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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 30 2014** OFFICE: CALIFORNIA 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 in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

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

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

On the Form I-129 visa petition, the petitioner describes itself as an information technology consulting company. In order to employ the beneficiary in what it designates as a "Computer Programmer " position,¹ the petitioner seeks to classify the beneficiary 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 each of two independent grounds, namely, that the evidence of record (1) failed to establish (1) that the proffered position qualifies for classification as a specialty occupation, and (2) that the petitioner would maintain the required employer-employee relationship with the beneficiary.

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

As will be discussed below, our review of the totality of the evidence of record, including all of the submissions on appeal, leads us to conclude that the director's decision to deny the petition on each of the grounds specified in her denial decision was correct. Accordingly, the appeal will be dismissed, and the petition will be denied.

I. EVIDENTIARY STANDARD APPLIED ON APPEAL

As a preliminary matter, and in light of counsel's references to the requirement that we apply the "preponderance of the evidence" standard, we affirm that, in the exercise of its appellate review in this matter, as in all matters that come within its purview, we follow the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010). In pertinent part, that decision states the following:

Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.

* * *

¹ The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for the SOC (O*NET/OES) Code 15-1131, the associated Occupational Classification of "Computer Programmers," and a Level I prevailing wage rate.

The “preponderance of the evidence” of “truth” is made based on the factual circumstances of each individual case.

* * *

Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is “more likely than not” or “probably” true, the applicant or petitioner has satisfied the standard of proof. *See INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing “more likely than not” as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Id.

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In doing so, we apply the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon review of the present matter pursuant to that standard, however, we find that the evidence in the record of proceeding does not support counsel’s contentions that the evidence of record requires that the petition at issue be approved. Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, we find that the director’s determinations in this matter were correct. Upon review of the entire record of proceeding, and with close attention and due regard to all of the evidence, separately and in the aggregate, submitted in support of this petition, we find that the petitioner has not established that its claims are “more likely than not” or “probably” true. As the evidentiary analysis of this decision will reflect, the petitioner has not submitted relevant, probative, and credible evidence that leads us to believe that the petitioner’s claims are “more likely than not” or “probably” true.

II. FACTUAL AND PROCEDURAL BACKGROUND

In its undated letter of support, filed with the Form I-129, the petitioner's Director described the petitioner as "a Business Intelligence Company that offers enterprise class Business Intelligence and Analytic Solutions useful in different functional domains utilizing advanced skill set and the latest available technologies." The petitioner also stated that it "continuously and promptly deliver[s] in-house projects with several clients each year."

According to the Form I-129, the petitioner seeks the beneficiary's services as a computer programmer on a full-time basis, for which, as specified at page 17 of the Form I-129H-1B Data

Collection Supplement, \$100, 000 would be the Rate of Pay Per Year. As noted previously, the LCA which the petitioner submitted had been certified for a job prospect within the occupational classification of "Computer Programmers" - SOC (ONET/OES Code) 15-1131 - at a Level I prevailing-wage rate, which the LCA identified as only \$61,984.00 per year for that type of position in the pertinent geographical area and employment period.

In the undated letter of support that was filed with the Form I-129, [REDACTED] signing as the petitioner's CEO, stated:

In the capacity of a computer programmer, the Beneficiary will have the following job duties:

- Study the design to determine that the client's requirement translated into the harmonized functional document (10%)
- Involve in preparation and maintenance of the harmonized functional Spec package to ensure proper implementation of tools (10%)
- Program BI applications using tools like OOBIEE, Qilkview, Teradata, Oracle, SQL Server, Unix, Windows Server, Database, Dashboard, reporting, etc. (50%)
- Creating the required DQL queries for the applications (10%)
- Involvement in Design Development, Testing and Deployment of Enhancements (20%)

Other documents filed with the Form I-129 also included: (1) a copy of the petitioner's offer-of employment-letter, signed by [REDACTED] as the petitioner's CEO, and by the beneficiary, on January 2, 2013; (2) copies of various pages from the petitioner's website; (3) a copy of the petitioner's organizational chart; (4) a copy of the petitioner's 2012 federal tax return; (5) a copy of the petitioner's quarterly tax returns for 2012; (6) an itinerary for the beneficiary; (7) a copy of an email message from [REDACTED] of [REDACTED] (hereinafter [REDACTED]); (8) a copy of a Subcontractor Agreement dated March 14, 2011 between the petitioner and [REDACTED] (or [REDACTED]) (9) copies of various documents demonstrating the beneficiary's employment onsite at the offices of [REDACTED] including the beneficiary's identification card and the beneficiary's online profile demonstrating the reporting structure of his employment; (10) a copy of the beneficiary's resume; and (11) copies of the beneficiary's educational credentials.

The itinerary submitted by the petitioner indicates that the beneficiary will work as a computer programmer from October 1, 2013 to September 1, 2016 at [REDACTED] - which appears to be an address on [REDACTED] main office-campus in [REDACTED]. Counsel's brief on appeal characterizes the situation as follows:

² We note that counsel claims that the petitioner would provide the beneficiary to work for [REDACTED]. Also, that [REDACTED] address appears to be on [REDACTED] Main campus in [REDACTED] see the [REDACTED] Internet site at [http://www.\[REDACTED\]](http://www.[REDACTED]) (which we accessed on June 12, 2014).

The expressed nature of employment involves having [the] Beneficiary perform services at an end-client company, [REDACTED] . . . with a middle vendor company, [REDACTED] . . . subcontracting the worker from the petitioner, ultimately to the client.

Upon review of the documentation submitted with the petition, it appears that the beneficiary is currently working and will continue to work onsite at the offices of [REDACTED]. The record further implies that the beneficiary's placement at the [REDACTED] office is based on an agreement between the petitioner and a mid-vendor, [REDACTED], as evidenced by the Subcontractor Agreement contained in the record. In its offer-of-employment letter, the petitioner claims that the beneficiary will be reporting to [REDACTED] identified as "Director" on the petitioner's internal organizational chart. Likewise, the record also contains an email message from [REDACTED] who restates the claims of the petitioner with regard to the duties that the beneficiary will perform and confirming that the beneficiary will be supervised by [REDACTED]. A review of the reporting structure for the beneficiary at [REDACTED] however, reveals that [REDACTED] not the petitioner's [REDACTED] is the beneficiary's direct supervisor.

The director found the evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on August 12, 2013. The petitioner was asked to submit probative evidence to establish that a specialty occupation position exists for the beneficiary, and that it would maintain the requisite employer-employee relationship with the beneficiary. Noting the nature of the petitioner's business and acknowledging the documentary evidence submitted, the director noted that there was insufficient evidence to establish the nature of the beneficiary's employment at the end client, [REDACTED]. The director requested specific evidence, such as contracts and work orders with the claimed end-client demonstrating that specialty occupation work was available for the beneficiary for the entire requested validity period, as well as probative evidence to establish the source of the tools and instrumentalities needed to perform the beneficiary's duties as well evidence demonstrating the manner in which the petitioner would supervise the beneficiary's work.

In a response dated September 20, 2013, counsel for the petitioner addressed the director's request. Counsel relied on a January 8, 2010 memorandum issued by Donald Neufeld, Associate Director Service Operations, entitled "*Determining Employer-Employee Relationships for Adjudications of H-1B Petitions, Including Third-Party Site Placements.*" Counsel specifically noted the provision which states that actual contracts are not mandatory in establishing that an employer-employee relationship exists. Nevertheless, counsel noted that the record did in fact contain the Subcontractor Agreement between the petitioner and [REDACTED] which identified [REDACTED] as the third-party client that would ultimately receive IT services pursuant to said agreement. Counsel further stated, with regard to the director's claim for additional, probative evidence, that "we have submitted as much evidence that is available under the circumstances," and contended that the record as constituted establishes the employer-employee relationship and the nature of the specialty occupation employment. Nevertheless, counsel submitted additional evidence, including (1) a second email

from [REDACTED] dated September 12, 2013;³ (2) photos of the beneficiary at [REDACTED] (3) a performance review for the beneficiary dated June 28, 2013; and (4) a letter from the petitioner dated September 12, 2013 restating the previously-identified duties of the beneficiary.

The director reviewed the information provided by the petitioner and counsel to determine whether the petitioner had established eligibility for the benefit sought. The director determined that the petitioner failed to establish (1) that specialty occupation work existed for the beneficiary for the duration of the requested validity period, and (2) that the petitioner would maintain the requisite employer-employee relationship with the beneficiary. The director therefore denied the petition on November 14, 2013. On appeal, counsel for the petitioner submitted a brief and contends that the director's findings were erroneous, again relying on the Neufeld memorandum.

III. LAW AND ANALYSIS

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

We will first discuss whether the petitioner has established that it meets the regulatory definition of a "United States employer" and 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" as set out at 8 C.F.R. § 214.2(h)(4)(ii).⁴

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;

³ We note that this email is virtually identical to Mr. [REDACTED] email dated March 19, 2013.

⁴ We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

- (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. That is to say, the record of proceeding does not provide evidence of a sufficient range of common-law employer-employee factors for us to reasonably determine that the requisite employer-employee relationship would exist between the petitioner and the beneficiary. We have reached this determination by analyzing the pertinent evidence of record under the common-law framework that will be discussed below.

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

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

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

"In determining whether a hired party is an employee under the general common

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

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

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

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,

⁵ While the *Darden* court considered only the definition of "employee" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(6), and did not address the definition of "employer," courts have generally refused to extend the common law agency definition to ERISA's use of employer because "the definition of 'employer' in ERISA, unlike the definition of 'employee,' clearly indicates legislative intent to extend the definition beyond the traditional common law definition." See, e.g., *Bowers v. Andrew Weir Shipping, Ltd.*, 810 F. Supp. 522 (S.D.N.Y. 1992), *aff'd*, 27 F.3d 800 (2nd Cir.), *cert. denied*, 513 U.S. 1000 (1994).

However, in this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. Instead, in the context 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 term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee" or "employer-employee relationship" combined with the agency's otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition" or, more importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. *Cf. Darden*, 503 U.S. at 318-319.⁶

Accordingly, in the absence of an express congressional intent to impose broader definitions, both the "conventional master-servant relationship as understood by common-law agency doctrine" and the *Darden* construction test apply to the terms "employee" and "employer-employee relationship" as used in section 101(a)(15)(H)(i)(b) of the Act, section 212(n) of the Act, and 8 C.F.R. § 214.2(h).⁷

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

The factors indicating that a worker is or will be an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. *Darden*, 503 U.S. at 323-324; *Clackamas*, 538 U.S. at 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),

⁶ To the extent the regulations are ambiguous with regard to the terms "employee" or "employer-employee relationship," the agency's interpretation of these terms should be found to be controlling unless "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359, 109 S.Ct. 1835, 1850, 104 L.Ed.2d 351 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945))).

⁷ That said, there are instances in the Act where Congress may have intended a broader application of the term "employer" than what is encompassed in the conventional master-servant relationship. *See, e.g.*, section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F) (referring to "unaffiliated employers" supervising and controlling L-1B intracompany transferees having specialized knowledge); section 274A of the Act, 8 U.S.C. § 1324a (referring to the employment of unauthorized aliens).

even though a medical contract service agency is the actual petitioner, because the hospitals ultimately hire, pay, fire, supervise, or otherwise control the work of the beneficiaries).

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

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

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

Applying the *Darden* and *Clackamas* tests to this matter, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee."

According to the inferences drawn from the documentary evidence and the claims of counsel, the petitioner seeks to employ the beneficiary onsite at [REDACTED] through the mid-vendor, [REDACTED]. We further note the petitioner's contention that at all times it will maintain an employer-employee relationship with the beneficiary. However, the record of proceeding does not substantiate that claim.

We note the petitioner's claim that the beneficiary will be supervised by [REDACTED]. However, the record's January 2, 2013 offer-of-employment letter, signed by [REDACTED] as the petitioner's CEO and by the beneficiary, does not indicate that such supervision would be either continuous, on-the-job, or in the nature of deciding, assigning, directing, or otherwise supervising the beneficiary's day-to-day work as it is being performed. Rather, we see that the petitioner's guidance to the beneficiary is mentioned as something in no definite terms of nature or timing. We see this aspect in the following segment of the "Duties" section of the offer-of-employment letter (with emphasis added):

You are required to follow company policies and procedures adopted from time to time by the Company as listed in the Employee Handbook *and to take such general direction as you may be given from time to time by Atul Varshney.*

In addition, we note that there is no evidence that the petitioner's [REDACTED] maintains any presence at the project site or that any office space or other accommodations has been assigned to him at the project site. In the same vein, we observe that the record's copy of the petitioner's organization chart lists [REDACTED] as the petitioner's Director, and we will take administrative notice that a Director position designation is not usually associated with an office location outside the organization to which the Director belongs.

Next we refer to the copy of the Internet page that the petitioner provided from the [REDACTED] Internet site [http://www.\[REDACTED\]](http://www.[REDACTED]). We find that the content of this printout (1) is affirmative evidence tending to show that [REDACTED] - not the petitioner - provides the beneficiary's immediate chain of supervision, and (2) that [REDACTED] appears to present the beneficiary as its *own* asset or as at least a person functioning as [REDACTED] staff.

Next, we look to the "Subcontractor Agreement" document which was executed by [REDACTED] and by the petitioner as "Subcontractor," to see what employer-employee factors it may provide.

Specifically, we take note of the subcontractor agreement between the petitioner and [REDACTED] which states in paragraph 2 as follows:

Evaluation of Subcontractor and its Employee's [sic] and/or Subagent's performance may be made by Client and/or [REDACTED] may review such performance, require progress reports, set the order or sequence for performing services and/or require Subcontractor to have its employees and/or Subagents at a particular location at particular times, in order to proficiently provide the required services in a timely manner to meet milestones and Project completion dates, which are either specified on Exhibit A or of which Subcontractor shall be notified from time to time as established or modified by Client.

This paragraph specifically states that evaluation of the petitioner's employees will be the responsibility of either [REDACTED] or the Client, which this agreement identifies as [REDACTED]. This statement, therefore, contradicts any claim that the petitioner alone will supervise and control the beneficiary's work. Also, we note, however, that, as evidenced in the above-quoted paragraph from the [REDACTED] Petitioner agreement, both [REDACTED] and its client [REDACTED] retain the right to:

- Set the order and sequence in which the project work would be performed;
- Determine, assign, and schedule the beneficiary's specific work and associated tasks;

- Require progress reports, by which the beneficiary's productivity could be measured; and
- Evaluate the beneficiary's performance.

In contrast, we see nothing in this document indicating that the petitioner would determine the duration and/or terms and conditions of any assignment that [REDACTED] might arrange for the beneficiary.

Further, we observe that, under the terms of this Subcontractor Agreement document, the petitioner would not even be able to ultimately determine that beneficiary would actually perform work for the client [REDACTED]. Rather, that determination would reside solely with [REDACTED] who at its discretion would decide whom to interview and whom to hire.

Moreover, we further note that there is no "Exhibit A," as referred to in the agreement, and that no other documentation originating from either [REDACTED] or [REDACTED] communicates for us the specific terms and conditions of the beneficiary's assignment. Such information as would be conveyed in any specific work order or statement of work outlining the exact nature of the beneficiary's actual assignment, its duration, the manner in which he will be supervised, or other such relevant factors, would be relevant to our consideration of this employer-employee issue – but neither such documents nor specific attestations of their content were provided.

With regard to documentation of the nature of the petitioner's control over the beneficiary and his work on assignment to [REDACTED] we see only the one-page, generic performance review dated June 28, 2013. We observe, however, that this performance review does not evaluate any specific tasks performed by the beneficiary but instead provides a checkmark rating system for traits such as "honesty," "punctuality," "attendance," and "attitude." Moreover, neither the performance review nor any other document in the record demonstrates the manner in which the evaluator, Mr. [REDACTED] supervises and reviews the beneficiary's performance, which is particularly relevant in light of the fact that [REDACTED] reporting structure for the beneficiary does not identify any member of the petitioner as being involved in the day-to-day supervision of the beneficiary's work for [REDACTED].

Moreover, as noted by the director, there is insufficient evidence establishing the nature of [REDACTED] involvement in the employment and placement of the beneficiary, and insufficient evidence to establish the exact nature of the beneficiary's ultimate assignment.

Next, we will look at September 12, 2013 e-mail from the [REDACTED] Program Manager.

That e-mail states (1) that [REDACTED] has a "service agreement with [REDACTED] which has a subcontract agreement with [the petitioner]"; (2) that the beneficiary "has already been placed on a project of ours through contractual agreements"; and (3) that "this arrangement will continue to get extended on an ongoing basis as this is an ongoing project." However, neither this e-mail nor any other

document from [REDACTED] relates the substantive details of any of the contractual terms and conditions that it imposed upon the beneficiary's services as the ultimate provider of the beneficiary's work.

The email is evidence that the petitioner – as the entity ultimately providing the beneficiary – does have some control over the beneficiary's availability for the proffered position. The pertinent statement is (with emphasis added):

Although during the assignment we will arrange tasks for the worker, we do not retain the ultimate right to hire, reassign, fire, supervise or control the worker, as these rights are retained by the worker's employer, [REDACTED]

However, for the purposes of the particular assignment that is the subject of this petition the tenor of the contractual evidence before us is that [REDACTED] primarily, but also [REDACTED] has the preeminent control over whether the beneficiary would be acceptable in the first place, and over how long the beneficiary's services would be retained by [REDACTED] if his assignment were accepted.

While we note that the petitioner may, as it contends in its offer of employment letter, pay the salary of the beneficiary and provide standard employee benefits, this alone is not sufficient for establishing eligibility here. While social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are still relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary's employer.

While we have considered the petitioner's attestations that it alone would control the beneficiary and his work, because the evidence of record does not establish either an actual project that would require the beneficiary's services, or the actual scope of such services that would be required, or the contractual terms set by whatever client would generate such a project, we cannot conclude that it is more likely than not that the petitioner - and not a client or intermediate party between the petitioner and the client - would have the requisite employer-employee relationship.

Moreover, the record lacks relevant Statements of Work, Schedules, Purchase Orders, or any like documents that would establish the existence of a project that would engage the beneficiary to perform the duties that the petitioner ascribes to the proffered position. Despite counsel's contentions to the contrary, such documents, in light of the scant evidence contained herein with regard to the beneficiary's actual employment, we find that such documents would in fact constitute probative evidence regarding the employer-employee issue. For example, the Subcontractor Agreement refers us to Exhibit A, which specifies the nature of the project and the portions of the project to be performed by both the beneficiary and the petitioner's other employees. However, the petitioner failed to submit Exhibit A or any other document outlining the manner in which the beneficiary would be employed pursuant to this agreement.

Further, we also note that the evidence of record does not establish how any actually existing project requires the beneficiary to perform the duties and responsibilities that the petitioner ascribes to the proffered position. Again, while the petitioner submitted copies of a subcontractor agreement and evidence suggesting that the beneficiary is currently working for [REDACTED] there is no evidence in the record establishing the exact nature of the beneficiary's proposed employment for the requested period.

As noted above, the plain language of the subcontractor agreement establishes that both [REDACTED] and [REDACTED] have the right to evaluate the performance of the petitioner's employees, including the beneficiary, which we equate with evaluating whether the beneficiary's performance is acceptable or merits pay. In short, we will not speculate further about relevant indicia of control in a case, as here, where the actual work to be performed has not been established. Without full disclosure of all of the relevant factors relating to the end-client, including evidence corroborating the beneficiary's actual work assignment, we are unable to find that the requisite employer-employee relationship will exist between the petitioner and the beneficiary; and such disclosure is precluded where there is no definite terms and condition and duration of employment shown.

As the record of proceeding before us does not document actual work that a particular project would generate for the beneficiary, the terms and conditions of such work, and the supervisory lines that would determine, evaluate, and control the beneficiary's day-to-day work, we do not have before us a sufficiently comprehensive record to identify and weigh all of the indicia of control that should be assessed to determine the employer-employee issue. We will not speculate which entity those indicia would favor. The evidence of record, therefore, is insufficient to establish that the petitioner qualifies as a "United States employer," as defined by 8 C.F.R. § 214.2(h)(4)(ii). Merely claiming in its letters that the beneficiary is the petitioner's employee does not establish that the petitioner exercises any substantial day-to-day control over the beneficiary and the substantive work that he performs.

That being said, as reflected in our discussions above of specific documentation in the record, it appears that the weight of the evidence of record does not favor a finding that the requisite employer-employee relationship resides with the petitioner and the beneficiary. However, on the basis of our consideration of the entire body of evidence relevant to the employer-employee issue, we specifically conclude that the petitioner has not provided evidence sufficient to establish that it more likely than not would have the employer-employee relationship with the beneficiary that is necessary to qualify as a U.S. employer as defined at 8 C.F.R. § 214.2(h)(4)(ii).

At an even more fundamental level, we find that the petitioner has not provided documentary evidence sufficient to establish actual work that the beneficiary would do and the actual nature of any business relationship that would exist between the beneficiary and the petitioner with regard to such work. Without evidence supporting the petitioner's claims, the petitioner has not established eligibility in this matter. 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)).

That failure to establish the substantive nature of the work that the beneficiary would perform will now be discussed in terms of its impact upon the specialty occupation issue.

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

As reflected in the preceding section's discussion and findings, a materially determinative aspect of the evidence of record is its failure to establish that, at the time of the petitioner's filing, the petitioner had secured definite, non-speculative employment for the beneficiary. Thus, we concur with the director's determination that the evidence submitted fails to establish non-speculative employment for the beneficiary for the period specified in the petition.

This feature of the evidence of record is also a determinative factor in our concluding that the evidence of record fails to establish the proffered position as a specialty occupation.

Although the petitioner requested, on the Form I-129, that the beneficiary be granted H-1B classification from October 1, 2013 to September 1, 2016, there is a lack of substantive documentation regarding work for the beneficiary for that period. As stated above, the record contains no contracts, statements of work, work orders, or other contractual documents demonstrating that the beneficiary will be assigned to work for a particular project or projects.

To meet its burden of proof with regard to the specialty occupation issue, 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 at 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.

We note that, as recognized by the court in *Defensor, supra*, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. *See Defensor v. Meissner*, 201 F.3d at 387-388. The court held that the former 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.

As previously noted, the petitioner indicated on the Form I-129 and in supporting documentation that it seeks the beneficiary's services in a position titled "Computer Programmer," to work on a full-time basis at a salary of \$100,000 per year.

One consideration that is necessarily preliminary to, and logically even more foundational and fundamental than the issue of whether a proffered position qualifies as a specialty occupation, is whether the petitioner has provided substantive information and supportive documentation sufficient to establish that, in fact, the beneficiary would be performing services for the type of position for which the petition was filed (here, a Computer Programmer). We find that the petition has failed in this regard.

At the outset, we note some discrepancies in the claims set forth by the petitioner. With regard to the offer-of-employment letter, we note that the letter identifies the proffered position as that of a Software Engineer, not a Computer Programmer as claimed on the petition and accompanying LCA. We note that the occupation of "Software Engineer" falls into the occupational classifications of both "Software Developers, Applications" - SOC (ONET/OES Code) 15-1132, as well as "Software Developers, Systems Software" - SOC (ONET/OES Code) 15-1133. It does not fall within the occupational classification of "Computer Programmers" - SOC (ONET/OES Code) 15-1131, for which the LCA accompanying this petition was certified.

In addition, the itinerary document submitted by the petitioner states: "The Beneficiary will be working as *Network Engineer* at the Petitioner's client locations." (Emphasis added.) Also, in inconsistent and self-contradictory fashion, that document refers to the beneficiary as both a Computer Programmer and Network Engineer. The occupational classification of "Network Engineer" likewise does not fall within the occupational classification of "Computer Programmers," but rather is found within "Network and Computer Systems Administrators" - SOC (ONET/OES

Code) 15-1142. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

While the majority of references in the record are to the proffered position as that of a Computer Programmer, the repeated references to other occupational titles within other occupational classifications underscores the petitioner's failure to credibly establish the substantive nature of any work that the beneficiary would perform if this petition were approved.

We have taken all of the evidence into account, including the March 19, 2013 "To Whom It May Concern" document presented as an email from [REDACTED] as Program Manager, [REDACTED]. While the aforementioned "Reporting Structure for [the Beneficiary]" document lists Mr. [REDACTED] as [REDACTED] most immediate supervisor of the beneficiary, that same document identifies the beneficiary *not* as a Computer Programmer *but* as an Engineer-Software – in two places. Further, we find it curious that the email would state that the beneficiary "will be supervised by [REDACTED] of [the Petitioner]" a statement whose tenor conflicts with [REDACTED] own Reporting Structure document that makes no mention of [REDACTED]. We also note that this email states the following, without identifying whatever the particular "contractual agreements" are that it mentions, without relating their terms, and without even identifying the project to which the phrase "project of ours" relates:

[REDACTED] has a service agreement with [REDACTED] which has a subcontract agreement with [the petitioner], which will be the employer of [the beneficiary]. [He] has already been placed on a project of ours through contractual agreements and this arrangement will continue to get extended on an ongoing basis as this is an ongoing project. . . .

Even when read in conjunction with all the other documentary evidence submitted into the record, this email throws no substantive light on the substantive nature of actual work that the beneficiary would perform for the petitioner. Further, even considered in the full context of the rest of the evidentiary record before us, this document fails to establish even the project upon which the beneficiary is supposedly working; and the document's statement as to the project's duration is no more corroborated than the unidentified project itself. 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. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In light of the above-noted aspects of this letter, we accord it no probative weight towards satisfying any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The above-noted discrepancies, coupled with the lack of a definitive and reliable statement from the end-client regarding the exact nature of the project upon which the beneficiary will work, preclude us from finding that the beneficiary will be employed as a computer programmer, a software engineer, a network administrator, or perhaps another occupation not previously identified. Additionally, we find that the record is devoid of any documentation establishing in-house work that would require the beneficiary to perform the duties and responsibilities that the petitioner has attributed to the proffered position. The record contains no evidence establishing the true nature of the beneficiary's employment during the requested validity period. Accordingly, as the petitioner has not provided documentary evidence substantiating the beneficiary's actual work, we cannot conclude that the petitioner established that it would employ the beneficiary in a specialty occupation.

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

For the reasons related in the preceding discussion, we find that the petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. Accordingly, the petition cannot be approved for this additional reason.

IV. CONCLUSION

⁸ It is noted that, even if the proffered position were established as being that of a computer programmer, a review of the U.S. Department of Labor's *Occupational Outlook Handbook* (hereinafter the *Handbook*) does not indicate that such a position qualifies as a specialty occupation in that the *Handbook* does not state a normal minimum requirement of a U.S. bachelor's or higher degree in a specific specialty or its equivalent for entry into the occupation of software programmer engineer. See U.S. Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Computer Programmers," <http://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm#tab-4> (accessed June 24, 2014). As such, absent evidence that the position of computer programmer satisfies one of the alternative criteria available under 8 C.F.R. § 214.2(h)(4)(iii)(A), the instant petition could not be approved for this additional reason.

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

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