



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **AUG 21 2014**

OFFICE: VERMONT SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner:

Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) 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 ten-employee software development business¹ established in 2005. In order to employ the beneficiary in what it designates as a full-time business analyst position at a salary of \$71,300 per year,² the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, concluding that the evidence of record does not demonstrate that the petitioner qualifies as an U.S. employer having an employer-employee relationship with the beneficiary; the record does not demonstrate that the petitioner had specialty occupation work in existence at its facility when the petition was filed; and the record does not provide sufficient information to demonstrate that the position proffered qualifies as a specialty occupation.

The record of proceeding contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's letter denying the petition; and (5) the Form I-290B, Notice of Appeal or Motion, and supporting documentation. We reviewed the record in its entirety before issuing our decision.³

Upon review of the entire record of proceeding, we find that the evidence of record does not overcome the director's grounds for denying this petition. Beyond the decision of the director, we will enter an additional ground that precludes approval of the petition, i.e., the failure to submit a valid Labor Condition Application (LCA) that corresponds to the petition. For all these reasons, the appeal will be dismissed, and the petition will be denied.

I. FACTS AND PROCEDURAL HISTORY

The petitioner filed the Form I-129 on April 4, 2013, listing its business address as [REDACTED] New Jersey. The petitioner indicated that it is a ten-employee software development company. With regards to the beneficiary, the petitioner indicated on the Form I-129 that it seeks to employ the beneficiary as a business analyst at the petitioner's business

¹ The petitioner provided a North American Industry Classification System (NAICS) Code of 541511, "Custom Computer Programming Services." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "541511 Custom Computer Programming Services," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited August 7, 2014).

² The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for use with a job prospect within the "Management Analysts" occupational classification, SOC (O*NET/OES) Code 13-1111, and a Level I prevailing wage rate.

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

address above. The petitioner specifically checked the box on the Form I-129 at Part 5, Question 5 indicating that the beneficiary will not work off-site.

In support of the initial petition, the petitioner submitted a letter, dated March 29, 2013, describing its services as helping to consolidate a company's business processes "through customized, robust, innovative [redacted] NetWeaver-based solutions and highly skilled software personnel." The petitioner stated further that the "highly-skilled software development and the custom-made software applications that [the petitioner] create[s] go a long way in making [a] company create [sic] and in maintaining an edge over others." The letter further stated that the petitioner's "area of specialization is [redacted] NetWeaver and its various applications." The letter then described the proffered position as follows:

In accordance with our growth objectives, we now wish to assign [the beneficiary] to undertake temporary specialized Business Analyst's assignments. In this position, [the beneficiary] will be responsible for developing strategies for remaining competitive in new rapidly developing technologies.

We require a Business Analyst to analyze skill gaps in client requirements and skills of consultants on projects, and recommend additional resources for tasks. In this capacity, an individual must collect, review, and analyze information to make recommendations to managers. In order to perform her duties she will be required to define the nature and extent of the problem. In this regard, a business analyst will be responsible for [redacted] configuration, User requirement gathering, Requirement analysis, testing and documenting specifically in [redacted] SD and sub modules, also be involved in GAP analysis between legacy/third party systems with [redacted] DATA migration analysis, DATA loading, Data Cleansing, Analyze migration issues and root cause analysis. [The beneficiary] will be involved in system go-live, cutover activates, job scheduling, migration strategies, post go live impact analysis, Script preparation/testing for Unit, Regression, Cutover, transport and data loads in Development, test, Quality and production systems and Coordinate with business users for system landscape design, impact analysis, migration paths, point of failures/recovery strategies, system scalability and indentify [sic] infringing system policies and suggest alternative remedies.

[The beneficiary] would then develop solutions to the various issues that arise in day to day operations of our clients. In the course of preparing [her] recommendations, she will have to take into account the nature of the organization, the relationship it has with others in the industry, and its internal organization and culture. Insight into the problem is often gained by building and solving mathematical models. We require a business analyst to develop a team of IT professionals who can understand the difference between vague customer ideas and the clear specifications that will guide the software team's work.

[The beneficiary] is required to for [sic] our in house project Continuous Internal Development and Internal Audit Compliance using [redacted], at our [redacted] NJ, USA

office. The details of the work are attached. She will work exclusively on our in house projects and will not work at any client locations. At all times he [sic] will report to his [sic] manager who is an employee of [the petitioner]. [redacted] petitioner's] [redacted] SCM) is our In-house project using [redacted] at our [redacted] NJ, USA. Our Consultants will work extensively on our in-house projects and will not work at any client locations.

[redacted] is intended to design, develop and customize the Supply Chain Management capability in [redacted] across industries in the areas of Planning, Inventory Management, Advance Plan Optimizing, Logistics, Finance and Controlling and HR areas implementing the design, user accountability, migration, scalability using [redacted] This project will enhance the existing implementation/services capabilities of [the petitioner] to a [sic] achieve more visibility in terms of market reach and solutions it offers to the customers across various industries and regions globally.

* * *

There are close to 400 customers using [redacted] in USA These industries lay down specific Supply Chain Management [SCM] processes suited for their industries. [The petitioner's] [redacted] project will facilitate SCM functionalities to easily integrate customers using [redacted] with their business processes/projects to comply with various organizations overseeing these specific industries [sic].

The petitioner submitted a document entitled "Project Importance" for the petitioner's project, identified as Global Scalability for Supply Chain Business Management Integrated Development System, for the petitioner's product, identified as [redacted] In pertinent part, this document describes "Phase I, [redacted].1.0," as consisting of the following:

- Product Development location: [redacted] NJ
- Project Blue print Start: July 1st week 2013
- Project Development/Configuration start date: October 1st week 2013
- First release beta release [redacted] P.1.0) – Prototype/customer Demo: October 2014
- Data Migration: April 2015
- First release: August 3rd week 2015
- Audit/Licensing submission: [redacted] Add-on June 3rd week 2015
- Go live System test/compliance: October 4th week 2015
- Unit and regression Testing: April 2016
- Data Validation: July 2016
- Go live: December 2016

⁴ The petitioner uses the acronyms [redacted] to identify its project. It is unclear whether these acronyms refer to the same purported project.

- After-go-Live Support: December 4th week 2016 onwards

Under "Phase II: [of the petitioner's] [REDACTED] the document lists the resources needed to complete the [REDACTED] project. Specifically, the document lists a total of ten requested positions, seven of which are for "Business Analyst [REDACTED] consultant" positions to perform the duties of "Product requirement Gathering & Functional Design," "Product development, Design and delivery," or "Functional Design, Testing and Cutover Plan (Financial Domain)."

The petitioner submitted a "Business Blueprint Documentation" statement providing general information about its [REDACTED] project.

The director issued a detailed RFE instructing the petitioner to submit additional documentation establishing that it "qualifies as a U.S. employer that will engage the beneficiary in specialty occupation work in-house." Specifically, the director requested evidence that the petitioner "has previously and continues to internally develop software or other tools of technology," including documentation showing how the petitioner's services are promoted, evaluated, and delivered to its clients, as well as evidence that the petitioner actively participates as a purveyor of development services in the software industry. The director then listed types of evidence that could be submitted to establish that the petitioner develops software internally and will employ the beneficiary in specialty occupation work, including, *inter alia*:

- Copies of relevant portions of recent contracts, statements of work, work orders, service agreements, and letters between the petitioner and companies to which the petitioner's product and/or services will be delivered, and for which the beneficiary will be engaged in developing the petitioner's product or rendering services;
- Copies of relevant portions of recent contracts, statements of work, work orders, service agreements, and letters between the petitioner and companies to which the petitioner's product and/or services have previously been delivered; and
- Documentary evidence of payments made to the petitioner by recent clients for products purchased and/or services delivered.

In response to the RFE, the petitioner submitted a letter, dated September 24, 2013, which provided the same description of the proffered position as previously described. The petitioner also submitted, *inter alia*: its 2012 Forms 941, Employer's Quarterly Federal Tax Return, showing that the petitioner employed seven employees for the 1st, 2nd, and 3rd quarters, and 9 employees in the 4th quarter; its 2012 Forms W-2, Wage and Tax Statements, issued to twelve employees; and the following service contracts and similar documentation:

1. Subcontract Supplier Agreement between the petitioner ("managed vendor") and [REDACTED] through its service line [REDACTED], in which the petitioner will assign its employees to [REDACTED] Services and its affiliates (each a "Customer") "to perform Customer's work

- under the operational supervision of the Customer." This agreement further states that the petitioner "will deal directly and exclusively with [REDACTED] with respect to Services (including, but not limited to, directions, requests for utilization of the Services, Managed Vendor Personnel/performance, Services requirements . . .)";
2. Work Orders from [REDACTED] listing the work site and location as [REDACTED];
 3. Statement of Work (SOW) between [REDACTED] and the petitioner ("subcontractor"), in which the petitioner will provide its employee to perform services for [REDACTED] ("Customer") in Kansas City. The SOW states that "[t]he Subcontractor or Consultant(s) will be located at designated Customer facilities, unless otherwise required by [REDACTED]";
 4. Subvendor Services Agreement between [REDACTED] and the petitioner ("Subvendor") in which the petitioner will provide temporary employees directly to [REDACTED] Client. This agreement further states: "Assigned Employees will report to the Client location and supervisor specified on each order at the prescribed time indicated. Client will supervise the Assigned Employee in performing the agreed upon duties";
 5. Contractor Agreement between [REDACTED] and the petitioner ("Contractor") in which "Contractor agrees to provide programming, systems analysis, engineering, technical writing or other specialized services as an independent contractor directly to the third party user client ("client"). Accompanying this agreement was Purchase Order 2, assigning two of the petitioner's consultants to the client, [REDACTED];
 6. Subvendor Services Agreement between [REDACTED] and the petitioner ("vendor") engaging the petitioner "to render to Infotech Spectrum the services of professional computer personnel for information technology and other related services" as set forth in specific work orders. Attached to this agreement was a Statement of Work for the petitioner to provide its employee to the client, [REDACTED] for consulting services in [REDACTED] New Jersey;
 7. Subcontract between [REDACTED] and the petitioner ("Agent") in which the petitioner will work as a [REDACTED] Development Lead for [REDACTED]. The subcontract specifies the "[m]ain place of work" as [REDACTED] TX," working onsite Monday through Thursday, and working remotely on Friday; and
 8. Master Services Agreement between [REDACTED] and the petitioner ("Consultant Firm") in which the petitioner will provide "[REDACTED] with "software engineers or other computer professionals . . . suitable for placement anywhere in the United States on projects administered by [REDACTED] or its clients," as set forth in specific work orders. Attached to this agreement were work orders for the petitioner to provide two of its employees to the client, [REDACTED] at the client's site in [REDACTED] Washington.

Finally, the petitioner submitted a document entitled "[REDACTED] BBP Workshop – Proposed Sample" which provided general information about the petitioner's purported in-house project.

The director denied the petition, concluding that the evidence of record does not demonstrate that the petitioner qualifies as an U.S. employer having an employer-employee relationship with the beneficiary. The director found that the agreements, statements of work, work orders, invoices, and checks "serve as evidence to demonstrate that [the petitioning] company may have provided staffing services to vendor companies for their clients and their clients' affiliates," and that these documents "do not reference either [REDACTED] or a project titled "Continuous Internal Development and Internal Audit Compliance." The director found no supporting documentation in the record establishing "the existence of previous, current, or prospective clients for products developed internally by [the petitioner], or evidence to demonstrate "the continuous development of [REDACTED] or any other existing in-house projects."

On appeal, counsel asserts that the director "misconstrues and disregards the evidence which was submitted in support of the petition." Specifically, counsel contends that in response to the RFE, the petitioner submitted "copies of relevant portions of recent contracts with clients for their professional services," many of which "were for professional services performed primarily in the office of the petitioner, but which may require the consultant to travel to the client site for purposes of installation, customization, and training." Counsel claims that the director misconstrued these contracts "as being for the placement of consultants at third party sites, and as not demonstrating that there is an in-house project for which the services of the beneficiary are required," stating, "[t]here's nothing whatsoever in the documentation submitted which would substantiate this contention." Finally, counsel explains that the petitioner submitted these contracts not to show which services of the beneficiary were required, but "only for purposes of demonstrating the depth and breadth of the petitioner's business at the specific request of the service."

II. STANDARD OF PROOF

As a preliminary matter and in light of counsel's references to the requirement that U.S. Citizenship and Immigration Services (USCIS) apply the "preponderance of the evidence" standard, we affirm that, in the exercise of our appellate review in this matter, as in all matters that come within 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.

* * *

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. EMPLOYER-EMPLOYEE RELATIONSHIP

The first issue to be discussed is whether the petitioner has established its standing to file the petition as the beneficiary's employer.

A. The Law

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).

B. Analysis

In this matter, the director determined that the evidence of record does not establish that the petitioner is a "United States employer" who will have "an employer-employee relationship" with the beneficiary. 8 C.F.R. § 214.2(h)(4)(ii); Section 101(a)(15)(H)(i)(b) of the Act.

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

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

"United States employer." *Id.* Therefore, for purposes of the H-1B visa classification, these terms are undefined.

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

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

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

In this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. See generally 136 Cong. Rec. S17106 (daily ed. Oct. 26, 1990); 136 Cong. Rec. H12358 (daily ed. Oct. 27, 1990). On the contrary, in the context of the H-1B visa classification, the regulations define the term "United States employer" to be even more restrictive than the common law agency definition.⁵

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

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

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

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).

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 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).

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

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

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

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

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."

In the instant matter, the petitioner asserts that the beneficiary will work exclusively on-site at its business location in [REDACTED] New Jersey, on its in-house projects. Specifically, the petitioner asserts that the beneficiary will work on its "Continuous Internal Development and Internal Audit Compliance" project and its [REDACTED] project. The petitioner states that the beneficiary, like its other consultants, "will work extensively on our in-house projects and will not work at any client locations."

However, the petitioner's claims are not credible or corroborated by documentary evidence. First, the evidence of record does not contain any documentation relating to the petitioner's claimed

"Continuous Internal Development and Internal Audit Compliance" project. For example, the petitioner did not provide its business plan including market analysis of the need for, salability, or profitability of the purported project and how such a project would be directly related to its ten-employee business. The petitioner did not provide any evidence that it had or was in the process of patenting or copywriting its designs or blueprints for the project. The petitioner did not describe the role of each of its resources to be used for the project. Accordingly, there is no probative evidence that this project exists and/or will be developed by the petitioner, such that the beneficiary will be employed to perform services for this project. While the petitioner submitted documentation relating to its claimed [REDACTED] project, the submitted documentation is a broad overview of a project and is not sufficiently defined as to relate to the petitioner and the individuals it hires specifically. The record is insufficient to establish the existence and/or actual development of this claimed in-house project.

Significantly, the director issued an RFE specifically instructing the petitioner to submit evidence that it "has previously and continues to internally develop software or other tools of technology," including documentation showing how the petitioner's services are promoted, evaluated, and delivered to its clients, as well as evidence that the petitioner actively participates as a purveyor of development services in the software industry. The director then listed types of evidence that could be submitted to establish that the petitioner develops software internally and will employ the beneficiary in specialty occupation work, including copies of relevant portions of recent contracts, statements of work, work orders, service agreements, and letters between the petitioner and companies to which the petitioner's product and/or services have been or will be delivered, and for which the beneficiary will be engaged in developing the petitioner's product or rendering services.

In response to the RFE, the petitioner submitted several contracts, statements of work, and similar documentation. None of the submitted documents, however, relate to or even mention the petitioner's claimed "Continuous Internal Development and Internal Audit Compliance" or [REDACTED] projects. 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)). In addition, failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Instead, the contracts, statements of work, and similar documentation submitted in response to the RFE establish that the petitioner is providing staffing services to vendor companies for their clients and their clients' affiliates, and that the petitioner's employees primarily work off-site at the clients' worksites.

Specifically, the Subcontract Supplier Agreement between the petitioner and [REDACTED] reflects that the petitioner will assign its employees to perform services for [REDACTED] Services, and the accompanying Work Orders list the work site and location to which the petitioner's employees would be assigned as [REDACTED]

It is significant to note that this agreement specifically states that the petitioner's employees will "perform Customer's work under the operational supervision of the Customer." In addition, the SOW between [REDACTED] and the petitioner reflects that the

petitioner's employee will perform services for the client located in Kansas City, or will otherwise perform work "located at designated Customer facilities, unless otherwise required." The Subvendor Services Agreement between [REDACTED] and the petitioner states that the petitioner will provide temporary employees directly to [REDACTED] Client, and that the petitioner's employees "will report to the Client location and supervisor specified on each order at the prescribed time indicated. Client will supervise the Assigned Employee in performing the agreed upon duties." The Contractor Agreement between the [REDACTED] and the petitioner reflects that the petitioner will provide "programming, systems analysis, engineering, technical writing or other specialized services as an independent contractor directly to the third party user client." The Subvendor Services Agreement between [REDACTED] and the petitioner engages the petitioner "to render to [REDACTED] the services of professional computer personnel for information technology and other related services," and the accompanying work orders assigned the petitioner's employee to the client [REDACTED] site located in [REDACTED] New Jersey. The Subcontract between [REDACTED] and the petitioner specifies that the petitioner's assigned employees' "[m]ain place of work" will be "[REDACTED] TX," and that the employees will work onsite four days a week. Finally, the Master Services Agreement between [REDACTED] and the petitioner engages the petitioner to provide [REDACTED] with "software engineers or other computer professionals . . . suitable for placement anywhere in the United States on projects administered by [REDACTED] or its clients," and the accompanying work orders designated two of the petitioner's employees to the worksite of the client, [REDACTED] Washington.

Here, we highlight the petitioner's statement that its consultants "will work extensively on our in-house projects and will not work at any client locations." This statement is contradicted by the above contracts and similar documents, all of which show that the petitioner's employees are being assigned to work off-site at various clients' worksites. We note that the petitioner claims to have ten employees.⁸ Considering the petitioner's number of employees as well as the submission of contracts and other similar documents showing the assignment of the petitioner's employees to at least eight different end clients, the evidence of record indicates that the petitioner more likely than not is primarily in the business of providing staffing services.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence; any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). 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. *Id.*

On appeal, counsel for the petitioner asserts that the submitted contracts and similar documents "were for professional services performed primarily in the office of the petitioner, but which may require the consultant to travel to the client site for purposes of installation, customization, and training." Counsel also asserts that the director misconstrued these contracts "as being for the placement of consultants at third party sites, and as not demonstrating that there is an in-house

⁸ According to the petitioner's 2012 Form 941, Employer's Quarterly Federal Tax Return, for the 1st, 2nd, and 3rd quarters, the petitioner employed seven employees.

project for which the services of the beneficiary are required." Neither counsel nor the petitioner, however, provides further explanation or evidentiary support for their assertions. As discussed above, the submitted contracts and similar documents establish the contrary, i.e., that the petitioner is providing staffing services directly to third party companies at their locations. Again, we emphasize that none of the submitted contracts and similar documents reference the petitioner's claimed in-house projects and reiterate that it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* In addition, the petitioner's claim that it submitted these contracts "only for purposes of demonstrating the depth and breadth of the petitioner's business at the specific request of the service" is not persuasive, considering that the RFE specifically instructed the petitioner to submit documentation of its in-house projects.

The documents the petitioner submitted relating to its claimed [REDACTED] project, e.g., the "Project [REDACTED]" and "Business Blueprint Documentation" documents, generally describe components of the [REDACTED] project. However, these documents do not explain with any specificity what actual work has been and/or will be done on this project. These documents only provide vague descriptions of the project or work to be done, such as "[p]roduct development" or "[p]roduct requirement [g]athering." The lack of relevant detailed information about this project, combined with the lack of objective evidence establishing the existence and/or development of this project, raises serious doubt as to the petitioner's claim that the beneficiary will work exclusively on this and other in-house projects.

Moreover, the petitioner's descriptions of the beneficiary's job duties are inconsistent and, therefore, not credible. *Id.* The petitioner asserts that the beneficiary will only work on in-house projects, but then lists duties that are necessarily client dependent, such as: "analyz[ing] skill gaps in client requirements and skills of consultants on projects;" "develop[ing] solutions to the various issues that arise in day to day operations of our clients;" "User requirement gathering;" "GAP analysis between legacy/third party systems with [REDACTED]" and "Coordinat[ing] with business users." The term "in-house" denotes that these projects are independent of third party clients. The petitioner in this matter has not provided probative evidence of an in-house project to which the beneficiary would be assigned. The petitioner has not submitted credible evidence that it has work for the beneficiary at its location and over which it will exercise control.

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the petitioner qualifies as a U.S. employer that has an employer-employee relationship with the beneficiary. See 8 C.F.R. § 214.2(h)(4)(ii); Section 101(a)(15)(H)(i)(b) of the Act. The key element in this matter is who will have the ability to control the work of the beneficiary for the duration of the H-1B petition. As discussed earlier, such indicia of control include when, where, and how a worker performs the job, among other factors. 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. Here, without a credible explanation and evidence of when, where, and how the beneficiary will perform the job, as well as other relevant factors necessary to determine whether the petitioner will have the ability to control the

beneficiary's work, we are unable to find that the requisite employer-employee relationship will exist between the petitioner and the beneficiary. For this reason, the petition must be denied.

IV. SPECIALTY OCCUPATION

The material deficiencies in the record regarding the employer-employee relationship between the petitioner and the beneficiary preclude the approval of the petition. However, for thoroughness we will next address whether the position proffered here qualifies as a specialty occupation. For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. We find that the director correctly noted in this matter that without evidence of a qualifying position at the petitioner's facility, USCIS cannot determine whether the position qualifies as a specialty occupation. Upon review, we affirm that the evidence of record fails to establish that the proffered position is a specialty occupation.

A. The Law

To meet its burden of proof in establishing the proffered position as a specialty occupation, 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 Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one 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 term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires [(1)] 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 requires [(2)] 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, the position must also meet one of the following criteria:

- (I) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

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

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

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

To determine whether a particular job qualifies as a specialty occupation, USCIS does not rely simply upon a proffered position's title. The specific duties of the 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 beneficiary, and determine whether the position qualifies

as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d at 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

As 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) in order to properly ascertain the minimum educational requirements necessary to perform those duties. *See Defensor*, 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.*

B. Analysis

Here, the record of proceeding in this case is devoid of sufficient information regarding the specific job duties to be performed by the beneficiary. As discussed earlier in this decision, we do not find the petitioner's assertion that the beneficiary will exclusively work on-site at its business premises on in-house projects to be credible. The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary, therefore, precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

In fact, upon review of the petitioner's statements regarding the nature of the proffered position, we find the statements unclear. The petitioner described the proffered position as a "Business Analyst" under the "Management Analysts" occupational classification.⁹ However, we cannot find that the majority of the proffered duties, such as [REDACTED] configuration, testing and documenting specifically in [REDACTED] SD and sub modules, data migration analysis, data loading, data cleansing, system go-live, migration strategies, post go-live impact analysis, and script preparation/testing, can reasonably be construed as falling within the range of duties for the "Management Analysts" classification.¹⁰

⁹ The LCA submitted by the petitioner in support of the petition was certified for use with a job prospect within the "Management Analysts" occupational classification, SOC (O*NET/OES) Code 13-1111, and a Level I prevailing wage rate.

¹⁰ According to the U.S. Dep't of Labor's (DOL) Occupational Information Network (O*NET OnLine), the duties of "Management Analysts" include: gather and organize information on problems or procedures; analyze data gathered and develop solutions or alternative methods of proceeding; confer with personnel concerned to ensure successful functioning of newly implemented systems or procedures; interview

Instead, we note that the proffered duties appear more appropriate for a position falling under the "Computer Systems Analyst" occupational category.¹¹ Furthermore, we note that the petitioner requests to employ the beneficiary from October 1, 2013 to September 15, 2016. The petitioner describes some of the beneficiary's duties as including "system go-live" and "post go live" duties. However, according to the petitioner's "Project [REDACTED] document, the [REDACTED] project is not scheduled to go live until December 2016, with after-go-live support not scheduled to occur until on or after the fourth week of December 2016. These inconsistencies further undermine the credibility of the petitioner's claims regarding the beneficiary's employment on the [REDACTED] project and the [REDACTED] project overall.

Considering all the deficiencies and inconsistencies discussed above, the evidence of record does not support the petitioner's claim that the beneficiary will work exclusively onsite on its in-house

personnel and conduct on-site observation to ascertain unit functions, work performed, and methods, equipment, and personnel used; document findings of study and prepare recommendations for implementation of new systems, procedures, or organizational changes; design, evaluate, recommend, and approve changes of forms and reports; and plan study of work problems and procedures, such as organizational change, communications, information flow, integrated production methods, inventory control, or cost analysis. See O*NET Online Summary Report for "13-1111.00 - Management Analysts," <http://www.onetonline.org/link/summary/13-1111.00> (last accessed August 7, 2014). Significantly, this description does not include duties such as SAP configuration and other technical work with computer software and applications.

¹¹ According to O*NET OnLine, the duties of a "Computer Systems Analyst" include: expand or modify system to serve new purposes or improve work flow; test, maintain, and monitor computer programs and systems, including coordinating the installation of computer programs and systems; develop, document and revise system design procedures, test procedures, and quality standards; provide staff and users with assistance solving computer related problems, such as malfunctions and program problems; consult with management to ensure agreement on system principles; confer with clients regarding the nature of the information processing or computation needs a computer program is to address; coordinate and link the computer systems within an organization to increase compatibility and so information can be shared; and determine computer software or hardware needed to set up or alter system. See O*NET OnLine Summary Report for "15-1121.00 - Computer Systems Analysts," <http://www.onetonline.org/link/summary/15-1121.00> (last accessed August 7, 2014).

In addition, DOL's *Occupational Outlook Handbook (Handbook)* similarly describes the duties of a "Computer Systems Analyst" as including: consult with managers to determine the role of the IT system in an organization; research emerging technologies to decide if installing them can increase the organization's efficiency and effectiveness; devise ways to add new functionality to existing computer systems; design and develop new systems by choosing and configuring hardware and software; oversee the installation and configuration of new systems to customize them for the organization; and conduct testing to ensure that the systems work as expected. See DOL, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Computer Systems Analysts," <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-2> (last accessed August 7, 2014).

The duties of a "Computer Systems Analyst" as described by both O*NET OnLine and the *Handbook* can reasonably be said to encompass all of the duties of the proffered position.

projects. The record contains no credible evidence that these in-house projects actually exist and/or will be developed by the petitioner. Nor does the record contain a credible description of the proffered position and corresponding duties. The record does not include probative evidence of any position where the beneficiary will actually be employed. Overall, the record is devoid of credible evidence establishing the substantive nature of the work to be performed by the beneficiary. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, at 591, *supra*. In this matter, the petitioner has not provided a credible, probative description of the beneficiary's actual duties.

We acknowledge counsel's citation to *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*, 839 F. Supp. 2d 985 (S.D. Ohio 2012), for the proposition that "[t]he knowledge and not the title of the degree is what is important. Diplomas rarely come bearing occupation-specific majors. What is required is an occupation that requires highly specialized knowledge and a prospective employee who has attained the credentialing indicating possession of that knowledge."

We agree with the aforementioned proposition that "[t]he knowledge and not the title of the degree is what is important." In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty (or its equivalent)" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in two disparate fields, such as philosophy and engineering, for example, would not meet the statutory requirement that the degree be "in *the* specific specialty (or its equivalent)," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required body of highly specialized knowledge is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added).

In this matter, as discussed above, the petitioner does not provide a consistent description of the beneficiary's actual work. Thus, we cannot determine what highly specialized knowledge is required for the position proffered here. In addition, the petitioner has not specifically stated its academic requirements to perform the generally described work. Other than stating that a bachelor's degree is required, and referencing "above-stated fields," with no indication of the actual fields of study, the record does not include information regarding the petitioner's requirements to perform the duties of the proffered position.¹² Thus, we cannot discern what credentialing is necessary or even what credentialing the petitioner believes is necessary to substantiate the beneficiary's possession of that knowledge. We observe here that the petitioner has indicated that the beneficiary's educational background and experience will assist her in carrying out the duties of the proffered position. However, the test to establish a position as a specialty occupation is not the skill set or education of

¹² We further observe that in its response to the RFE, the petitioner identified the position as a "Software Engineer." No explanation regarding this statement is provided.

a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. As the petitioner has not submitted a consistent and probative description of the duties of the proffered position, it has failed to meet its burden and establish that the particular position offered in this matter requires a bachelor's or higher degree in a specific specialty, or its equivalent, directly related to the position's duties in order to perform those duties.

In any event, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*.¹³ We note that, in contrast to the broad precedential authority of the case law of a United States circuit court, we are not bound to follow the published decision of a United States district court in matters arising even within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before us, the analysis does not have to be followed as a matter of law. *Id.* at 719.

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

V. THE CERTIFIED LCA DOES NOT CORRESPOND TO THE PETITION

Finally, beyond the decision of the director, the petition must also be denied due to the petitioner's failure to provide a certified LCA that corresponds to the petition. Specifically, the job title on the LCA submitted with the petition reads "Business Analyst," and it was certified for SOC (O*NET/OES) Code 13-1111 or "Management Analysts." As determined *supra*, however, the job as titled and as described by the petitioner is best classified as a computer systems analyst occupation, i.e., SOC (O*NET/OES) Code 15-1121.00 "Computer Systems Analysts." As such, the petitioner was required to provide at the time of filing an LCA certified for SOC (O*NET/OES) Code 15-1121.00, not SOC (O*NET/OES) Code 13-1111, in order for it to be found to correspond to the petition.

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the U.S. Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining 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 (emphasis added):

¹³ It is noted that the district judge's decision in that case appears to have been based largely on the many factual errors made by the service center in its decision denying the petition. We further note that the service center director's decision was not appealed to the AAO. Based on the district court's findings and description of the record, if that matter had first been appealed through the available administrative process, we may very well have remanded the matter to the service center for a new decision for many of the same reasons articulated by the district court if these errors could not have been remedied by us in our *de novo* review of the matter.

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.

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, the petitioner has failed to submit a valid LCA that has been certified for the proper occupational classification, and the petition must be denied for this additional reason.

V. CONCLUSION AND ORDER

As set forth above, we agree with the director's finding that the evidence of record does not establish an employer-employee relationship between the petitioner and the beneficiary. We also determine that the evidence of record does not demonstrate that the proffered position qualifies for classification as a specialty occupation and that the LCA corresponds to the petition. Accordingly, the director's decision will not be disturbed.

An application or petition that fails to comply with the technical requirements of the law may be denied by us even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when we deny a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that we abused our discretion with respect to all of the 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.