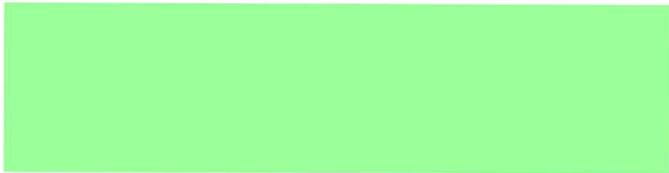


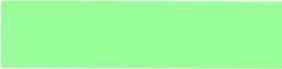
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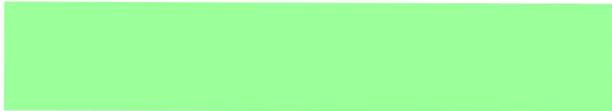
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

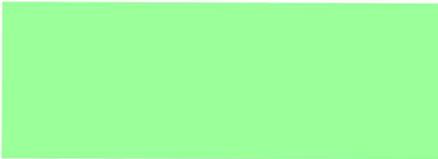


DATE: **JUN 27 2014** OFFICE: CALIFORNIA SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary:

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg", written over a circular stamp or seal.

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.

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the California Service Center on April 4, 2013. In the Form I-129 visa petition, the petitioner describes itself as a software development company established in 1996. In order to employ the beneficiary in what it designates as a systems 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 on July 10, 2013, finding that the petitioner failed to establish that it will be a United States employer having an employer-employee relationship with the beneficiary as an H-1B temporary employee. On appeal, the petitioner, through counsel, asserts that the director's basis for denial of the petition is erroneous and contends that the petitioner satisfied all evidentiary requirements.

The record of proceeding contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the petitioner's Form I-290B and supporting documentation. We reviewed the record in its entirety before issuing its 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. FACTUAL AND PROCEDURAL BACKGROUND

In this matter, the petitioner states in the Form I-129 petition that it seeks the beneficiary's services as a systems analyst to work on a full-time basis. Further, the petitioner indicates that the beneficiary would be employed in [REDACTED] OH, and also at [REDACTED]. The petitioner states that the dates of intended employment are from October 1, 2013 to September 4, 2016.

In a letter dated March 18, 2013, the petitioner provided the following job description:

Specifically, as a Systems Analyst, the beneficiary will analyze computer problems of existing and proposed systems and initiate and enable specific technologies that will maximize our company's ability to deliver more efficient and effective technological and computer-related solutions to our business clients. The beneficiary will gather information from users to define the exact nature of system problems and then design a system of computer programs and procedures to resolve these problems. As a Systems Analyst, the beneficiary will plan and develop new computer systems and devise ways to apply the IT industry's already-existing technological resources to additional operations that will streamline our clients'

business processes. This process of developing new computer systems will include the design or addition of hardware or software applications that will better harness the power and usefulness of our clients' computer systems. In this position, the beneficiary will employ a combination of techniques, including: structured analysis, data modeling, information engineering, mathematical model building, sampling, and cost accounting to plan systems and procedures to resolve computer problems. As part of the duties of a Systems Analyst, the beneficiary will also analyze subject matter operations to be automated, specify the number and type of records, files, and documents to be used, and format the output to meet user's needs. As a Systems Analyst, the beneficiary is also required to develop complete specifications and structure charts that will enable computer users to prepare required programs. Most importantly, once the systems have been instituted, the beneficiary will coordinate tests of the systems, participate in trial runs of new and revised systems, and recommend computer equipment changes to obtain more effective operations.

As with any Systems Analyst position, the usual minimum requirement for performance of the job duties is a bachelor's degree, or equivalent, in computers, engineering, or a related field. For a position at the level offered, it is not uncommon for the incumbent to also possess a master's degree and/or a number of years of experience of increasing responsibility in programming analysis or engineering.

The petitioner submitted documentation regarding its business operations and the proffered position. The petitioner also provided the beneficiary's diploma and academic transcripts to establish that the beneficiary received a Master of Science degree in Electrical and Computer Engineering from [REDACTED] and a diploma from a foreign university.

Moreover, the petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The LCA designation for the proffered position corresponds to the occupational classification of "Computer Systems Analysts" – SOC (ONET/OES Code) 15-1121. The petitioner designated the proffered position as a Level I (entry level) position.² In the LCA, the petitioner

² Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties. The U.S. Department of Labor (DOL) emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received as indicated by the job description.

The "Prevailing Wage Determination Policy Guidance" issued by DOL provides a description of the wage levels. A Level I wage rate is described by DOL as follows:

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that

(b)(6)

indicated that the beneficiary would work at the petitioner's location in [REDACTED] OH and at [REDACTED]

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on April 18, 2013. The director acknowledged that the petitioner had submitted various documents in support of the petition, but found that the evidence was insufficient to establish eligibility for the benefit sought. The director outlined the types of evidence to be submitted.

The petitioner responded to the RFE by submitting a letter dated May 23, 2013, and additional evidence. The director reviewed the evidence but determined that the petitioner failed to establish eligibility for the benefit sought. The director denied the petition on July 10, 2013. Counsel for the petitioner submitted an appeal of the denial of the H-1B petition.

II. LAW AND ANALYSIS

A. Lack of Standing to File the Petition as a United States Employer

We reviewed the record of proceeding in its entirety. We will first discuss whether the petitioner has 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." 8 C.F.R. § 214.2(h)(4)(ii).

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)

require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance, Nonagric. Immigration Programs* (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

³ The petitioner submitted an itinerary indicating that the beneficiary will be employed at [REDACTED] in [REDACTED] California for the duration of the requested H-1B period.

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

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

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

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

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

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.⁴

⁴ 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).

Specifically, the regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to engage a person to work within the United States, and to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee" or "employer-employee relationship" combined with the agency's otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition" or, more importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. *Cf. Darden*, 503 U.S. at 318-319.⁵

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).

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).

⁵ 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))).

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

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

The petitioner and its counsel claim that the petitioner and the beneficiary have an employer-employee relationship. On appeal, counsel asserts that the petitioner "submitted ample evidence establishing that [p]etitioner has the power to hire, pay, fire, supervise, and control the work of the [b]eneficiary." Counsel further claims that the petitioner "is the sole director of the location, hours, and nature of the [b]eneficiary's work" and that it has "regular, consistent, and direct contact with the [b]eneficiary and knowledge of the [b]eneficiary's performance throughout the employment duration."

Upon review, we find that there is insufficient probative evidence in the record to support these assertions. 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."

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 petitioner provided an employment agreement between itself and the beneficiary, dated March 14, 2013. The agreement indicates that the essential job function for the position is to "[a]nalyze computer and business problems of existing and proposed systems as well as initiate and enable specific technologies that will maximize our company's ability to deliver more efficient and effective technological and computer related solutions to [the petitioner's] business clients." However, upon review of the document, we note that it does not provide any level of specificity as to the beneficiary's duties and the requirements for the position. Further, it states that

the "[e]mployee agree[s] that their duties shall be primarily rendered at [the] Employer's business premises or at such other places as the Employer shall in good faith require," but does not provide further information about any particular project at its own location or identify "such other places" that the beneficiary may be assigned to. Thus, just a few weeks prior to the filing of the H-1B petition, the petitioner did not specify in the employment agreement where the beneficiary would be employed. While an offer of employment letter 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.

The petitioner also submitted copies of pay statements that it issued to the beneficiary from December 2012 to February 2013. The method of payment of wages can be a pertinent factor for determining the petitioner's relationship with the beneficiary. However, while items such as wages, 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., who will oversee and direct the work of the beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary's employer.

In support of the petition, the petitioner submitted a Performance Appraisal Form. The document is a general template and does not provide any specific criteria with regard to the petitioner's operations and/or the proffered position. For example, the document does not relate any specificity or details regarding this particular position and the beneficiary's performance, including who specifically will appraise the beneficiary's performance; the frequency of evaluations for this particular position; the appraisal criteria for this particular position; how work and performance standards are established for this particular position; the methods for assessing and evaluating the beneficiary's performance for this particular position; and the criteria for determining bonuses and salary adjustments for this particular position. Moreover, there is a lack of information in the record as to how the day-to-day work of the beneficiary has been and will be supervised and overseen.

In addition, the petitioner submitted copies of the beneficiary's timesheets. While the timesheets identify the work performed such as "customized the websphere seedlist for search integration for website," the project name as "clinical library," the client name as [REDACTED] and are signed by the petitioner's signatory, the timesheets do not establish the specific duties of the position or provide information regarding which entity supervised the beneficiary.

The record also contains an organizational chart depicting the petitioner's staffing hierarchy. In the support letter, the petitioner stated that "[the beneficiary]'s supervisor is shown on the enclosed organization chart of our company." The chart shows the beneficiary's position as reporting to the manager of the software development and consulting group, but the chart does not contain the name of the beneficiary's supervisor. Furthermore, the petitioner did not submit a description of the supervisor's job duties and/or other probative evidence on the issue. Importantly, the petitioner states that the beneficiary will be physically located at [REDACTED]

while the petitioner is located over 2400 miles away in [REDACTED] Ohio, raising questions as to who will supervise, control and oversee the beneficiary's work.

In response to the RFE, the petitioner submitted an affidavit from [REDACTED] who claims that he/she is that a colleague of the beneficiary at [REDACTED] and that the beneficiary has been working as a systems analyst and web developer since October 2011. We note that in the record, there are copies of several emails exchanged between the beneficiary and this individual, but there is insufficient information about who employs this individual, and the basis of his/her claimed knowledge on the matter. For instance, the emails note the individual's name [REDACTED] but there is no other information as to which entity employs this individual. Further, there is insufficient information as to this individual's work relationship with the beneficiary, and whether this individual has knowledge of, among other things, the beneficiary's job duties, schedule, and who supervises the beneficiary. Further, we note that this individual indicates that the beneficiary has been working as a systems analyst and web developer (whereas the petitioner states that the beneficiary will only serve in a systems analyst position). No explanation was provided by the petitioner.

The record also contains a printout entitled "[REDACTED] Identify Manager," which names the beneficiary and identifies him as a contractor at [REDACTED] at [REDACTED]. However, the job description is "Software Architect-Client Server-HS," not systems analyst. The local-part of the beneficiary's email address is the username of the beneficiary (his first name and last name), with the domain [REDACTED]. The document indicates that the beneficiary does not have a "Non-[REDACTED] email address. The beneficiary's assigned email address does not support the assertion that the beneficiary is employed by the petitioner. We further note that "[REDACTED] Sponsor/Manager" is identified as [REDACTED] whose email domain is [REDACTED]. Thus, the information does not substantiate an employer-employee relationship between the petitioner and the beneficiary.

In response to the RFE and also on appeal, counsel refers to copies of emails between the beneficiary and his colleagues as evidence of his work and placement. However, while the e-mails provide some information about the project, the emails do not sufficiently establish that the petitioner is the employer. For example, in the e-mail dated April 26, 2013 from [REDACTED] Mr. [REDACTED] signs off as "Sr. Project Manager" "Clinical Library Mobilization Project," [REDACTED] Intranet" and his email domain is [REDACTED].

The petitioner also provided a photo identification badge stating [REDACTED] and the beneficiary's name. The badge does not contain validity dates, nor does it appear to contain security features (e.g., access restrictions, bar code, holographic image, digital signature, magnetic strip). There is no indication as to when the badge was produced, for what purpose, or by whom. The badge does not contain any information connecting the beneficiary to the petitioner.

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, USCIS looks at a number of factors, including who will provide the instrumentalities and tools required to perform the duties of the position and the beneficiary's role in hiring and paying assistants. Upon review of the record of proceeding, the petitioner did not provide probative evidence relating to these factors.

The itinerary in the record indicates that the beneficiary's services will be performed at [REDACTED] located at [REDACTED]. The itinerary further indicates that the services will be provided through vendor companies [REDACTED] and [REDACTED]. The record contains the petitioner's professional agreement with [REDACTED] dated August 17, 2009, and also a letter from [REDACTED] dated March 15, 2013. In the letter, [REDACTED] claims that it "has Service Agreement with [REDACTED] to provide specialized technical services" and the beneficiary is "providing services to the [REDACTED] client, [REDACTED]". The record contains a letter from [REDACTED] dated April 23, 2013 which states that the beneficiary "has been providing services to [REDACTED] as a Systems Analyst position" for [REDACTED]. [REDACTED] indicates that it "subcontracted [the beneficiary]'s services through [REDACTED]".

We note that while the record contains a services agreement between the petitioner and [REDACTED] there are no documents provided to establish relationship and/or contracts between [REDACTED] and [REDACTED] and/or [REDACTED] and [REDACTED]. Moreover, while the services agreement with [REDACTED] states "whereby Contractor will provide professional services to be performed by the Contractor's staff in accordance with the terms and provisions below," the section that would presumably explain the terms and provisions has been redacted. Further, [REDACTED] notes that the beneficiary "works under the oversight of [REDACTED] who is described as a [REDACTED] employee.

In the RFE, the director noted that the documentation provided does not establish the specific duties the beneficiary will be performing at a third party location or list the duration of the computer-related services. However, the petitioner did not submit evidence from the end-client, [REDACTED]. The record does not contain probative evidence such as contracts, work orders, and statements of work which outline in sufficient detail the nature and scope of the beneficiary's intended employment with [REDACTED]. The record corroborating what the beneficiary would do, where the beneficiary would work, and the availability of work for the beneficiary for the entire requested period of employment. Without full disclosure of all of the relevant factors relating to the end-client, we are unable to find that the requisite employer-employee relationship will exist between the petitioner and the beneficiary.

The evidence submitted fails to establish non-speculative employment for the beneficiary for the entire period requested, specifically from October 1, 2013 to September 4, 2016. The letter from [REDACTED] dated March 15, 2013 states that it "is anticipated that [the beneficiary]'s assignment will go on for a foreseeable future with an excellent opportunity for possible further extensions," but does not specify the start and end dates of the project. The letter from [REDACTED] dated April 25, 2013 states that the beneficiary has been working as a systems analyst since October 10, 2011 at [REDACTED]. [REDACTED] further indicated that the "duration of our [REDACTED] engagement is ongoing and is expected to exceed 2+ years." [REDACTED] adds that it "has had a long-standing relationship with [REDACTED] and we expect to continue to be providing IT consulting services to the company for years to come." In response to the RFE, the petitioner claimed that "[d]ue to its policies, staffing companies are often unable to issue work orders in increments greater than a certain number of months; however, the work orders are routinely extended for as long as the project is ongoing," and that "[t]his practice is typical in the IT industry." The petitioner further states "[b]ased on the aforementioned evidence provided, we anticipate that the Beneficiary will remain on this

assignment and that there will be sufficient specialty occupation work with [REDACTED] for the entire requested period." However, the [REDACTED] "Identify Manager" document indicates that the project end date is August 30, 2013. Thus, the document does not support the petitioner's assertion that the project is ongoing. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

There is a lack of substantive documentation regarding work for the beneficiary for the duration of the requested period. Rather than establish non-speculative employment for the beneficiary for the entire period requested, the petitioner simply claimed that the beneficiary would be working on a project for [REDACTED] for the requested period. However, the petitioner did not submit probative evidence substantiating specific work for the beneficiary. The petitioner also did not submit documentary evidence regarding any additional work for the beneficiary. 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). Thus, even if it were found that the petitioner would be the beneficiary's United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii), the petitioner has not demonstrated that it would maintain such an employer-employee relationship with the beneficiary for the duration of the period requested.⁶

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

⁶ The agency made clear long ago that speculative employment is not permitted in the H-1B program. For example, a 1998 proposed rule documented this position as follows:

Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. See section 214(i) of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998). While a petitioner is certainly permitted to change its intent with regard to non-speculative employment, e.g., a change in duties or job location, it must nonetheless document such a material change in intent through an amended or new petition in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E).

"employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the director's decision must be affirmed and the petition denied on this basis.

B. Failure to Establish that Proffered Position Qualifies as a Specialty Occupation

Beyond the decision of the director, we will now address whether the petitioner has established that the proffered position qualifies as a specialty occupation position.

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 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 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.

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.

In ascertaining the intent of a petitioner, USCIS must look to the Form I-129 and the documents

filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

In the instant case, the petitioner states that proffered position requires a "bachelor's degree or equivalent in computers, engineering, or a related field." Such an assertion, i.e., that the duties of the proffered position can be performed by a person with a degree in any one of those disciplines, (i.e., computers, engineering or a related field) suggests that the proffered position is not, in fact, a specialty occupation. More specifically, the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but such a degree in a *specific specialty* that is directly related to the position. See section 214(i)(1)(b) of the Act, 8 U.S.C. § 1184(i)(1)(b), and 8 C.F.R. § 214.2(h)(4)(ii).

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" 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 disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty," 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 provided again, that the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

Absent evidence to the contrary, the fields of computers and engineering are not closely related specialties, and the petitioner fails to establish how these fields are directly related to the duties and responsibilities of the proffered position. 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, it is not readily apparent (1) 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 (i.e., that engineering and computer science are closely related fields); or (2) that any and all engineering

specialties are directly related to the duties and responsibilities of the particular position proffered in this matter. Absent this evidence, it cannot be found that the particular position proffered in this matter has a normal minimum entry requirement of a bachelor's or higher degree in a specific specialty or its equivalent under the petitioner's own standards. 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.

Moreover, 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 company'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 former 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.

Further, the job duties provided by the petitioner in its support letter dated March 18, 2013 differ from the job descriptions provided by the two middle vendors, [REDACTED] and [REDACTED]. Both vendors indicate that the beneficiary performs the following duties:

1. Analyze new business requirements and existing business operations
2. Participate in developing and presenting project plan and timeline in coordination with business project manager
3. Building web applications using Java/J2EE and IBM WebSphere Web Content Management
4. Providing web services to mobile application
5. Performing functional and performance testing
6. Participating in status meeting
7. Working closely with Business project manager and technical architect to tract status and report issues.

No explanation for the variance in job descriptions was provided by the petitioner.⁷

⁷ As reflected in the description of the position as quoted above, the proposed duties are stated in terms that fail to convey the relative complexity, uniqueness and/or specialization of the proffered position. The abstract level of information provided about the proffered position and its constituent duties is exemplified by the assertion that the beneficiary will "participat[e] in status meeting" and "participate in developing and presenting project plan and timeline in coordination with business project manager." These statements do not include information regarding the day-to-day tasks of the position, and the term "participate" does not delineate the actual work that the beneficiary will perform. This is again illustrated by the statement that the beneficiary will work closely with the business project manager and technical architect to tract status and report issues. The statement does not illuminate the substantive application of knowledge involved in

In the instant case, the record of proceeding contains inconsistent information regarding the job duties for the proffered position and is devoid of substantive information from the end-client regarding not only the specific job duties to be performed by the beneficiary, but also information regarding whatever the end-client may or may not have specified with regard to the educational credentials of persons to be assigned to its projects. The record of proceeding does not contain documentation on this issue from, or endorsed by, the actual end-client, the company that has been or will be utilizing the beneficiary's services as a systems analyst (as stated by the petitioner).

The petitioner has not established that the petition was filed for non-speculative work for the beneficiary that existed as of the time the H-1B petition was filed. The petitioner did not submit sufficient, probative evidence corroborating that, when the petition was filed, the beneficiary would be assigned to perform services pursuant to any specific contract(s), work order(s), and/or statement(s) of work (or other probative evidence) for the requested validity period and/or that the petitioner had a need for the beneficiary's services during the requested validity dates. There is insufficient documentary evidence in the record corroborating what the beneficiary would do, where the beneficiary would work, and the availability of work for the beneficiary for the requested period of employment. 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.

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

Accordingly, as the petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position qualifies as a specialty occupation. For this reason also, the petition must be denied.

III. 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 the AAO conducts appellate review on a *de novo* basis).

"work[ing] closely" or any particular educational attainment associated with such application.



(b)(6)

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. The petition is denied.