



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **SEP 26 2014**

OFFICE: VERMONT SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner:
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:

[REDACTED]

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

I. PROCEDURAL AND FACTUAL BACKGROUND

On the Form I-129 visa petition, the petitioner describes itself as a software development and consulting firm. In order to employ the beneficiary in what it designates as a programmer analyst position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner failed to establish that it had specialty occupation work to which it would assign the beneficiary and failed to establish that, when it filed the visa petition, it had a labor condition application (LCA) that corresponds to the visa petition. On appeal, counsel asserted that the director's bases for denial were erroneous and contended that the petitioner satisfied all evidentiary requirements.

As will be discussed below, we have determined that the director did not err in her decision to deny the petition on the bases specified in her decision. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

We base our decision upon our review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's submissions on appeal.

II. EVIDENCE

The visa petition, which was submitted on April 1, 2013, states that the petitioner is located in [REDACTED] Delaware, but that the beneficiary would work at [REDACTED] Delaware.

The Labor Condition Application (LCA) submitted with the visa petition states that the proffered position is a programmer analyst position, and that it corresponds to Standard Occupational Classification (SOC) code and title 15-1121 Computer Systems Analysts from the Occupational Information Network (O*NET). The LCA further states that the proffered position is a Level I, entry-level, position. The LCA lists two places of employment, (1) [REDACTED] Delaware, and (2) the petitioner's address in [REDACTED] Delaware. Both of those locations are within the [REDACTED] Metropolitan Statistical Area. That LCA is not valid for employment outside of that area.

With the visa petition, counsel submitted evidence that the beneficiary received a bachelor's degree in engineering from [REDACTED] Belgaum in [REDACTED] India; and a master's degree in software engineering from [REDACTED] in the United States.

Counsel also submitted (1) a description of the proffered position; (2) an employment offer, dated March 25, 2013; (3) an employment contract, also dated March 25, 2013; and (4) a letter, dated April 1, 2013, from the petitioner's president.

The description of the proffered position is on the petitioner's letterhead and signed by the petitioner's HR manager. It states that the beneficiary would work in [REDACTED] Delaware. It also states the following about the proffered position:

- Design, development and implementation of Applications related to [REDACTED] Rules Process Commander, Multi-tier client-server applications using **Java, J2EE**, and C in Windows, Citrix and UNIX environments.
- Extensive working experience using [REDACTED] **Healthcare Framework**, Java, Servlets, SOAP, Weblogic, ODBC, and JDBC.
- Responsible for architecting business applications using [REDACTED] and other [REDACTED] frameworks. Provides architecture guidance to project teams developing BPM/BRE solutions using Pega.
- Provide thought-leadership to client across business and technical project dimensions solving complex business requirements.
- Develops and demonstrates an advanced knowledge of the [REDACTED] and all [REDACTED] design and implementation features.
- Accountable for ensuring the business and technical architecture of the delivered solution matches customer technical and functional requirements, and commits to Customer Success (realization of business benefit).
- Participates in the development of additional consulting opportunities within the customer base.
- Expertise and good understanding of Relational Database Management Systems including architecting and designing for performance and scalability and working with Object to Relational Mapping schemes for distributed data access.
- Experience in Web technologies including Servlets, JSP, and XML. Should have hands on experience in developing web applications.

The March 25, 2013 employment offer is signed by the petitioner's HR manager and by the beneficiary. It states that the beneficiary would work at [REDACTED] Delaware.

The March 25, 2013 employment contract states:

The petitioner may terminate any and/or all Project Schedule(s) at any time, and for any reason or no reason, immediately upon notifying the employee, without any resulting liability to employer by virtue of such termination.

The petitioner's president's April 1, 2013 letter states, *inter alia*: "The beneficiary will be providing services to the end client [REDACTED], which is located in [REDACTED] North Carolina." That letter further states that the proffered position "requires at least a bachelor[']s or master's degree in science or engineering in the relevant field."

On May 20, 2013, the service center issued an RFE in this matter. The service center requested, *inter alia*, evidence that the petitioner would have an employer-employee relationship with the beneficiary. The service center provided a non-exhaustive list of items that might be used to satisfy the employer-employee requirements.

In response, counsel submitted (1) an organizational chart of the petitioner's operations; (2) a Provider Services Agreement between the petitioner and [REDACTED], dated January 10, 2011 and signed on July 12, 2011 by representatives of the petitioner and [REDACTED]; (3) a letter, dated August 12, 2013, from the petitioner's Business Development Manager/Coordinator; (4) a letter, dated August 12, 2013, from [REDACTED]; (5) a Supplier Purchase Order dated June 26, 2013; (6) two additional LCAs; (7) a copy of an e-mail from the Department of Labor (DOL) regarding a certified LCA with the case number [REDACTED] forwarded to [REDACTED] on August 14, 2013; and (8) a letter, dated August 14, 2013, from counsel.

The petitioner's organizational chart indicates that the beneficiary is directly supervised by the petitioner's CEO, but it does not list the beneficiary's job title.

The Provider Services Agreement states general terms pursuant to which [REDACTED] may utilize the services of the petitioner's workers. It does not indicate that [REDACTED] agreed to utilize the beneficiary's services.

The letter from the petitioner's Business Development Manager/Coordinator reiterates the duty description contained in the description of the proffered position that was provided with the visa petition. It does not state any educational requirement of the proffered position. The letter states that the beneficiary will "provide services to the end client conEdison through [the petitioner's] direct vendor [REDACTED] New York.

The letter from [REDACTED] also states that the beneficiary would work at the [REDACTED] location in New York, and that it is a [REDACTED] location. It states the following as to the duties of the proffered position:

- Design, development and implementation of Applications related to [REDACTED] Multi-tier client-server applications using Java, J2EE, and C in Windows, Citrix and Unix environments.

¹ It is noted that [REDACTED] is also referred to as [REDACTED] by the petitioner. We will refer to this company as [REDACTED]."

- Extensive working experience using [REDACTED], CPM, Healthcare Framework, Java, Servlets, SOAP, Weblogic, ODBC, and JDBC.
- Responsible for architecting business applications using [REDACTED] and other [REDACTED] frameworks. Provides architecture guidance to project teams developing BPM/BRE solutions using [REDACTED]
- Develops and demonstrates an advanced knowledge of the [REDACTED] Architecture and all [REDACTED] design and implementation features.

As to the educational requirement of the proffered position, Ms. [REDACTED] stated: "By normal industry standards these services require at least a Bachelors [sic] Degree or equivalent in a relevant technology field." She did not delineate the technology fields that would be considered to be sufficiently relevant to the proffered position.

The Supplier Purchase Order between the petitioner and [REDACTED] although dated June 26, 2013, purports to have been electronically signed by [REDACTED] and a representative of the petitioner on August 8, 2013. Further, it states that it is for work by the beneficiary to commence on July 1, 2013, prior to the date upon which it was ratified. The Anticipated End Date of that work is June 30, 2014. The end client identified on that order is [REDACTED]

One of the additional LCAs provided by counsel is blank, except a photocopy of page four was signed by president on August 13, 2013, a photocopy of page five contains the electronic signature of the appropriate DOL official, and page six indicates that the work may be performed at [REDACTED] New Jersey.

The forwarded e-mail was sent from the petitioner's president's iPhone to [REDACTED] and purports to show that LCA case number [REDACTED] with filing date August 7, 2013, was certified on August 13, 2013 for a programmer analyst to be employed from September 17, 2013 to September 17, 2016.

In his August 14, 2013 letter, counsel asserted that the additional LCA provided was certified for the revised [REDACTED] New York location of the beneficiary's proposed employment, but that the copy sent to the petitioner by DOL was blank. In support of this assertion, counsel submitted the other additional LCA, which he asserts accurately represents the LCA submitted to DOL that was subsequently certified. That LCA is for a Level I programmer analyst to work from September 17, 2013 to September 17, 2016 at either the [REDACTED] New York location or at the [REDACTED] New Jersey. That copy is not certified by DOL.

The director denied the petition on October 6, 2014, finding, as was noted above, that the petitioner had not demonstrated (1) the availability of specialty occupation work at the time the Form I-129 was filed, and (2) that when it filed the visa petition, the petitioner had an LCA that corresponds with the visa petition.

On appeal, counsel submitted, *inter alia*, (1) a December 2, 2013 Provider Services Agreement executed by the petitioner and [REDACTED] (2) a copy of a forwarded e-mail, dated December 2, 2013; (3) copies of three vacancy announcements; (4) copies of two letters from people in the information technology (IT) industry; and (5) a brief.

The December 2, 2013 Provider Services Agreement is an updated version of the previous agreement between the petitioner and [REDACTED]. It again provides general terms pursuant to which [REDACTED] may agree to utilize the petitioner's workers.

The forwarded e-mail was sent by [REDACTED] with an [REDACTED] e-mail address, to the petitioner's president, on December 2, 2013. The petitioner's president then forwarded it to [REDACTED] with the added message: "Pls use this add to show that we had job at [REDACTED] DE at the time of h1 application." The body of the e-mail indicates that an unidentified company offered to subcontract a "Sr. Web Application Developer" to another unidentified company. The e-mail lists various skills and qualifications for the position, but does not list any educational requirement.

In the appeal brief, counsel stated that the beneficiary was assigned to work in [REDACTED] North Carolina for end client [REDACTED] through National Systems Consulting when the visa petition was filed. Counsel further stated that, "On or around August 2013, the beneficiary has been assigned to a new SOW (Statement of Work) with the end client [REDACTED] New York." Counsel states that the beneficiary's prospective employment at [REDACTED] in New York was arranged between the petitioner and [REDACTED] and between [REDACTED]

As to the additional LCA submitted, counsel stated that it was certified for the New York location of the beneficiary's prospective work on August 14, 2013 but the certified form provided to the petitioner by DOL was blank. Counsel stated: "It is not fair if the petition is denied due to the blank certified LCA which was sent to the employer by the DOL without any fault of the latter."

Counsel stated that, if the visa petition is approved, the beneficiary will work for end client [REDACTED] Delaware."²

Counsel further stated:

Please be advised that the employer could not gather the end client letter/valid work status or any kind of agreement with the end client [REDACTED] as the beneficiary's H1B is still pending. Please find attached the copy of the email from the vendor National Systems Consulting to the petitioner as proof that a specialty occupation work was available for the beneficiary at the time of filing of the petition as Exhibit "J".

² We will assume that counsel meant [REDACTED] Delaware."

It is impossible to obtain a work order for a prospective employee unless a visa has been issued as no one would want to enter into a legally binding contract unless there is an assurance that the service provider shall be available. The petitioner has numerous clients who routinely seek to avail its services and there are positions available for the beneficiary.

Legally speaking, an agreement does not have to be in a specific format. It can even be verbal. A pattern supported by actions and documentation is also sufficient to establish a contract. There is enough chain of activities between the intermediary, end client and the petitioner which will establish a legal and contractual relationship which is well defined and beyond reasonable doubt.

Counsel further asserted that the petitioner is a viable entity and has more than sufficient work to employ the beneficiary throughout the period of requested employment. Counsel provided financial information in support of those assertions. Counsel also asserted that the evidence submitted demonstrates that the proffered position qualifies as a specialty occupation.

III. AVAILABILITY OF SPECIALTY OCCUPATION WORK AT THE TIME THE PETITION WAS FILED

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

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

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

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

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

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

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

The petitioner has asserted that the proffered position is a programmer analyst position. The LCA provided with the visa petition is certified for a computer systems analyst, which is the appropriate O*NET SOC title for a programmer analyst position.

However, as was observed above, and as recognized by the court in *Defensor v. Meissner, supra*, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. Here, the end client has not been reliably identified.

On the visa petition, the petitioner stated that the beneficiary would work at [REDACTED] in [REDACTED] Delaware. On the LCA, the petitioner indicated that the beneficiary would work either in [REDACTED] Delaware or at [REDACTED] Delaware. The [REDACTED] Delaware location has been identified as a location of [REDACTED]. The petitioner's president's April 1, 2013 letter states that the beneficiary will provide services to [REDACTED] North Carolina.

The August 12, 2013 letter from the petitioner's Business Development Manager/Coordinator states that the beneficiary will work at [REDACTED] New York, which has been identified as a [REDACTED] location. The August 12, 2013 letter from [REDACTED] also states that the beneficiary would work at the [REDACTED] New York location of [REDACTED]. A revised LCA also contains that address.

On appeal, counsel asserts that the beneficiary would work for [REDACTED] in Delaware, but also appears to imply that the petitioner might assign him to work at other locations for other companies.

Given the conflicting evidence of the location where the beneficiary would work and the end client for whom he would work, it cannot be found that the petitioner has established, by a preponderance of the evidence, where it would assign the beneficiary to work or for what end client. Further, the record lacks evidence provided by any of the potential end clients. As such, the educational requirement imposed on the performance of the duties of the proffered position the end client has not been demonstrated. In fact, the duties themselves, as they would be performed by the beneficiary in the context of the operations of the end client or end clients have not been demonstrated.

Further, even if it had been demonstrated, whether the work available at the [REDACTED] location is specialty occupation work is of no direct relevance to the approvability of the instant visa petition. The instant visa petition was filed on April 1, 2013. The Purchase Order between the petitioner and [REDACTED] is dated June 26, 2013, which is after the visa petition was submitted.

The purchase order between the petitioner and [REDACTED] is not evidence of work that was available to the petitioner when it filed the instant visa petition. 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).

Further, that purchase order states that it is for work by the beneficiary to commence on July 1, 2013. The Anticipated End Date of that work is June 30, 2014. That purchase order purports to show work that was to commence on July 1, 2013; however, it was signed on August 8, 2013. The purchase order does not appear to have been signed and effective until after the petition was filed. As such, even if it were shown to be otherwise relevant to the approvability of the instant visa petition, the visa petition could not be approved for employment prior to August 8, 2013 on the strength of that purchase order.

Further still, that purchase order shows that the work to be performed was anticipated to end on June 30, 2014. Even if that purchase order were shown to be relevant to the approvability of the instant visa petition, the visa petition could not be approved for any time after June 30, 2014.

We have considered counsel's assertion that no end client can be identified until the visa petition is approved. However, an explanation of why the end client cannot be identified when the visa petition is filed is insufficient to demonstrate that the duties the beneficiary would perform for an unidentified end client would be specialty occupation duties.

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that

determines (1) the normal minimum educational requirement for 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.

We further observe that, even if the petitioner had been able to demonstrate, with reference to the duties that the end client would assign to the beneficiary, that the proffered position is a programmer analyst position, the proffered position would have been unlikely to qualify as a specialty occupation position. The U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)*, on which we routinely rely for the educational requirements of particular occupations, does not indicate that computer systems analysts in general, or programmer analysts in particular, require a minimum of a bachelor's degree in a specific specialty or its equivalent. Further, the LCA indicates that the proffered position is a Level I computer systems analyst position, that is, an entry-level position for an employee who has only basic understanding of the occupation. See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf. Level I computer systems analyst positions are less likely to require a minimum of a bachelor's degree in a specific specialty or its equivalent than computer systems analyst positions in general.

Also, at a more basic level, as reflected in this decision's discussion of the evidentiary deficiencies, the record lacks credible evidence that when the petitioner filed the petition, the petitioner had secured work of any type for the beneficiary to perform during the requested period of employment. USCIS regulations 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 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). For this reason also, the appeal will be dismissed and the petition denied.

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

IV. CORRESPONDING LCA ANALYSIS

The remaining basis for the decision of denial is the director's finding that the petitioner failed to establish that, when it filed the visa petition, it had an LCA that corresponds to the visa petition. The visa petition, the duty description submitted with it, the employment offer addressed to the beneficiary, and the beneficiary's employment contract all state that the beneficiary would work at the [REDACTED] Delaware location of [REDACTED]. The petitioner's president's April 1, 2013 letter,

also submitted with the visa petition, states that the beneficiary would work for [REDACTED] in [REDACTED] North Carolina.

In response to the RFE, counsel submitted (1) the August 12, 2013 letters from the petitioner's Business Development Manager/Coordinator and [REDACTED] and the June 26, 2013 Supplier Purchase Order, all of which indicate that, if the visa petition were approved, the beneficiary would work at the [REDACTED] New York location of [REDACTED].

On appeal, counsel asserts that, if the visa petition were approved, the beneficiary would work for [REDACTED] Delaware.

The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) stipulates the following:

Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

While the U.S. Department of Labor (DOL) is the agency that certifies LCAs before they are submitted to USCIS, the DOL regulations note that it is within the discretion of the U.S. Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) to determine whether the content of an LCA filed for a particular Form I-129 actually supports that petition. See 20 C.F.R. § 655.705(b), which states, in pertinent part:

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification. . . .

[Italics added]

Given the conflicting evidence, the petitioner has not demonstrated, by a preponderance of the evidence, the location where the beneficiary would work, and has not demonstrated, therefore, that when it filed the instant visa petition the petitioner had an LCA that corresponded to the visa petition in that it was approved for employment in all of the locations where the beneficiary would work.³ The appeal will be dismissed and the visa petition will be denied for this additional reason.

³ The AAO observes that the petitioner is obliged to show not only that, when it filed the visa petition, it intended to assign the beneficiary to one of the locations listed on the LCA submitted with the visa petition, but also that it still has work for him to perform at that location and that it still intends to employ him there.

V. ADDITIONAL ISSUES

The record suggests additional issues that were not addressed in the decision of denial but that, nonetheless, also preclude approval of this visa petition.

A. NUMERICAL LIMITATION ON H-1B VISAS (CAP)

The petitioner filed the Form I-129 on April 1, 2013, with a requested period of employment from October 1, 2012 to September 17, 2016. We observe that the request for a start date six months prior to the filing date and a period of requested employment of more than three years is an apparent typographical error. We will exercise our discretion to consider the visa petition to request a period of employment from October 1, 2013 to September 17, 2016.

Pursuant to section 214(g)(1)(A) of the Act, the total number of H-1B visas issued per fiscal year may not exceed 65,000. The petition was filed for an employment period to commence in October 2013. The 2014 fiscal year (FY14) extends from October 1, 2013 through September 30, 2014. The instant petition is therefore subject to the 2014 H-1B cap, unless exempt.

Section 214(g)(5) of the Act states, in pertinent part:

The numerical limitations . . . shall not apply to any nonimmigrant alien issued a visa or otherwise provided [H-1B status] who –

(A) is employed (or has received an offer of employment) at an institution of higher education (as defined in section 1001(a) of Title 20), or a related or affiliated nonprofit entity.

(B) is employed (or has received an offer of employment) at a nonprofit research organization or a governmental research organization; or

(C) has earned a master's or higher degree from a United States institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a)), until the number of aliens who are exempted from such numerical limitation during such year exceeds 20,000.

The Form I-129 H-1B Data Collection and Filing Fee Supplement (hereinafter, "H-1B Supplement"), at Part C, Numerical Limitation, reads as follows:

In addition to showing that the visa petition was approvable when it was submitted, the petitioner is obliged to demonstrate that it has remained approvable since then and continues to be approvable.

1. Specify how this petition should be counted against the H-1B numerical limitation (a.k.a. the H-1B "Cap"). (*Check one*):

- ☐ a. CAP H-1B Bachelor's Degree
- ☐ b. CAP H-1B U.S. Master's Degree or Higher
- ☐ c. CAP H-1B1 Chile/Singapore
- ☐ d. CAP Exempt

The petitioner checked box b, indicating that the petitioner claimed that the beneficiary is exempt from the numerical limitation pursuant to section 214(g)(5)(C) of the Act, the advanced degree exemption.

Further, in response to item "2" of that section, which requested that the petitioner identify the beneficiary's advanced degree and the institution where the beneficiary received it, the petitioner indicated that the beneficiary received a master's degree from [REDACTED]. Evidence in the record confirms that the beneficiary received a master's degree from that institution on March 13, 2011.

However, as stated above in 214(g)(5)(C) of the Act, the master's degree exemption from the general numerical cap applies to beneficiaries who received a minimum of a master's degree from a United States institution of higher education as defined in 20 U.S.C. 1001(a), which defines an institution of higher education as follows:

(a) Institution of higher education

For purposes of this chapter, other than subchapter IV, the term "institution of higher education" means an educational institution in any State that—

- (1) admits as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate, or persons who meet the requirements of section 1091 (d) of this title;
- (2) is legally authorized within such State to provide a program of education beyond secondary education;
- (3) provides an educational program for which the institution awards a bachelor's degree or provides not less than a 2-year program that is acceptable for full credit toward such a degree, or awards a degree that is acceptable for admission to a graduate or professional degree program, subject to review and approval by the Secretary;

(4) is a public or other nonprofit institution; and

(5) is accredited by a nationally recognized accrediting agency or association, or if not so accredited, is an institution that has been granted preaccreditation status by such an agency or association that has been recognized by the Secretary for the granting of preaccreditation status, and the Secretary has determined that there is satisfactory assurance that the institution will meet the accreditation standards of such an agency or association within a reasonable time.

(b) Additional institutions included

For purposes of this chapter, other than subchapter IV, the term "institution of higher education" also includes—

(1) any school that provides not less than a 1-year program of training to prepare students for gainful employment in a recognized occupation and that meets the provision of paragraphs (1), (2), (4), and (5) of subsection (a) of this section; and

(2) a public or nonprofit private educational institution in any State that, in lieu of the requirement in subsection (a)(1), admits as regular students individuals—

(A) who are beyond the age of compulsory school attendance in the State in which the institution is located; or

(B) who will be dually or concurrently enrolled in the institution and a secondary school.

The record contains insufficient evidence that [REDACTED] is a public or other nonprofit institution, and no indication, therefore, that [REDACTED] is an institution of higher education as defined in 20 U.S.C. § 1001(a) at the time the beneficiary was awarded his degree. Without evidence that the institution the beneficiary attended is such an institution, the beneficiary has not been shown to be entitled to the advanced degree exemption.⁴ The visa petition must be denied for this additional reason.

⁴ The AAO observes that the visa petition was submitted on April 1, 2013, and the FY 2014 cap final receipt date was April 5, 2013. As such, when the visa petition was submitted, the cap had not been exhausted.

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

B. 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)

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

Petitions indicating that they are exempt from the numerical limitation but that are determined by USCIS after the final receipt date to be subject to the numerical limit will be denied and filing fees will not be returned or refunded.

The instant visa petition was submitted with an indication that it was exempt from the cap pursuant to section 214(g)(5)(C) of the Act. We have now, considerably after the exhaustion of the general H-1B cap, determined that the instant visa petition was not eligible for that exemption. The visa petition must therefore be denied pursuant to 8 C.F.R. § 214.2(h)(8)(ii)(B).

"employment" to the H-1B "employee." Subsections 212(n)(1)(A)(i) and 212(n)(2)(C)(vii) of the Act, 8 U.S.C. § 1182(n)(1)(A)(i), (2)(C)(vii) (2012). Further, the regulations indicate that "United States employers" must file a Petition for a Nonimmigrant Worker (Form I-129) in order to classify aliens as H-1B temporary "employees." 8 C.F.R. § 214.2(h)(1), (2)(i)(A). Finally, the definition of "United States employer" indicates in its second prong that the petitioner must have an "employer-employee relationship" with the "employees under this part," i.e., the H-1B beneficiary, and that this relationship be evidenced by the employer's ability to "hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer").

Neither the former Immigration and Naturalization Service (INS) nor U.S. Citizenship and Immigration Services (USCIS) defined the terms "employee" or "employer-employee relationship" by regulation for purposes of the H-1B visa classification, even though the regulation describes H-1B beneficiaries as being "employees" who must have an "employer-employee relationship" with a "United States employer." *Id.* Therefore, for purposes of the H-1B visa classification, these terms are undefined.

The United States Supreme Court has determined that where federal law fails to clearly define the term "employee," courts should conclude that the term was "intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (hereinafter "*Darden*") (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). The Supreme Court stated:

"In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party."

Darden, 503 U.S. at 323-324 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. at 751-752); see also *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440, 445 (2003) (hereinafter "*Clackamas*"). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).

In this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. See generally 136 Cong. Rec. S17106 (daily ed. Oct. 26, 1990); 136 Cong. Rec. H12358 (daily ed. Oct. 27,

1990). On the contrary, in the context of the H-1B visa classification, the regulations define the term "United States employer" to be even more restrictive than the common law agency definition.⁵

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 318-319.⁶

⁵ 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).

Finally, it is also noted that if the statute and the regulations were somehow read as extending the definition of employee in the H-1B context beyond the traditional common law definition, this interpretation would likely thwart congressional design and lead to an absurd result when considering the \$750 or \$1,500 fee imposed on H-1B employers under section 214(c)(9) of the Act, 8 U.S.C. § 1184(c)(9). As 20 C.F.R. § 655.731(c)(10)(ii) mandates that no part of the fee imposed under section 214(c)(9) of the Act shall be paid, "directly or indirectly, voluntarily or involuntarily," by the beneficiary, it would not appear possible to comply with this provision in a situation in which the beneficiary is his or her own employer, especially where the requisite "control" over the beneficiary has not been established by the petitioner.

⁶ 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*

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).⁷

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

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

It is important to note, however, that the factors listed in *Darden* and *Clackamas* are not exhaustive and must be evaluated on a case-by-case basis. Other aspects of the relationship between the parties relevant to control may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met; however, the fact finder must weigh and compare a combination of the factors in analyzing the facts of each individual case. The determination must be based on all of the circumstances in the relationship between the parties, regardless of whether the parties refer to it as an employee or as an independent contractor relationship. *See Clackamas*, 538 U.S. at 448-449; *New Compliance Manual* at § 2-III(A)(1).

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)).

⁷ 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).

Furthermore, when examining the factors relevant to determining control, USCIS must assess and weigh each actual factor itself as it exists or will exist and not the claimed employer's right to influence or change that factor, unless specifically provided for by the common-law test. *See Darden*, 503 U.S. at 323-324. For example, while the assignment of additional projects is dependent on who has the *right* to assign them, it is the *actual* source of the instrumentalities and tools that must be examined, and not who has the *right to* provide the tools required to complete an assigned project. *See id.* at 323.

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

As was discussed at length above, the evidence is insufficient to show where the beneficiary will work, for what organization he will perform his services, or the duties he will perform. The terms of his employment, who will assign the beneficiary's duties and supervise his performance of them, for instance, also have not been adequately addressed.

Although the petitioner's organizational chart indicates that the petitioner's CEO will directly supervise the beneficiary, the record contains no indication that the petitioner's CEO will be assigned to work remotely at the same location where the beneficiary will work, wherever that may be. The petitioner has not demonstrated who will assign the beneficiary's tasks and supervise the beneficiary's performance of them and has not, therefore, demonstrated that it will have an employer-employee relationship with the beneficiary. The visa petition must be denied for this additional reason.

VI. CONCLUSION

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 the enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

The director's decision will be affirmed and the petition will be denied 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.