</sup> The services provided require that certain [petitioning company's] personnel and resources be assigned to work on-site at our office." While the letter generally discusses its contractual relationship with the petitioner and references the beneficiary, the proffered position, and the worksite, the letter does not provide any specific information regarding the proffered position's duties and responsibilities; thus, it is not probative evidence to establish the beneficiary's role or the nature of his work while working at the end-client.

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 – and these seem to be within the petitioner's realm – other incidents of the relationship, e.g., who will oversee and direct the work of the beneficiary, where will the work be located, and who has the right or ability to affect the project work 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. As reflected in our comments on the documentary record, there is a significant weight of evidence in these other areas that would align as factors not favoring an employer-employee determination for the petitioner. However, as also reflected in this decision, the record of proceeding is simply not sufficiently comprehensive to provide a conclusive determination on the employer-employee issue. An evidentiary record that fails to fully disclose all of the relevant factors will not establish that the requisite employer-employee relationship will likely exist between the petitioner and the beneficiary.

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<sup>10</sup> The record also includes a letter signed by [REDACTED] allegedly in his capacity as the petitioner's Vice President. The letter is also dated March 6, 2013 and references the beneficiary. The body of the letter is a verbatim copy of the letter allegedly authored by a [REDACTED] employee. The use of identical language and phrasing in the letters, including the same use of pronouns and references to the petitioner as a third party, suggest that the language in one or both of the letters is not the authors' own. That is, it is not possible to ascertain that the photocopy of the letter submitted on [REDACTED] letterhead originated from the [REDACTED] employee. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of 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).

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). The petitioner provided an Employment Agreement with the H-1B petition submission. The Employment Agreement does not convey (1) a specific place of employment, (2) for a particular client on a defined project, (3) with an established duration, which had been established prior to the filing of the H-1B petition. While an employment agreement 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.

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). 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).

Accordingly, the appeal will be dismissed and the petition will be denied, on this basis.

#### B. Specialty Occupation

We will now address the director's determination that the petitioner failed to establish that the duties of the proffered position comprise a specialty occupation.

To meet its burden of proof on this issue, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements. Section 214(i)(1) of the 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, supra*. To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing 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 or its equivalent in a specific specialty directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To ascertain the intent of a petitioner, USCIS must look to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, location of employment, proffered wage, *et cetera*.

One consideration that is necessarily preliminary to, and logically even more foundational and fundamental than the issue of whether a proffered position qualifies as a specialty occupation, is whether the petitioner has provided substantive information and supportive documentation sufficient to establish that, in fact, the beneficiary would be performing services for the type of position for which the petition was filed (here, a senior consultant). We find that the petitioner has failed in this regard.

First, we note here that, as recognized by the court in *Defensor, supra*, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. *See Defensor v. Meissner*, 201 F.3d at 387-388. The court held that the former Immigration and Naturalization Service 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.

We concur with the director's determination that the record is insufficient to establish that the duties of the proffered position comprise the duties of 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(s), as well as any hiring requirements that it may have specified, 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 is insufficient to establish that, in fact, the beneficiary would be performing services for the type of position for which the petition was filed, in this matter, a senior consultant position.

Although in response to the RFE the petitioner submitted a letter and itinerary for the beneficiary, expanding upon the beneficiary's responsibilities and relating the claimed responsibilities to the [REDACTED] project, the record lacks corroborating documentation from [REDACTED] regarding the deliverable-based service that it requested or other documentation attesting to the actual duties the beneficiary specifically would perform as it relates to this project. The additional documentation submitted on appeal to evidence the work [REDACTED] required also failed to include information identifying the nature of

the proposed work. Accordingly, we cannot discern from the nature of the proposed work, as it has not been detailed, that the work requires a bachelor's degree in a specific discipline. 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)). Moreover, the end-client's acknowledgement that the work it requested of the petitioner required only a general bachelor's degree to perform the related duties, is tantamount to an admission that the position is not, in fact, a specialty occupation.

Accordingly, upon review of the totality of the record, the petitioner has not provided substantive information and supportive documentation sufficient to establish that, in fact, the beneficiary would be performing services primarily as a senior consultant for the duration of the requested employment period. As the petitioner in this matter has not provided documentary evidence substantiating the beneficiary's actual work, we cannot conclude that the petitioner established that it would employ the beneficiary in a specialty occupation.

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

Accordingly, as the petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position qualifies as a specialty occupation. For this reason, the appeal will be dismissed and the petition denied.

## V. CONCLUSION AND ORDER

For the reasons discussed above, we conclude (1) that the evidence of record failed to establish the existence of an employer-employee relationship between the petitioner and the beneficiary; and (2) that the evidence of record failed to demonstrate that the duties of the proffered position comprise a specialty occupation.

An application or petition that fails to comply with the technical requirements of the law may be denied by this office 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 this office abused its discretion with respect to all of our enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*. 345 F.3d 683.

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

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