



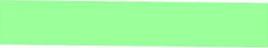
U.S. Citizenship
and Immigration
Services

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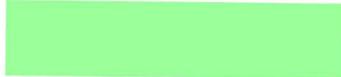
OFFICE: VERMONT SERVICE CENTER

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: SELF-REPRESENTED

INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg

Chief, Administrative Appeals Office

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

I. PROCEDURAL AND FACTUAL BACKGROUND

On the Form I-129 visa petition, the petitioner describes itself as a "Custom Software Development, System Integration, Data Management & System Administration" firm. In order to employ the beneficiary in what it designates as a programmer analyst position, 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, finding that the petitioner (1) failed to establish that it would employ the beneficiary in a specialty occupation position, (2) failed to establish that it has standing to file the visa petition as the beneficiary's prospective employer, and (3) failed to provide the itinerary requested by 8 C.F.R. § 214.2(h)(2)(i)(B). As will be discussed below, we have determined that the director did not err in her decision to deny the petition on the bases specified in her decision. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

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

II. THE LAW

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

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

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

Specialty occupation means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the

attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

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

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

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

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens

who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

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

We note that, as recognized by the court in *Defensor, supra*, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. *See Defensor v. Meissner*, 201 F.3d at 387-388. The court held that the former Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. *Id.* at 384. Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work.

III. EVIDENCE

The visa petition gives the petitioner's address as [REDACTED] and states that the period of requested employment is from October 1, 2013 to September 10, 2016.

The Labor Condition Application (LCA) submitted to support the visa petition states that the proffered position is a programmer analyst position, and that it corresponds to Standard Occupational Classification (SOC) code and title 15-1121, Computer Systems Analysts from the Occupational Information Network (O*NET). The LCA further states that the proffered position is a Level I, entry-level, position. The LCA submitted states that the beneficiary will work at the petitioner's [REDACTED] address, and at [REDACTED]

With the visa petition, the petitioner submitted evidence that the beneficiary received a master's degree from the [REDACTED]. The record contains no evidence of the subject that degree is in. The evidence also shows that the beneficiary was awarded various foreign degrees, including a "Bachelor of Studies (B.S.)" degree in "Electrical, Electronics, and Computer

Engineering" from the [REDACTED] The record does not contain an evaluation of the beneficiary's degrees in terms of a U.S. educational equivalent.

The petitioner also submitted: (1) a copy of the beneficiary's employment contract, dated March 11, 2013; (2) a document, on the petitioner's letterhead, headed Detailed Itinerary; and (3) a letter, dated March 29, 2013, from the petitioner's human resources (HR) manager.

The beneficiary's employment contract states: "[The beneficiary's] primary duty would be to abide by the assignments given by the client's reporting manager." It further states, "These tasks will be client specific and may change when [the beneficiary is] allocated to another client location." Yet further, it states, "[The petitioner] reserves all of it's [sic] rights as an 'at will' employer, including the right, in the sole discretion, to change . . . the location of [the beneficiary's] employment." Further still, the employment contract states:

You understand and acknowledge that when the project/work to which you have been assigned has been completed, [the petitioner] shall exercise its discretion to terminate your employment without cause in the event that [the petitioner] is unable to assign you to another project/work.

As to deductions the petitioner may make from the beneficiary's wages, the employment contract states:

If you terminate your agreement with in [sic] one year of the start date of your employment, you will be responsible for part or whole of the cost incurred by [the petitioner] such as legal cost, relocation, sponsorship etc. in transitioning your employment into [the petitioner], shall be collected by [the petitioner] from your wages, bonus or any other payment which [the petitioner] owe [sic] you, otherwise owed to you[.]

The document headed Detailed Itinerary states that the beneficiary will work at the locations listed on the LCA throughout the period of requested employment. It also contains the following description of duties:

- Worked for designing and developing integrations for Oracle EBS.
- Actively participate in the design, development and maintenance of interfaces to and from the Oracle E-business Applications.
- Work closely with the Business Analysts and Functional Consultants to gather requirements for reports, interfaces, extensions and conversions for eBusiness applications.
- Developed PL/SQL Packages, Procedures, Functions for validating the invoices and payment information from the legacy system and imported into Oracle Application using the Payables Open Interface Import program and populated the

Base Tables, which involved in Releasing Invoices from Hold, Approval of invoices and creating of New Invoices.

- Used Auto Invoice Interface to import Standard Invoices from a Legacy system into Oracle Receivables using a control file, PL/SQL Packages/Procedures and Auto Invoice Import program.
- Customized the AR Invoice, Sales Tax Reports in Receivables.
- Customized the Auto Accounting and Auto Invoice Programs in Receivables.
- Involved in analysis, design and development task.
- Involved in importing and exporting data from one instance to another instance using Data mover.
- Extensively worked on **Production issues, and resolved various bugs working in collaboration with Oracle Support** on Sev1 and Sev2 Service requests.

The inclusion of that duty description on what purports to be the beneficiary's proposed itinerary suggests that it is a description of the duties that the beneficiary would perform in the proffered position if the instant visa petition is approved.

In his March 29, 2013 letter, the petitioner's HR manager stated that the petitioner "*will exclusively and directly hire, pay, supervise, and otherwise control [the beneficiary's] work activities, including all of her job duties and responsibilities.*"

As to the educational requirement of the proffered position, the petitioner's HR manager stated: "This position requires minimum a US Baccalaureate or Equivalent Degree in Science or Engineering or it's [sic] equivalent" He further stated:

The industry standard in the United States for educational requirements among all . . . Programmer Analyst . . . is that the candidate possesses at least a Bachelor of Science Degree in Science or Engineering or Information Systems or a related area or any Bachelor's Degree with significant work experience in related filed [sic].

As to the beneficiary's qualifications, the petitioner's HR manager stated:

After completing 12 years of school education, [the beneficiary] graduated with Bachelors in Education from [REDACTED] from India and has experience in the field of programming and software development.

On April 21, 2013, the service center issued an RFE in this matter. The service center requested, *inter alia*, evidence that the petitioner has standing to file the instant visa petition as the beneficiary's prospective U.S. employer. The service center provided a non-exhaustive list of items that might be used to satisfy the specialty occupation and the employer-employee requirements.

In response, the petitioner submitted: (1) a letter, dated June 4, 2013, from [REDACTED] who identifies himself as an Oracle Apps Developer; (2) a letter, dated June 10, 2013, from the beneficiary, (3) a letter, dated June 11, 2013, from [REDACTED] managing director of [REDACTED] (4) E-mail exchanges between the beneficiary and others; and (5) a letter, dated June 12, 2013, from the petitioner's HR manager.

In his June 4, 2013 letter, [REDACTED] stated that he is an Oracle Apps Developer and has worked through [REDACTED] as a consultant at [REDACTED] for two years. He further stated: "I like to state that it is normal industry practice and especially at [REDACTED] that most of the projects are long[-]term and ongoing assignment anticipated to continue for at least three years (3 years)." He further stated:

[The beneficiary] provides her IT expertise in:

- Worked for designing and developing integrations for Oracle EBS.
- Actively participate in design, development and maintenance of interfaces to and from the Oracle E-business Applications.
- Work closely with the Business Analysts and Functional Consultants to gather requirements for reports, interfaces, extensions and conversions for E-Business applications.
- Developed PL/SQL Packages, Procedures, Functions for validating the invoices and payment information from the legacy system and imported into Oracle Application using the Payables Open Interface Import program and populated the Base Tables, which involved in Releasing Invoices from Hold,
- Approval of invoices and creating of New Invoices. Used Auto Invoice Interface to import Standard Invoices from a Legacy system into Oracle Receivables using a control file, PL/SQL Packages/Procedures and Auto Invoice Import program.
- Customized the AR Invoice, Sales Tax Reports in Receivables. Customized the Auto Accounting and Auto Invoice Programs in Receivables. Involved in analysis, design and development task. Involved in importing and exporting data from one instance to another instance using Data mover.
- Extensively worked on Production issues, and resolved various bugs working in collaboration with Oracle Support on Sev1 and Sev2 Service requests.

As to the educational requirement of the petitioner's position, Mr. [REDACTED] stated: "Bachelor's degree in Engineering, Computer Science or related industry experienced is required"

In her June 10, 2013 letter, the beneficiary stated, "Although I work at [REDACTED] my chain of command is directly to [the petitioner]." She stated that the petitioner will pay her salary and withhold the various required deductions. She further stated that she understands that if [REDACTED] wished to change the scope of her assignment, she must obtain permission from the petitioner.

In his June 11, 2013 letter, [REDACTED] stated:

This letter is to verify that [the beneficiary], an employee of [the petitioner] [is] currently under contract with us, [REDACTED] to provide consulting services to one of our clients – [REDACTED]. Her services are currently under engagement at [REDACTED] NJ where [REDACTED] is implementing the project for [REDACTED].

In the e-mail exchanges provided, various people assigned tasks to the beneficiary. The e-mail messages do not indicate that any of the people who assigned tasks to the beneficiary are employees of the petitioner.

In his June 12, 2013 letter, the petitioner's HR manager stated that no evidence is available from [REDACTED] because of [REDACTED] HR policies, and that the agreement between [REDACTED] also cannot be provided because of confidentiality concerns. He further stated: "However, please find enclosed the Letter from [REDACTED] confirming that they have contracted beneficiary services from us and the beneficiary is an employee of [the petitioner]" The record does not contain a letter from [REDACTED].

As to the supervision of the beneficiary, the petitioner's HR director stated: "The beneficiary will be reporting to Mr. [REDACTED] submitting the Timesheets weekly status Call and Quarterly Performance Review. Periodic Review, photo, source code." He further cited unpublished AAO decisions as support for the propositions that the petitioner is the beneficiary's employer and the proffered position qualifies as a specialty occupation position. The petitioner's HR manager also stated that the evidence of record is sufficient to show that the instant visa petition should be approved.

The director denied the petition on June 20, 2013, finding, as was noted above, that the petitioner had not demonstrated that the proffered position qualifies as a position in a specialty occupation by virtue of requiring a minimum of a bachelor's degree in a specific specialty or its equivalent, had not demonstrated that it has standing to file the visa petition as the beneficiary's prospective employer, and had not provided the itinerary required by 8 C.F.R. § 214.2(h)(2)(i)(B).

On appeal, the petitioner submitted additional copies of some evidence previously provided, reiterated some previous assertions, and stated that the evidence submitted is sufficient to justify approving the visa petition.

IV. SPECIALTY OCCUPATION ANALYSIS

Initially, we will address the petitioner's citation of unpublished AAO decisions. The petitioner's HR manager cited an unpublished decision in which we determined that a particular software design engineer position qualified as a specialty occupation position. The petitioner's HR manager asserted that this case supports approval of the instant visa petition. He also cited an unpublished decision in

which we found that a particular graphic designer position as supporting the instant visa petition in various ways.

The petitioner is permitted, of course, to demonstrate that the facts of a previous case are substantially similar to the facts in the instant case, to note the reasoning of the previous case, and to assert that the reasoning is sound and should be extended to the instant case. However, the petitioner furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decisions. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. The decisions cited have no value as precedent.

As another preliminary matter, we observe that the petitioner has asserted that an otherwise undifferentiated bachelor's degree in science or engineering would be a sufficient educational qualification for the proffered position.

The requirement of a bachelor's degree in science or engineering is inadequate to establish that a position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of degrees with generalized titles, such as science or engineering,¹ without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988). To prove that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As explained above, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. USCIS has consistently stated that, although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).

The petitioner's assertion that an otherwise undifferentiated bachelor's degree in science or engineering would be a sufficient educational qualification for the proffered position demonstrates that the proffered position does not require a minimum of a bachelor's degree in a specific specialty

¹ The field of engineering is a broad category that covers numerous and various specialties, some of which are only related through the basic principles of science and mathematics, e.g., nuclear engineering and aerospace engineering. Therefore, besides a degree in electrical engineering, it is not readily apparent that a general degree in engineering or one of its other sub-specialties, such as chemical engineering or nuclear engineering, is closely related to computer science or that engineering or any and all engineering specialties are directly related to the duties and responsibilities of the particular position proffered in this matter.

or its equivalent. The director's decision must therefore be affirmed and the petition denied on this basis alone.

Yet further, as was observed above, the court in *Defensor v. Meissner*, 201 F. 3d 384, recognized that where the work is to be performed for entities other than the petitioner, evidence of the client company's job requirements is critical. 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. Such evidence must be sufficiently detailed and explained as to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work. The record of proceeding lacks such substantive evidence from any end-user entities that may generate work for the beneficiary and whose business needs would ultimately determine what the beneficiary would actually do on a day-to-day basis. In short, as noted by the director, the petitioner has failed to establish the existence of H-1B caliber work for the beneficiary.

The evidence in the record indicates that the petitioner would assign the beneficiary to [REDACTED] which would assign her to [REDACTED] which would utilize her on a project at the location of [REDACTED] at a location of [REDACTED]. The record does not make clear whether that project would be managed by [REDACTED].² Whichever of those entities would manage the project, in this attenuated employment situation, it is manifestly unlikely that the petitioner will directly assign tasks to the beneficiary and supervise her performance of them. Further, the beneficiary's employment contract makes explicit that the beneficiary's responsibility will be to perform tasks assigned by the petitioner's client. In this scenario, the requirements imposed on the proffered position by the end-user are the critical consideration, as the duties that the end-user will assign and the educational requirements placed on those duties by the end-user determine whether the proffered position qualifies as a specialty occupation position by virtue of requiring a minimum of a bachelor's degree in a specific specialty or its equivalent.

The record in the instant case, however, contains no evidence from either [REDACTED] the company for whom the work would be performed, or from [REDACTED] the company that may be managing the software project for [REDACTED] pertinent to the duties that would be required of the beneficiary if the instant visa petition were approved, or pertinent to the educational requirements placed on the performance of those duties by the end-user.

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

² In his June 11, 2013 letter, [REDACTED] stated, "[REDACTED] is implementing the project for [REDACTED]." This suggests that [REDACTED] is the entity that would assign the beneficiary's tasks and supervise her performance, but the letter is neither sufficiently clear nor sufficiently authoritative to demonstrate that proposition by a preponderance of the evidence.

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.

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

V. EMPLOYER-EMPLOYEE RELATIONSHIP ANALYSIS

Another basis for the decision of denial was the director's finding that the petitioner had not demonstrated that it has standing to file the instant visa petition as the beneficiary's prospective U.S. employer.

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

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

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

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

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

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

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

Neither the former Immigration and Naturalization Service (INS) nor 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.³

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

³ While the *Darden* court considered only the definition of "employee" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(6), and did not address the definition of "employer," courts have generally refused to extend the common law agency definition to ERISA's use of employer because "the definition of 'employer' in ERISA, unlike the definition of 'employee,' clearly indicates legislative intent to extend the definition beyond the traditional common law definition." *See, e.g., Bowers v. Andrew Weir Shipping, Ltd.*, 810 F. Supp. 522 (S.D.N.Y. 1992), *aff'd*, 27 F.3d 800 (2nd Cir.), *cert. denied*, 513 U.S. 1000 (1994).

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

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

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 318-319.⁴

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).⁵

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

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

It is important to note, however, that the factors listed in *Darden* and *Clackamas* are not exhaustive and must be evaluated on a case-by-case basis. Other aspects of the relationship between the parties relevant

⁴ 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))).

⁵ 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).

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."

The evidence indicates that the petitioner will pay the beneficiary's wages and will withhold amounts as required by law. However, the record makes explicit that the beneficiary will not work at the petitioner's location. Further, although the petitioner claims that it would review the beneficiary's performance, the record makes similarly clear that, in the attenuated employment scenario described, the petitioner will not assign the beneficiary's tasks and supervise her performance.

As was stated above, the petitioner will provide the beneficiary to [REDACTED] which would assign her to [REDACTED]. The beneficiary would work on an [REDACTED] project at an [REDACTED] location. The beneficiary's employment contract indicates that her primary duty would be to perform those tasks assigned to her either by [REDACTED] or by [REDACTED], whichever is the end-user managing the project. Under these circumstances, we find that the petitioner would not have an employer-employee relationship with the beneficiary. The appeal will be dismissed and the visa petition denied for this additional reason.

VI. LACK OF ITINERARY -- ANALYSIS

The director also denied the visa petition on the basis of her finding that it was not accompanied by the itinerary required by 8 C.F.R. § 214.2(h)(2)(i)(B).

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) states, in pertinent part:

Service or training in more than one location. A petition that requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with USCIS as provided in the form instructions. The address that the petitioner specifies as its location on the Form I-129 shall be where the petitioner is located for purposes of this paragraph.

Thus, if the beneficiary will work in more than one location during the period of requested employment, the petitioner must provide an itinerary of the proposed employment. In the instant case, the itinerary provided indicates that the beneficiary would work exclusively in [REDACTED] New Jersey and [REDACTED] New Jersey, and the remaining question is whether the petitioner has demonstrated that, if the visa petition were approved, the beneficiary would actually work in those locations throughout the period of requested employment.

The petitioner has stated that it intends the beneficiary to work on the [REDACTED] project throughout the requested period of employment, but has not stated any basis for the belief that work there will be available for the beneficiary throughout that period. The record contains insufficient evidence from either [REDACTED] that the project is expected to continue for that long.

The record does contain the letter from [REDACTED] who stated that normally projects in the industry continue for three years. However, even if he were a demonstrated authority pertinent to that assertion, the assertion would not be persuasive evidence that the specific project to which the beneficiary would be assigned would continue for that period.

Further, the beneficiary's employment contract makes clear that the petitioner is considering that the project may terminate before the end of the period of requested employment and that, in that event, it may assign the beneficiary to other projects. Specifically, that contract states that the beneficiary's duties may change when the beneficiary is sent to another location and that the petitioner reserves the right to assign the beneficiary to another location.

Based on all of the evidence in the record, we find that the petitioner has not demonstrated that, if the visa petition were approved, the beneficiary would work at the [REDACTED] project throughout the period of requested employment. As such, the petitioner was obliged to provide an itinerary of the beneficiary's prospective employment pursuant to 8 C.F.R. § 214.2(h)(2)(i)(B). The itinerary provided, however, has not been shown to be accurate. The appeal will be dismissed and the visa petition will be denied on this additional basis.

VII. OTHER ISSUES

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

Section 214(i)(2) of the Act states, in general, that a petitioner is obliged to demonstrate that its beneficiary is qualified to work in the proffered position.

A beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the petitioner has failed to establish that the proffered position requires a baccalaureate or higher degree in a specific specialty or its equivalent.

Therefore, we need not engage in an in-depth discussion of the beneficiary's qualifications. We note, however, that one diploma in the record was awarded on June 30, 2012 by the [REDACTED] which does not appear to have been accredited when that degree was awarded. Thus, it cannot be found that the beneficiary holds a "United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university." 8 C.F.R. § 214.2(h)(4)(iii)(C)(1). Further, another diploma in the record was awarded by [REDACTED] which the petitioner has not established is an accredited university.⁶

Further, the remaining diplomas in the record are clearly from foreign institutions. Where a petitioner relies on a beneficiary's foreign educational qualifications to show that the beneficiary is qualified for the proffered position, the petitioner is obliged, pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(3), to provide an evaluation showing the equivalence of the beneficiary's foreign education in terms of a U.S. education and degree. No evaluations of the beneficiary's foreign educational qualifications were submitted.

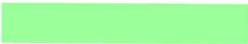
For the reasons discussed, the beneficiary has not been demonstrated, pursuant to the salient regulations, to be qualified to work in any specialty occupation position. The appeal will be dismissed for this additional reason.

IIX. CONCLUSION

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

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

⁶ The petitioner notes in its March 29, 2013 letter that [REDACTED] is in India; however, the beneficiary's transcript indicates that the school is located in [REDACTED] California.



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

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