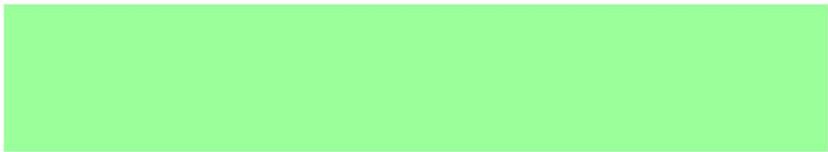


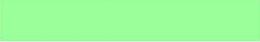


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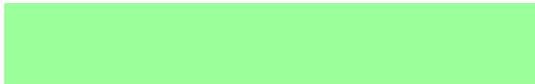


DATE: **AUG 26 2014**

OFFICE: CALIFORNIA SERVICE CENTER FILE: 

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,

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

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

On the Form I-129 visa petition, the petitioner describes itself as a 77-employee computer and IT consulting company<sup>1</sup> established in 1997. In order to employ the beneficiary in a full-time position that it identifies by the job title "Senior Implementation Consultant" at a minimum salary of \$105,000 per year,<sup>2</sup> the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, concluding that the evidence of record fails to demonstrate that the proffered position qualifies as a specialty occupation.

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

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

#### I. Factual and Procedural Background

As noted above, the petitioner described itself on the Form I-129 as a computer and IT consulting company and stated that it has been in business since 1997, that it currently employs 77 individuals, and that it has a gross annual income of approximately \$20 million.

In a letter of support dated March 18, 2013, the petitioner described itself as "a project-centric information technology firm, specializing in web and client/server technologies." It further stated that it provides IT (Information Technology) and business consulting services to clients in a variety of industries, including healthcare, insurance, retail, and transportation.

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

<sup>2</sup> The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for use with a job prospect within the occupational classification of "Software Developers, Applications," SOC (O\*NET/OES) Code 15-1131, and for which the appropriate prevailing wage level would be Level IV.

Regarding the proffered position, the petitioner claimed that the beneficiary would be serving in the role of senior implementation consultant, and would be assigned to work on the "Oracle Retail v12 Implementation" project for its client, [REDACTED] Minnesota. The petitioner further claimed that, while working on this project, the beneficiary would at all times remain under the direct supervision of [REDACTED] Partner of the petitioner, who in turn would be directly supervised by the petitioner's Vice President of [REDACTED]

The petitioner provided the following overview of the proffered position:

The general purpose of the Senior Implementation Consultant position is to perform the necessary analysis to identify the IT solutions to the business needs of our clients and then to deliver and implement the solutions. The specific essential functions of the position include the following:

- Consult with clients about their business/technical needs and analyzing their existing and proposed foundation data, replenishment, pricing and distribution software systems;
- Deliver and implement new & customized Oracle Retail business products according to best practice methodology;
- Demonstrate expertise in current version of chosen technology – Oracle Forms and Reports, PL/SQL, MQ, Java and ProC;
- Prepare project documentation for functional/technical work streams of all implementation phases;
- May coordinate work of Implementation Consultants and provide mentoring in business and technical areas of Oracle Retail business products;
- Develop and execute test/quality assurance plans to ensure client's requirements are met;
- Prepare reports and presentations to keep client informed of project status; and
- Train client staff to maximize utility of new programs and to ensure that they can be supported after implementation is complete.

As we shall be further discussed later in this decision, based upon our review of the entire record of proceeding, including the submissions on appeal, we have determined that the evidence of record does not provide sufficient information about the substantive nature of the proposed duties for us to reasonably determine that the beneficiary would more likely than not perform the duties that we just quoted above for any appreciable period for any particular client. Further, the evidence of record lacks sufficient substantive details for us to determine that the beneficiary would actually perform duties that comprise a position within the Software Developer, Applications occupational group - as claimed - and that would require the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty.

The petitioner continued by claiming that the position requires a person with a bachelor's degree in computer science, or electrical or computer or communications engineering, or a related field, or the

equivalent. The petitioner claimed that the beneficiary was qualified to perform the duties of the position by virtue of his foreign degree deemed equivalent to a U.S. bachelor's degree in electrical engineering.

In further support of the petition, the petitioner submitted: (1) a printout of its website; (2) various financial and tax documents related to its business operations; and (3) various documents pertaining to the beneficiary, including his resume, transcripts, and an evaluation of his foreign academic credentials.

The director found the evidence submitted insufficient, and issued an RFE on July 1, 2013. Specifically, the director noted that aside from the petitioner's letter of support dated March 18, 2013, there was no evidence in the record corroborating the petitioner's claim that it would employ the beneficiary onsite at its client, [REDACTED] and that it would maintain control over his work during the course of that assignment. The director requested additional evidence to support this contention, and outlined the specific documentation to be submitted, including an employment agreement, copies of signed contracts and statements of work with the claimed end-client(s), and a more detailed description of the beneficiary's duties.

In a response dated September 12, 2013, counsel for the petitioner addressed the director's queries. Counsel provided an overview in list form of the documents submitted in response to the RFE, which included the following:

1. A copy of the petitioner's Offer of Employment letter to the beneficiary dated March 18, 2013;
2. A copy of the petitioner's "Employee Non-Confidentiality, Non-Disclosure and Non-Solicitation Agreement;"
3. A copy of the petitioner's organizational chart;
4. A copy of the petitioner's Employee Handbook;
5. A copy of the Client Services Contract between the petitioner and [REDACTED] dated August 21, 2006 (and revised on September 22, 2006);
6. A copy of Addendum #3 to the Client Services Agreement; and
7. Evidence pertaining to employee health benefits.

With regard to the Client Services Agreement, we note that the agreement manifests the intention of the petitioner to "provide the services of the individual(s) listed in the Addendum, as amended from time to time by mutual written agreement of [the petitioner] and Client, as a Consultant(s) to provide consulting services in the solution of specific tasks and problems within the Consultant's field of expertise. . . ." We further note that Addendum #3, which pertains to the claimed Oracle Retail v12 project upon which the beneficiary will work, was signed by the parties in December of 2006, states that the completion date of that project was June 30, 2007, approximately six years prior to the filing of the instant petition.

Neither counsel nor the petitioner provided any additional information or details regarding the nature of the duties the beneficiary would perform during the course of his assignment with [REDACTED]

On November 21, 2013, the director denied the petition, noting that the petitioner failed to provide evidence establishing that the claimed assignment with [REDACTED] was in effect at the time of filing. Additionally, the director found that the petitioner failed to provide specific details regarding the nature of the duties that would be performed by the beneficiary during his assignment on this project. The director concluded that the record was devoid of evidence establishing that the proffered position was a specialty occupation.

On appeal, the petitioner submits additional documentation, including subsequent addendums to the original Client Services Contract with [REDACTED] which the petitioner claims to be the basis of its current relationship with the client. The petitioner further contends that in the unlikely event that its contract with [REDACTED] is not renewed in the future, it has numerous other clients to which it could assign the beneficiary. In support of this contention, the petitioner submitted copies of various other on-going agreements with [REDACTED]

## II. Law and Analysis

To meet the petitioner's burden of proof with regard to the proffered position's classification as an H-1B specialty occupation, the evidence of record must establish that the employment the petitioner 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:

- (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 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.

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.

In this matter, the petitioner contends that the beneficiary will perform services for its client [REDACTED] on a project entitled Oracle Retail v12. The petitioner, however, provided no documentation to corroborate this claim. Although the petitioner submitted a copy of its Client Services Agreement with [REDACTED] executed by the parties in 2006, it did not provide any subsequent work orders, statements or work, or other documentation confirming the beneficiary's assignment to the claimed Oracle Retail v12 project. We find this lack of documentation significant, since the Client Services Agreement specifically states, on page 1, that the Addendum(s) to the agreement will ultimately identify the consultants who are assigned to the project and their associated duties.

Again, as discussed above, Addendum 3, submitted in response to the RFE, was executed by the parties in December 2006 and indicated that the Oracle Retail v12 project covered by that addendum had a completion date of June 30, 2007. While we perceive that document as being representative of the petitioner's ongoing agreement with [REDACTED] and as being representative of the type of consulting services that the petitioner was providing at that time, the record is devoid of evidence establishing that the beneficiary, during the validity period requested in this petition (from October 1, 2013 to September 5, 2015), would actually be assigned to a such a project and, if so, what substantive work he actually would be required to perform for such a project.

On appeal, the petitioner submits copies of no less than 10 subsequent Addenda to the original agreement, ranging in number from 6 to 32, and covering the period from 2007 to 2013. The petitioner also claims that Addendum #32 is the most recent Addendum, and refers us to this particular document for confirmation of the petitioner's current agreement with [REDACTED] for the beneficiary's services.

While we acknowledge that Addendum 32 sets forth the petitioner's agreement to provide no less than 560 hours of consulting services to [REDACTED] on the Oracle Retail Data Warehouse project between April 2013 and April 2014, this document does not provide any details regarding the required duties of the consultants to be supplied by the petitioner. Most importantly, the Addendum does not identify the beneficiary by name, thus providing no probative value in determining the true nature of the beneficiary's proposed job duties. Despite the submission of numerous Addenda which establish the petitioner's ongoing relationship with [REDACTED] the petitioner has failed to demonstrate that an actual project upon which the beneficiary would work exists, and simultaneously that such work would qualify as specialty occupation work.

We again refer to the description of duties provided by the petitioner in the letter of support dated March 18, 2013. As noted previously, the petitioner contends that the duties of the beneficiary will be dictated by specific client requirements, which obviously would vary by assignment. Specifically, the petitioner identified the duties of the proffered position as including such tasks as "consulting with clients about their business/technical needs and analyzing their existing and proposed foundation data, replenishment, pricing and distribution software systems," and "deliver[ing] and implement[ing] new & customized Oracle Retail business products according to best practice methodology."

Clearly, the beneficiary will be required to provide customized solutions to various clients based on their specific needs within the terms and requirements of a specific project. The generic overview of the duties of the proffered position, without providing more specific examples of what the beneficiary will do on a daily basis for a given client, precludes us from finding that the proffered position qualifies as a specialty occupation. Specifically, the lack of specificity with regard to the actual duties of the beneficiary is a deficiency that does not permit further examination into the true nature of the proffered position.

Moreover, we note the petitioner's assertion on appeal that, should the proposed project with [REDACTED] (of which the record contains no evidence as it pertains to the beneficiary) were to terminate or not be renewed, the petitioner has multiple other client agreements in effect and notes that the beneficiary could easily be reassigned to one of those projects. The petitioner submits representative agreements with [REDACTED] and asserts that the existence of these agreements demonstrates sufficient specialty occupation work for the beneficiary. We disagree.

One consideration that is necessarily preliminary to, and logically even more foundational and fundamental than the issue of whether a proffered position qualifies as a specialty occupation, is whether the petitioner has provided substantive information and supportive documentation sufficient to establish that, in fact, the beneficiary would be performing services for the type of position for which the petition was filed (here, a senior implementation specialist). Another such fundamental preliminary consideration is whether the petitioner has established that, at the time of the petition's filing, it had secured non-speculative work for the beneficiary that corresponds with the petitioner's claims about the nature of the work that the beneficiary would perform in the proffered position. We find that the petition has failed in each of these regards.

As discussed above, the record does not establish that, at the petition's filing, the petitioner had secured any work for the period of intended employment that would require the beneficiary to perform the duties of the proffered position for the period specified in the petition. Although it contends that the beneficiary will work for its client, [REDACTED] the petitioner provides no documentary evidence to support this claim. 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 fact, the petitioner submits numerous other representative agreements with clients as evidence of potential work assignments for the beneficiary, acknowledging, albeit indirectly, that the beneficiary's assignment(s) can vary at any given time based on client needs.

Additionally, we find that the record is devoid of any documentation establishing in-house work that would require the beneficiary to perform the duties and responsibilities that the petitioner has attributed to the proffered position.

While we again note the petitioner's assertions on appeal, and the submissions of subsequent Addenda for the [REDACTED] agreement, the fact remains that the record contains no evidence establishing the true nature of the beneficiary's employment during the requested validity period. While these documents provide some general details regarding an ongoing project for which the petitioner provides consulting services, none of these documents provide details regarding the duties to be performed by the petitioner's personnel, or clear evidence establishing that the beneficiary in fact would be one of those consultants.

Accordingly, as the petitioner has not provided documentary evidence substantiating the beneficiary's actual work, we cannot conclude that the petitioner established that it would employ the beneficiary in a specialty occupation.

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

For the reasons related in the preceding discussion, we find that 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, we cannot find

that the proffered position qualifies as a specialty occupation. Accordingly, the petition cannot be approved for this reason. The appeal will be dismissed, and the petition will be denied.

### III. Beyond the Director's Decision

Beyond the decision of the director, we find that the petitioner has not established that it meets the regulatory definition of a United States employer.<sup>3</sup> 8 C.F.R. § 214.2(h)(4)(ii). Specifically, the petitioner has not established that it will have "an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." *Id.*

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

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

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

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

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

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

The record is not persuasive in establishing that the petitioner will have an employer-employee relationship with the beneficiary.

As reflected in this decision's earlier comments and findings, the record of proceeding provides little

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

substantive information and practical detail about all of the contractual terms and conditions in play, among the previously named business entities, that would have a material bearing upon the employer-employee question. In this regard, we also find that the specific content of the common-law factors that must be weighed to determine the employer-employee question in this case reside largely in the specific terms and conditions of the contractual documents at play in this particular case.

While the petitioner may not be required to produce copies of all of the contractual documents pertaining to the employer-employee question, the petitioner nevertheless has the burden to provide information and corroborative evidence - in whatever form - that is sufficiently detailed and comprehensive to convey the full breadth of common-law employer-employee factors that USCIS should consider, weigh, and balance in order to reasonably determine whether it is more likely than not that the petitioner and the beneficiary have the requisite employer-employee relationship. This the petitioner has not done.

By way of just a small number of relevant employer-employee factors not documented in this record are the related parties' abilities to assign, schedule, modify, and evaluate the beneficiary's work on a day-to-day basis; to terminate the beneficiary's assignment; to determine if the beneficiary's performance merits payment by the end-client or intermediate vendors; what instrumentalities, if any, the parties would provide for the beneficiary's actual use; conditions on the parties' abilities to accept or reject the beneficiary for the project work; whether the petitioner retained an ability to unilaterally assign the beneficiary away from the project work; the weight, if any, that the end-client was required to give the petitioner's evaluations; and the deference, if any, that the petitioner would be required to give to the performance evaluations conducted by the end-client and/or the business entities with which the end-client has contracted for the project work.

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.<sup>4</sup>

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<sup>4</sup> While the *Darden* court considered only the definition of "employee" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(6), and did not address the definition of "employer," courts have generally refused to extend the common law agency definition to ERISA's use of employer because "the definition of 'employer' in ERISA, unlike the definition of 'employee,' clearly indicates legislative intent to extend the definition beyond the traditional common law definition." See, e.g.,

Specifically, the regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to engage a person to work within the United States, and to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee" or "employer-employee relationship" combined with the agency's otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition" or, more importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. *Cf. Darden*, 503 U.S. at 318-319.<sup>5</sup>

Accordingly, in the absence of an express congressional intent to impose broader definitions, both the "conventional master-servant relationship as understood by common-law agency doctrine" and the *Darden* construction test apply to the terms "employee" and "employer-employee relationship" as used in section 101(a)(15)(H)(i)(b) of the Act, section 212(n) of the Act, and 8 C.F.R. § 214.2(h).<sup>6</sup>

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*Bowers v. Andrew Weir Shipping, Ltd.*, 810 F. Supp. 522 (S.D.N.Y. 1992), *aff'd*, 27 F.3d 800 (2nd Cir.), *cert. denied*, 513 U.S. 1000 (1994).

However, in this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. Instead, in the context of the H-1B visa classification, the term "United States employer" was defined in the regulations to be even more restrictive than the common law agency definition. A federal agency's interpretation of a statute whose administration is entrusted to it is to be accepted unless Congress has spoken directly on the issue. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-845 (1984).

<sup>5</sup> To the extent the regulations are ambiguous with regard to the terms "employee" or "employer-employee relationship," the agency's interpretation of these terms should be found to be controlling unless "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359, 109 S.Ct. 1835, 1850, 104 L.Ed.2d 351 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945))).

<sup>6</sup> That said, there are instances in the Act where Congress may have intended a broader application of the term "employer" than what is encompassed in the conventional master-servant relationship. *See, e.g.*, section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F) (referring to "unaffiliated employers" supervising and controlling L-1B intracompany transferees having specialized knowledge); section 274A of the Act, 8 U.S.C. § 1324a (referring to the employment of unauthorized aliens).

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 at 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."

Although the petitioner claims the beneficiary will be directly supervised by the petitioner's employee, [REDACTED] no evidence to support this claim was submitted. Moreover, while the petitioner reiterates throughout the petition that the beneficiary is employed by the petitioner and that the petitioner controls the beneficiary's salary and conditions of employment, this contention, without more, will not suffice.

While social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are still relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary's employer. Without full disclosure of all of the relevant factors, we are unable to find that the requisite employer-employee relationship will exist between the petitioner and the beneficiary.

The evidence, therefore, is insufficient to establish that the petitioner qualifies as a United States employer, as defined by 8 C.F.R. § 214.2(h)(4)(ii). Merely claiming that the petitioner exercises the requisite control over the beneficiary, but without providing the comprehensive body of evidence of common-law indicia to be weighed and balanced to substantiate such a claim, will not suffice. Again, 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. at 165. The evidence of record prior to adjudication did not establish that the petitioner would act as the beneficiary's employer in that it will hire, pay, fire, or otherwise control the work of the beneficiary. Despite the director's specific request for evidence from the end client outlining the nature of the beneficiary's proposed assignment, the petitioner did not submit such evidence prior to adjudication. 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).

Based on the tests outlined above, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii). For this additional reason, the petition may not be approved.

#### IV. Conclusion

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

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 conducts appellate review on a *de novo* basis).

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

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

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