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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

DATE: JUN 12 2014

OFFICE: VERMONT SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner: [REDACTED]

Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg  
Chief, Administrative Appeals Office

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

On the Form I-129 visa petition, the petitioner describes itself as an information technology (IT) consulting business established in 2004. In order to employ the beneficiary in what it designates as a programmer analyst position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, counsel for the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements.

The record of proceeding before us contains: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) the Form I-290B and supporting materials. We reviewed the record in its entirety before issuing our decision.

For the reasons that will be discussed below, we agree with the director that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

**I. PROCEDURAL AND FACTUAL BACKGROUND**

In the petition signed on April 3, 2013, the petitioner indicates that it wishes to employ the beneficiary as a programmer analyst on a full-time basis. On the Form I-129, the petitioner indicates that the beneficiary will work at [redacted] Washington, D.C. [redacted]. The petitioner did not request any other work sites.

In the support letter dated April 3, 2013, the petitioner describes the duties and requirements of the proffered position as follows:

The position of Programmer Analyst with [the petitioner], by virtue of the highly complex job duties, is a specialty occupation requiring at least a Bachelors [sic] degree or its equivalent in Computer Science or related fields, or its equivalent.

\* \* \*

In this position he/she will expand or modify system to serve new purposes or improve work flow; test, maintain, and monitor computer programs and systems, including coordinating the installation of computer programs and systems; develop, document and revise system design procedures, test procedures, and quality

standards; and provide staff and users with assistance solving computer related problems, such as malfunctions and program problems.

He/she will also review and analyze computer printouts and performance indicators to locate code problems, and correct errors by correcting codes; consult with management to ensure agreement on system principles; confer with clients regarding the nature of the information processing or computation needs a computer program is to address; read manuals, periodicals, and technical reports to learn how to develop programs that meet staff and user requirements; coordinate and link the computer systems within an organization to increase compatibility and so information can be shared; and determine computer software or hardware need to set up or alter system.

Duties	% of work in a normal 8 hour day
System Design (Gross Design & Modification)	10%
Systems Analysis	45%
Write code & Develop programs	15%
Developing / Creating New Code	10%
Downloading historical data	5%
Unit and System Testing and debugging	10%
Generating management reporting and implementation and provision of technical software support	5%

The position of Programmer Analyst with [the petitioner], by virtue of the highly complex job duties, is a specialty occupation requiring at least a Bachelors [sic] degree or its equivalent in the Computer Sciences or Engineering Sciences." Since many of the applications we develop are of an industrial and manufacturing nature, many of our Programmer Analysts are ideally suited to develop these systems because of their background in the Engineering and/or Sciences.

With the initial petition, the petitioner submitted a copy of the beneficiary's foreign academic credentials, as well as a credential evaluation from [redacted]. The credential evaluation indicates that the beneficiary's combined academic achievements amount to "the equivalent of a Bachelor of Science Degree, with a dual major in Information Technology and Chemistry, and a Master of Science Degree in Computer Science from an accredited US college or university."

In support of the petition, the petitioner also submitted several documents, including the following:

- A Labor Condition Application (LCA). The occupational category is designated as "Computer Systems Analysts" – SOC (ONET/OES Code) 15-1121, at a Level I (entry) wage. The LCA lists the beneficiary's places of employment as follows:

- [REDACTED] Washington, D.C. [REDACTED] and
- [REDACTED] Ellicott City, Maryland [REDACTED].<sup>1</sup>
- A letter from [REDACTED] of [REDACTED] Inc., dated March 7, 2013.<sup>2</sup> In the letter, Mr. [REDACTED] states that the beneficiary "will be providing information technology services to our company on [REDACTED] Inc's Project" located at [REDACTED] Washington, D.C. [REDACTED] Mr. [REDACTED] further states that "[the beneficiary] will be working as [a] Solutions Architect" and that "[t]he estimated completion date of his contract is March 7, 2014." In addition, Mr. [REDACTED] claims that "[t]he position requires a person with a minimum of [a] Bachelors [sic] degree in computers/science/engineering/business related field and experience in information technology related area."
- A copy of the petitioner's Income Tax Return for 2010. The tax return indicates that the petitioner paid \$31,000 in compensation to its officer (line 7), and it did not pay any salaries or wages (line 8).

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on April 22, 2013. The director outlined the specific evidence to be submitted.

On July 17, 2013, counsel responded to the request and provided additional supporting evidence, including the following documentation:

- A Statement of Work (SOW) between the petitioner and [REDACTED] Inc., effective March 7, 2013.<sup>3</sup> The document indicates that the SOW "as of March 7th, 2013 ('SOW Effective Date') shall be entered into pursuant to the Master Service Agreement dated March 7th, 2013 (the 'Agreement') by and between [the petitioner] and [REDACTED]". In addition, the document indicates that "[t]his SOW shall commence on October 1st, 2013 and shall continue until October 1st, 2016, with an option to extend." The SOW

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<sup>1</sup> Notably, the petitioner did not include the Ellicott City, Maryland as a work location for the beneficiary in the Form I-129 petition. No explanation was provided by the petitioner.

<sup>2</sup> The letter is not on company letterhead. It must be noted for the record that at the end of Mr. [REDACTED]'s letter, he indicates his first and last name and email address as [REDACTED]. However, at the end of the letter, he states "please feel free to contact me directly at [REDACTED]". Notably, the local-part of the email address appears to refer to the owner of the petitioning company [REDACTED] and the domain name refers to the petitioning company [REDACTED]. No explanation was provided for the discrepancy. Thus, the accuracy and credibility of the letter is questionable.

<sup>3</sup> The SOW was signed prior to the submission of the Form I-129 petition. However, the petitioner did not include the SOW with its initial submission.

further indicates the following:

# Role per month	Average Monthly Hours	Estimated cost
1 EIM Specialist (\$12800)	160 [the beneficiary]	Not to exceed

- An offer of employment letter from the petitioner to the beneficiary. The letter is dated February 21, 2013. The letter indicates that the beneficiary's role "will be of Solutions Architect" and that he "will join the Delaware Location." The letter further indicates that "whilst this offer is based from the Delaware office, [the petitioner's] Clients are based throughout USA" which "means that you may be required to travel to and from, or temporarily transfer to, a client engagement or [the petitioner] project in a location away from your normal home location."
- An employment agreement between the petitioner and the beneficiary, dated February 21, 2013. The agreement indicates that "[t]he Employee acknowledges and agrees to work anywhere in the United States as assigned by the Employer." In addition, the agreement indicates that "[t]he Employee shall provide services as a Manager – Consulting."

The director reviewed the response, and found the evidence insufficient to establish eligibility for the benefit sought. The director denied the petition on July 26, 2013. The petitioner submitted an appeal of the denial of the H-1B petition. With the brief, counsel submitted copies of the documentation previously submitted in response to the RFE, along with new evidence.<sup>4</sup>

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<sup>4</sup> With regard to the new documentation submitted on appeal that was encompassed by the director's RFE, we note that this evidence is outside the scope of the appeal. The regulations indicate that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary in the adjudication of the petition. See 8 C.F.R. §§ 103.2(b)(8); 214.2(h)(9)(i). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. § 103.2(b)(1), (8), and (12). The 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).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, we will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaigbena*, 19 I&N Dec. 533. If the petitioner had wanted the submitted evidence to be considered, it should have submitted it with the initial petition or in response to the director's request for evidence. *Id.* The petitioner has not provided a valid reason for not previously submitting the evidence. Under the circumstances, we need not consider the sufficiency of such evidence requested by the director in the RFE but submitted for the first time on appeal. Nevertheless, we reviewed the documentation. However, as will be discussed in this decision, the petitioner has not established eligibility for the benefit sought.

## II. ISSUES NOT ADDRESSED BY THE DIRECTOR'S DECISION

### A. Employer-Employee Relationship

We reviewed the record of proceeding in its entirety. As a preliminary matter, we will discuss an issue, beyond the decision of the director that precludes the approval of the petition.<sup>5</sup> More specifically, the petitioner has not established that it meets the regulatory definition of a United States employer. 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.

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

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

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<sup>5</sup> We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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 legacy Immigration and Naturalization Service ("INS") nor USCIS defined the terms "employee" or "employer-employee relationship" by regulation for purposes of the H-1B visa classification, even though the regulation describes H-1B beneficiaries as being "employees" who must have an "employer-employee relationship" with a "United States employer." *Id.* Therefore, for purposes of the H-1B visa classification, these terms are undefined.

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

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

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

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

Oct. 27, 1990). On the contrary, in the context of the H-1B visa classification, the regulations define the term "United States employer" to be even more restrictive than the common law agency definition.<sup>6</sup>

Specifically, the regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to engage a person to work within the United States, and to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee" or "employer-employee relationship" combined with the agency's otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do

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

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

The regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to employ persons in 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," "employed," "employment" or "employer-employee relationship" indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition." Therefore, in the absence of an intent to impose broader definitions by either Congress or USCIS, the "conventional master-servant relationship as understood by common-law agency doctrine," and the *Darden* construction test, apply to the terms "employee," "employer-employee relationship," "employed," and "employment" 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). That being 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).

not intend to extend the definition beyond "the traditional common law definition" or, more importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. *Cf. Darden*, 503 U.S. at 318-319.<sup>7</sup>

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

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

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

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

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<sup>7</sup> To the extent the regulations are ambiguous with regard to the terms "employee" or "employer-employee relationship," the agency's interpretation of these terms should be found to be controlling unless "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359, 109 S.Ct. 1835, 1850, 104 L.Ed.2d 351 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945))).

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

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, 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."

We note that there are numerous inconsistencies and discrepancies in the petition and supporting documents, which undermine the petitioner's credibility with regard to the beneficiary's employment. When a petition includes numerous errors and discrepancies, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions. Doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

As a preliminary matter, the petitioner has provided inconsistent information regarding the beneficiary's place of employment. In the Form I-129, the petitioner indicates that the worksite for the beneficiary is [REDACTED] Washington, D.C. [REDACTED]. However, the LCA indicates that the beneficiary will have two places of employment: [REDACTED] Washington, D.C.; and [REDACTED] Ellicott City, Maryland [REDACTED]. In the offer of employment letter (dated February 21, 2013, shortly before the H-1B submission), the petitioner states that the beneficiary "will join the Delaware Location." The petitioner further states that as its clients are based throughout the United States, the beneficiary "may be required to travel to and from, or temporarily transfer to, a client engagement or [the petitioner's] project in a location away" from the Delaware office. Thus, the offer of employment letter does not convey that (1) a specific place of employment, (2) for a particular client on a defined project, (3) with an established duration, had been established immediately prior to the filing of the H-1B petition. No explanation for the discrepancies was provided.

Furthermore, we find that there are additional discrepancies and inconsistencies in the record of proceeding with regard to the job title of the proffered position. For instance, in the Form I-129 and LCA, the petitioner refers to the proffered position as "Programmer Analyst." However, in the July 16, 2013 letter, submitted in response to the RFE, the petitioner refers to the proffered position as "Solutions Architect." Further, in the SOW, the petitioner refers to the proffered position as "EIM Specialist." In addition, in the offer of employment letter, the petitioner refers to the proffered position as "Manager – Consulting;" however, further in the same letter, the petitioner refers to the proffered position as "Solution Architect." Moreover, in the employment agreement, the petitioner refers to the proffered position as "Manager – Consulting." No explanation for the variances was provided.

There are additional discrepancies and inconsistencies in the record of the proceeding with regard to the beneficiary's salary. For example, in the Form I-129 (pages 5 and 17), the petitioner states that the beneficiary's rate of pay is \$61,000 per year. However, in the offer of employment letter and the employment agreement, submitted in response to the director's RFE, the petitioner states that the beneficiary would be compensated at the rate of \$80,000 per year. The petitioner did not acknowledge or provide any explanation for the discrepancy.

In the instant case, the petitioner claims that it will pay the beneficiary's salary. We acknowledge that the method of payment of wages can be a pertinent factor to determining the petitioner's relationship with the beneficiary. However, while such items such as wages, contributions, federal and state income tax withholdings, and other benefits are relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., where will the work be located, who will provide the instrumentalities and tools, who will oversee and direct the work of the beneficiary, 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.

For H-1B classification, the petitioner is required to submit written contracts between the petitioner and the beneficiary, or if there is no written agreement, a summary of the terms of the oral agreement under which the beneficiary will be employed. *See* 8 C.F.R. § 214.2(h)(4)(iv)(A) and (B). In the instant case, the record contains an offer of employment letter and an employment agreement between the petitioner and the beneficiary, both dated February 21, 2013. Notably, the offer of employment letter and the employment agreement were signed prior to the submission of the Form I-129 petition. The petitioner, however, did not provide the documents with its initial H-1B submission.

Upon review of the offer of employment letter and employment agreement, we note that they fail to adequately establish several critical aspects of the beneficiary's employment. For example, the documents do not provide any level of specificity as to the beneficiary's duties and the requirements for the position. Further, the offer of employment letter states that the beneficiary "may be required to travel to and from, or temporarily transfer to, a client engagement or [the petitioner's] project in a location away." In addition, the agreement states that "[t]he Employee acknowledges and agrees to work anywhere in the United States as assigned by the Employer." Thus, according to the offer of employment letter and employment agreement, the beneficiary may be placed "anywhere in the

United States" and not necessarily at 1200 G Street NW, Suite 800, Washington, D.C. 20005 as indicated in the H-1B petition.

The offer of employment letter and employment agreement report that the beneficiary will be eligible for benefits. However, a substantive determination cannot be inferred regarding these "benefits" as no further information regarding the plans, including eligibility requirements, was provided to USCIS. Moreover, it must be noted that while an offer of employment letter and employment agreement may provide some insights into the relationship of a petitioner and a beneficiary, it must be noted again that the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450.

As previously noted, when making a determination of whether the petitioner has established that it has or will have an employer-employee relationship with the beneficiary, we look at a number of factors, including who will provide the instrumentalities and tools required to perform the specialty occupation. In the instant case, the director specifically noted this factor in the RFE. Moreover, the director provided examples of evidence for the petitioner to submit to establish eligibility for the benefit sought, which included documentation regarding the source of the instrumentalities and tools needed to perform the job. However, upon review of the record of proceeding, the petitioner did not provide any information on this matter. Here, the petitioner was given an opportunity to clarify the source of instrumentalities and tools to be used by the beneficiary, but it failed to address or submit any probative evidence on the issue.

Moreover, through the RFE, the director provided the petitioner an opportunity to submit documentation regarding the beneficiary's role in hiring and paying assistants. In the instant case, the petitioner did not address this issue or provide any documentation regarding the beneficiary's role in hiring and paying assistants.

Further, the petitioner has not established the duration of the relationship between the parties. More specifically, on the Form I-129, the petitioner requested that the beneficiary be granted H-1B classification from October 1, 2013 to September 16, 2016. As previously mentioned, the petitioner stated on the Form I-129 that the beneficiary will work at [REDACTED] Washington, D.C. [REDACTED]. In response to the director's RFE, the petitioner submitted an SOW between the petitioner and [REDACTED] Inc., effective March 7, 2013. The SOW is signed by [REDACTED] Vice President (and 100% shareholder) for the petitioning company, and [REDACTED] Principal for [REDACTED] Inc.<sup>9</sup> The SOW states that "[t]his Statement of Work ('SOW') as of March 7th, 2013 ('SOW Effective Date') shall be entered into pursuant to the Master Service Agreement dated March 7th, 2013 (the 'Agreement') by and between [the petitioner] and [REDACTED]." Notably, the petitioner did not provide the Master Service Agreement referenced in the SOW. In addition, the SOW indicates the following:

This SOW shall commence on October 1st, 2013 and shall continue until October 1st, 2016, with an option to extend.

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<sup>9</sup> [REDACTED] within the record is listed as vice president, account manager and 100% shareholder.

\* \* \*

# Role	Average Monthly Hours	Estimated cost per month
1 EIM Specialist	160 [the beneficiary]	Not to exceed (\$12800)

While the SOW references the beneficiary, it refers to the role as an "EIM Specialist." That is, the document does not indicate that the beneficiary's role is a programmer analyst (as stated in the H-1B petition) but rather as an "EIM Specialist." There is no indication that the duties of a programmer analyst are the same as an EIM specialist.

The petitioner also submitted a letter from [redacted] of [redacted] Inc., dated March 7, 2013. In the letter, Mr. [redacted] states that the beneficiary "will be providing information technology services to our company on [redacted] Inc's Project" located at [redacted] Washington, D.C. [redacted]. In addition, Mr. [redacted] states that "[the beneficiary] will be working as [a] Solutions Architect." We observe that he does not indicate the proffered position of programmer analyst but rather a "Solutions Architect." No explanation for the variance was provided by the petitioner or by Mr. [redacted]. Further, there is no indication that the duties of a programmer analyst are the same as a Solutions Architect.

Furthermore, Mr. [redacted] states that "[t]he estimated completion date of his contract is March 7th 2014." Thus, according to Mr. [redacted] the beneficiary's services will end on March 7, 2014 (approximately five months *after* the petitioner's requested start date for H-1B employment). Mr. [redacted] also provides a bullet point list of the beneficiary's duties, which contains vague tasks such as defining MDM and Data Quality roadmap and scope for [redacted] providing guidance and helping making decisions, and working across global teams and understanding of cross culture. The list of duties fails to provide the beneficiary's specific role in performing such tasks.

Mr. [redacted] states that "[t]he position requires a person with a minimum of [a] Bachelors [sic] degree in computers/science/engineering/business related field and experience in information technology related area." Notably, the requirements for the position as stated in this letter are not consistent with the academic requirements for the proffered position as asserted by the petitioner in the letter of support dated April 3, 2013. No explanation for the variance was provided.

A key element in this matter is who would have the ability to hire, fire, supervise, or otherwise control the work of the beneficiary for the duration of the H-1B petition. In Mr. [redacted]'s March 7, 2013 letter, he states that the beneficiary will be supervised by [redacted] Account Manager for the petitioning company. We observe that in the RFE, the director specifically requested that the petitioner provide documentation to clarify the petitioner's employer-employee relationship with the beneficiary. The director provided a list of the types of evidence to be submitted, which included a request that the petitioner provide such documentation as a brief description of who will supervise the beneficiary along with the person's duties and/or other similarly probative documents. However, the petitioner failed to provide specific information regarding the beneficiary's supervisor (e.g., brief description of job duties, location).

On appeal, for the first time, counsel claims that "there is also work available for [the beneficiary] through [REDACTED]. In support of his assertion, counsel submitted a letter from [REDACTED] President of [REDACTED]. In the letter, Mr. [REDACTED] states that [REDACTED] has contracted for the services of [the beneficiary] an employee of [the petitioner] as a Programmer Analyst to work on a project for [REDACTED]. Mr. [REDACTED] further states that the "[w]ork will be completed and performed at [REDACTED] Ellicott City, MD [REDACTED]. Notably, Mr. [REDACTED] provides a job description that differs from the description provided by the petitioner in the April 3, 2013 letter of support. Mr. [REDACTED] also did not provide the requirements (if any) for the position. Moreover, he failed to provide any information regarding the expected duration of the project (except to state that "the project is on-going in duration"), when the project commenced, whether or not the project has been extended in the past, et cetera.

In addition, counsel submitted a document entitled "EIM Strategy & Data Governance," dated August 2008, from [REDACTED] Inc. In the appeal, counsel states that the document is "a sample of a project [the beneficiary] will be utilizing his skills." We observe that neither the beneficiary nor the proffered position is listed in the document. The document does not provide information establishing the role and details of the beneficiary's work on the project.

We note that the petitioner did not submit any further evidence establishing any additional projects or specific work for the beneficiary. The petitioner requested the beneficiary be granted H-1B classification from October 1, 2013 to September 16, 2016. However, the documentation does not establish that a project for the beneficiary to serve as a programmer analyst (performing the duties as stated by the petitioner) will commence/continue from October 1, 2013 to September 16, 2016. Thus, the record does not demonstrate that the petitioner will maintain an employer-employee relationship for the duration of the validity of the requested period. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

Upon complete review of the record of proceeding, we find that the evidence in this matter is insufficient to establish that the petitioner qualifies as a United States employer, as defined by 8 C.F.R. § 214.2(h)(4)(ii). The evidence of record does not establish that the petitioner would act as the beneficiary's employer. Despite the director's specific request for evidence on this issue, the petitioner failed to submit sufficient evidence to corroborate its claim. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). Based on the tests outlined above, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii).

There is a lack of probative evidence to support the petitioner's assertions. It cannot be concluded, therefore, that the petitioner has satisfied its burden and established that it qualifies as a United States employer with standing to file the instant petition in this matter. *See* section 214(c)(1) of the Act (requiring an "Importing Employer"); 8 C.F.R. § 214.2(h)(2)(i)(A) (stating that the "United States employer . . . must file" the petition); 56 Fed. Reg. 61111, 61112 (Dec. 2, 1991) (explaining

that only "United States employers can file an H-1B petition" and adding the definition of that term at 8 C.F.R. § 214.2(h)(4)(ii) as clarification). Accordingly, the petition cannot be approved, and the appeal must be dismissed.

### **B. Itinerary Requirement**

Moreover, we will now address another basis for denial of the petition. More specifically, we find that the petitioner failed to comply with the itinerary requirement at 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.

The itinerary language at 8 C.F.R. § 214.2(h)(2)(i)(B), with its use of the mandatory "must" and its inclusion in the subsection "Filing of petitions," establishes that the itinerary as there defined is a material and necessary document for an H-1B petition involving employment at multiple locations, and that such a petition may not be approved for any employment period for which there is not submitted at least the employment dates and locations.

Here, the petitioner has provided inconsistent information as to the beneficiary's work location. On the LCA, the petitioner provided two distinct worksites for the beneficiary. However, the petitioner did not submit the dates of the beneficiary's employment for the each of the locations.

Moreover, it must be noted that there is a lack of documentary evidence sufficient to corroborate the claim that the beneficiary would be serving as a programmer analyst at Information Unlimited's facility for the period sought in the petition. Although the petitioner requested the beneficiary be granted H-1B classification until September 16, 2016, the petitioner failed to substantiate the proposed employment at [REDACTED] for the duration of the period requested.

Thus, it appears that the beneficiary will work at multiple locations at some point during the requested period of employment and the petitioner failed to provide an itinerary when it filed the Form I-129 in this matter. Thus, the petition must also be denied on this additional basis.<sup>10</sup>

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<sup>10</sup> On page 4 of the Form I-129 petition, the petitioner indicated that an itinerary was included with the petition. However, upon complete review of the record of proceeding, we find that the petitioner did not submit an itinerary with the employment dates and locations of the beneficiary's employment for the duration of the requested validity period.

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

#### Specialty Occupation

We will now address the director's determination that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions.

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

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

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

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

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

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

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or

- (4) The nature of the specific duties [is] so specialized and complex that 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 387. To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

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

The petitioner asserted that the beneficiary would be employed as a programmer analyst. However, 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.

Here, the petitioner has provided inconsistent information regarding the educational requirement for

the proffered position.

- Specifically, in the April 3, 2013 letter of support, the petitioner stated that "[t]he position of Programmer Analyst with [the petitioner], by virtue of the highly complex job duties, is a specialty occupation requiring at least a Bachelors [sic] degree or its equivalent in Computer Science or related fields, or its equivalent."
- However, further in the same letter, the petitioner asserted that the proffered position requires "at least a Bachelors [sic] degree or its equivalent in the Computer Sciences or Engineering Sciences."
- The petitioner continued by stating that "many of [its] Programmer Analysts are ideally suited to develop these systems because of their background in the Engineering and/or Sciences."
- In addition, the petitioner provided a letter from [redacted] of [redacted] Inc., which stated that "[t]he position requires a person with a minimum of Bachelors [sic] degree in computers/science/engineering/business related field and experience in information technology related area."

No explanation for the variances was provided. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 591-92.

Further, it must be noted that the petitioner's requirements are inadequate to establish that the proposed position qualifies as a specialty occupation. More specifically, in general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty (or its equivalent)" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in two disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty (or its equivalent)," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added).

In other words, while the statutory "the" and the regulatory "a" both denote a singular "specialty," we do not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. See section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). This also includes even seemingly disparate specialties providing, again, the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the

particular position.

Again, the petitioner states that its minimum educational requirement for the proffered position is a bachelor's degree in computer science, engineering science and/or sciences. The issue here is that these fields cover numerous and various specialties. Therefore, it is not readily apparent that a general degree in one of these fields is directly related to the duties and responsibilities of the particular position proffered in this matter. Accordingly, as the evidence of record fails to establish a standard, minimum requirement of at least a bachelor's degree *in a specific specialty*, or its equivalent, for entry into the particular position, it does not support the proffered position as being a specialty occupation and, in fact, supports the opposite conclusion.

Furthermore, 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's job requirements is critical. See *Defensor v. Meissner*, 201 F.3d at 387-388. That is, it is necessary for the end-client to provide sufficient information regarding the proposed job duties to be performed at its location in order to properly ascertain the minimum educational requirements necessary to perform those duties. *Id.* at 387-388. The court held that the legacy INS 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.

With the initial petition, the petitioner submitted a letter dated March 7, 2013 from [REDACTED] who works for the end-client (according to the petitioner), [REDACTED] Inc. In the letter, Mr. [REDACTED] provided a list of the beneficiary's duties, along with the academic requirements for the position.

Upon review of the record, we note that the petitioner and the end-client did not provide any information with regard to the order of importance and/or frequency of occurrence with which the beneficiary will perform the functions and tasks. Thus, the record fails to specify which tasks are major functions of the proffered position. Moreover, the evidence does not establish the frequency with which each of the duties will be performed (e.g., regularly, periodically or at irregular intervals). As a result, the record does not establish the primary and essential functions of the proffered position.

Moreover, while the petitioner has identified its proffered position as that of a programmer analyst, the descriptions of the beneficiary's duties, as provided by the petitioner and the client, lack the specificity and detail necessary to support the petitioner's contention that the position is a specialty occupation. While a generalized description may be appropriate when defining the range of duties that are performed within an occupation, such generic descriptions generally cannot be relied upon by the petitioner when discussing the duties attached to specific employment for H-1B approval. In establishing such a position as a specialty occupation, especially one that may be classified as a staffing position or labor-for-hire, the description of the proffered position must include sufficient details to substantiate that the petitioner has H-1B caliber work for the beneficiary. Here, the job

description fails to communicate (1) the actual work that the beneficiary would perform on a day-to-day basis; (2) the complexity, uniqueness and/or specialization of the tasks; and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty.

Further, the evidence not establish the substantive nature of the work to be performed by the beneficiary. There is a lack of documentation regarding the claimed projects and the beneficiary's specific role in the project(s). While the petitioner may be able to eventually locate some work for the beneficiary, it has failed to establish that the petition was filed for non-speculative work for the beneficiary that existed *as of the time of the petition's filing*. There is insufficient documentary evidence in the record corroborating the availability of work for the beneficiary for the requested period of employment and, consequently, what the beneficiary would do and how this would impact the circumstances of her relationship with the petitioner.

Moreover, it must be noted that the petitioner stated on the Form I-129 that it was established in 2004 and that it has three employees. The petitioner provided several documents regarding its business operations. For instance, the petitioner provided its tax return. The tax return indicates that the petitioner compensated its officer \$31,000 (line 7), but it did not pay any salaries and wages (line 8).

It is reasonable to assume that the size and/or scope of an employer's business has, or could have, an impact on the duties of a particular position. *See EG Enterprises, Inc. d/b/a/ Mexican Wholesale Grocery v Department of Homeland Security*, 467 F. Supp. 2d 728 (E.D. Mich. 2006). Thus, the size of a petitioner may be considered as a component of the nature of the petitioner's business, as the size impacts upon the duties of a particular position. In matters where a petitioner's business is relatively small, USCIS reviews the record for evidence that its operations, are, nevertheless, of sufficient complexity to indicate that it would employ the beneficiary in position requiring the theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent). Additionally, when a petitioner employs relatively few people, it may be necessary for it to establish how the beneficiary will be relieved from performing non-qualifying duties. The petitioner did not address this issue, nor did it provide information regarding the duties and responsibilities of the other employee(s). Thus, without additional information, it cannot be ascertained how the beneficiary would be relieved from performing non-qualifying duties such that it would not affect the occupational classification of the position.

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

For the reasons related in the preceding discussion, 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. For this additional reason, the appeal must be dismissed and the petition denied.

#### IV. CONCLUSION AND ORDER

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

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

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

**ORDER:** The appeal is dismissed.